

## Two sides of the same coin: Contradictory legal and administrative practices towards children in immigration detention centres in Indonesia, Malaysia and Thailand

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**Abstract:** *The scale of migration among Asian countries has increased over the decades. Children are also part of this migratory flow as they travel either alone or with their parents. Since much of the migration occurs through extra-legal routes, many migrants and their children face a multitude of legal problems, including incarceration. The number of children deprived of liberty for migration-related reasons in the Asia Pacific region has also increased over the past few years. This study will look at Indonesia, Malaysia and Thailand, as three of the most popular transit countries that routinely detain large numbers of children in immigration detention centres. Despite the fact that the Convention on the Rights of the Child (to which all three countries are party) emphasises the fact that detention does not serve the best interests of the child and, therefore, should only be used as a last resort and for the shortest appropriate period of time (article 37(b)), children nevertheless are routinely detained and then also for long periods of time. This is particularly problematic when children are detained for migration-related reasons, since it never serves the purpose of the best interests of the child (Nowak 2019). This study examines immigration detention centres (IDCs) by analysing from a socio-political perspective existing regulations and practices in the three countries selected. Using secondary data, the study addresses two questions, namely, (a) how existing legal and administrative practices of three Asia Pacific (transit/destination) countries impact children in immigration detention centres; and (b) why these countries fail to uphold international obligations regarding the best interests of children in IDCs. The article argues that adverse administrative*

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*practices and the absence of domestic legal frameworks on children in IDCs contradict numerous international obligations. Not only does this jeopardise the survival and development of children, but it also creates barriers for these children to access fundamental human rights, social justice and other entitlements.*

**Key words:** *children; best interests; deprived of liberty; detention; immigration law*

## 1 Introduction

The deprivation of children's liberty occurs in various forms for many reasons. The *Global Study on children deprived of liberty* (2019) presents six situations where children are routinely deprived of liberty, including (i) administration of justice; (ii) children living in prisons with their primary caregivers; (iii) migration-related detention; (iv) institutions; (v) armed conflict; and (vi) for national security reasons. In the category of migration-related detention, immigration detention centres (IDCs) have been used for detaining children who are on the move as refugees or asylum seekers either alone or with their parents/families.

The article focuses on those refugee children and children of asylum seekers who have been placed in IDCs in the three countries, namely, Thailand, Malaysia and Indonesia. The researchers acknowledge that the detention of children where migration-related issues are concerned also includes the children of undocumented migrant workers. However, there are a few reasons why we do not discuss the issue of migrants' children in this research.

First, refugees and asylum seekers have no choice but to flee from their countries due to human rights suppressions, prosecution, political instability or war. Refugee children and children of asylum seekers travel with or without their parents to other countries in search of better protection. Migrant workers mostly leave their countries on their own to find new employment opportunities. Migrants are likely to support themselves and their children while they are working in the hosting countries. Second, there is a similar pattern regarding the state's response concerning refugee and asylum populations. The countries offer no support to these marginalised groups. People who cross the border illegally are subjected to detention or deportation. By contrast, as the primary destination countries, Thailand and Malaysia create more holistic policies towards migrant workers and their families since this group fulfils labour shortages and contributes to economic growth. For instance, due to the COVID-19 pandemic, the Thai government allows undocumented migrant workers to register and to continue working in the country.

According to the *Global Trends Report* (2019) issued by the United Nations High Commissioner for Refugees (UNHCR), more than 79,5 million people are forcibly displaced worldwide. Of these, 26 million are refugees and 4,2 million are asylum seekers. Furthermore, 40 per cent of forcibly-displaced persons worldwide are children, of which 75 000 are unaccompanied or separated children (UASC). In the Asia Pacific region, the scale of migration has recently increased, especially due to the Rohingya crisis in Myanmar. By the end of 2019 there were 4 182 400 refugees in the region (UNHCR 2019). Many of these are children who are at high risk of being abused and exploited. Especially vulnerable are unaccompanied children. According to the official statistics, Malaysia alone detained 1 334 asylum seekers and refugee children in 2014, but by 2015 the number had increased to 1 433 (Parthiban & Hooi 2019). In 2017 on one day alone Thailand captured and detained 19 refugee children from Pakistan and Somalia (Fortify Rights 2017).

While many studies have focused on laws and policies of destination countries and their impact on children being held in IDCs, there has been less focus in the context of transit countries. This study comparatively investigates three countries (Indonesia, Malaysia, and Thailand) which often serve as transit countries for refugees and asylum seekers on their way to their final destination – mostly Australia. The article analyses the similarities and differences in treatment of children deprived of liberty in these countries. The aim is to understand the socio-political and administrative factors that hinder the obligation of these states to protect migrant children in the region. The study addresses two questions, namely, (i) how existing legal and administrative practices of three Asia Pacific (transit/destination) countries impact children in immigration detention centres; and (ii) why these countries fail to uphold international obligations regarding the best interests of children in IDCs.

This article uses a comparative case study method drawing from secondary data across the three selected countries of South East Asia, namely, Indonesia, Malaysia and Thailand. Moreover, the article applies a critical analysis of existing regulations and practices in the selected countries with regard to IDCs, drawing upon existing administrative practice and socio-political perspectives. It ends with a discussion of the lessons learned from these particular countries and provides practical recommendations as to a way forward. Since the global pandemic situation of coronavirus disease (COVID-19) has spread throughout the region, the researchers conduct this desk research based on the review of relevant research publications, organisational reports, and legal documents.

## 2 Legal frameworks on child protection in relation to migration

### 2.1 International framework

Relevant international standards protecting children deprived of liberty include the 1951 Convention Relating to the Status of Refugees and its 1967 Optional Protocol. This Convention presents the primary foundation for protecting refugees (Cetinkaya 2017). The Convention lists the state's obligations to ensure that people have the right to request asylum, thus stressing that a fundamental responsibility of all states is not to turn people away. Another key standard is the Convention on the Rights of the Child (CRC). In article 2 CRC stipulates that all member states must ensure the rights outlined in the Convention irrespective of the national, social or ethnic origin of the child, which includes refugee, asylum-seeking and migrant children (as also mentioned in article 22 and in General Comment 6 of the CRC Committee).

Regardless of immigration status, the detention of children in fact is never in the best interests of the child. States are obligated to ensure that all children are taken care of in a family-type environment without being deprived of their liberty. The deprivation of one's liberty falls under very strict circumstances guaranteed under international laws. Articles 37(b) and 3(1) of CRC stipulate that the deprivation of children's liberty shall be used only as a measure of last resort and for the shortest period of time and with the best interests of the child in mind. More importantly, the detention of children for migration-related reasons cannot be considered as a last resort and, therefore, needs to be prohibited (Nowak 2019). Article 37(d) also guarantees the right to challenge the lawfulness of the detention of children. In this sense, the national court has the authority to release a child from detention if it is arbitrary and not in compliance with domestic and international law.

Looking at a framework for the protection of children, mandated by the United Nations High Commissioner for Refugees (UNHCR), it provides six goals, wherein it not only includes some necessary social conditions, but also enhances legal access and their best interests throughout the migrating process. A set of guiding principles and approaches are established in order to guarantee the successful delivery of the six goals. These include state responsibility; a family and community-based approach; urgency; child participation; non-discrimination; the best interests of the child; no infliction of harm; age; gender and diversity; partnership; and accountability (UNHCR 2012). The other UN organ, the United Nations Children's Fund (UNICEF), similarly develops six policies towards the migration of children. One of UNICEF's policies is to end the detention of children seeking refugee status or migrating, as they may risk themselves

encountering violence in the IDCs (UNICEF 2017). Moreover, UNICEF suggests that it is best to keep families together with their children in communities, notably where children find themselves friendly to live in. More importantly, access to healthcare and other social services must be exercised by children and their families. UNICEF (2017) further explains one last point to help end children being detained, which is to call for public opinion to demand the termination of IDCs.

## **2.2 Regional framework**

In comparison, the Asia-Pacific region does not have a regional system for human rights protection. However, there has been some developments in the sub-region of South East Asia. In 2009, the Association of South East Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights (AICHR), the first of its kind in the region. The Commission in 2012 successfully drafted the ASEAN Human Rights Declaration, which was adopted by the ten ASEAN member states. Despite its non-binding nature, the Declaration in article 12 stipulates the importance of protecting people from deprivation of liberty. Furthermore, article 16 recognises everyone's right to seek and receive asylum. Similarly, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) was established in 2010 in order to uphold the rights of women and children as guaranteed in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and CRC (both of which are ratified by all member nations of the ASEAN). The sixth thematic area of the ACWC Work Plan 2016-2020 concerns migrant children and children in the juvenile justice system. The Work Plan also urges its relevant strategic measures for the ASEAN Socio-Cultural Community Blueprint 2025 to reduce barriers of quality care and support. Furthermore, it aims to strengthen the protection and promotion of human rights as well as the social protection of children living in at-risk areas (ACWC 2018).

### **2.2.1 ASEAN Declaration on the Rights of Children in the Context of Migration**

ASEAN member states expressed their commitment to protecting children's rights by unanimously adopting the Declaration on the Rights of Children in the Context of Migration during the 35th ASEAN Summit in Thailand (November 2019). The Declaration seeks to ensure the rights of children by acknowledging the need for protection of *all* children, including refugee and asylum-seeking children, while also emphasising the importance of ensuring their access to basic services. Additionally, it accepts the necessity of establishing alternatives to detention so as to secure the best interests of children. This Declaration thus reaffirms the responsibility of states to adopt relevant laws and policies that ensure, within a migration context, that state practices adhere to the best interests

principle as a primary consideration (UNICEF 2019). However, a number of member states issued reservations, citing principles of non-interference in internal affairs of the member states as a priority.

### **3 Unpleasant truth**

CRC is considered the most successful human rights treaty as it has the most ratifications. However, it lacks clarity when dealing with issues associated with refugee children and child asylum seekers. Although CRC emphasises the rights of children to seek asylum, states mostly adopt restrictive domestic laws and policies that apply to the unauthorised arrival of accompanied and unaccompanied children, which is inconsistent with the Convention. IDCs have been used as places to detain children who are on the move as refugees or asylum seekers with their parents or families. The detention of children for migration-related reasons is not in their best interests and should never be an option for any state. The Global Study suggests that states must apply non-custodial solutions that prioritise the child's best interests (Nowak 2019). However, each year at least 330 000 children are detained in 77 states due to migratory reasons (Nowak 2019). According to the Global Study (2019), it is found that Lao People's Democratic Republic is the only member country of the ASEAN where children are not detained. There is no reliable data illustrating the accumulating number of detained children for migration-related reasons in the ASEAN. However, Indonesia was recorded as a country where as many as 982 children are detained as a result of migration (Nowak 2019). These children live in places where not only facilities and conditions are sub-standard, but fundamental rights are also taken away. Given these factors, children in IDCs remain in highly-vulnerable situations where they run the risk of being abused and exploited.

The examples of Indonesia, Malaysia and Thailand provide an opportunity to consider how different national contexts impact children in detention centres. Additionally, it helps to understand how national security considerations impact a country's obligation to respect, protect and fulfil the rights of all children within its territory – regardless of their status.

#### **3.1 Case study: Detained children in Indonesia**

Indonesia is a prominent transit hub for refugees and asylum seekers fleeing from Asia, particularly from Afghanistan, Myanmar, Iraq, Somalia and Sri Lanka. Children with their families and unaccompanied minors stay in Indonesia either before their third country resettlement or their arduous and expensive journey by boat to Australia. Yet, when arriving in Indonesia they also run the risk of being detained. As of 2016, there

are 1 602 migrant children who were kept in IDCs in Indonesia (Save the Children 2017).

The implementation of restrictive immigration policies and activities is noteworthy in the case of Indonesia. The government does not regard refugee children and child asylum seekers (both accompanied and unaccompanied) as legal in their territory. Under Indonesian domestic law, refugees and asylum seekers are subjected to the 2011 Immigration Law. Interestingly, this law makes no distinction between refugees/asylum seekers and other types of foreigners entering the country. The Indonesian Immigration Law allows immigration detention for up to 10 years without judicial review, but this law makes no concessions for children (Human Rights Watch 2013). The law justifies the government's duty to provide immigration services, enforce the law and maintain state security, thereby indicating that the state has no political will and commitment to the protection of these marginalised groups in their territory. The government tries to discourage newcomers by setting high entry requirements rather than expanding the protection to refugee children and child asylum seekers living in its territory. In 2016, President Joko Widodo signed President Regulation 125 on the Treatment of Refugees and Asylum Seekers (Missbach et al 2018). The regulation urges provincial administrations across Indonesia to provide temporary accommodation for asylum seekers and refugees while they wait for their resettlement requests to be processed by the UNHCR. Yet, uncertainty remains as to Indonesia's long-term commitment to its responsibility towards the protection of children.

Indonesia introduced a more tolerant practice towards refugee children and child asylum seekers, which allows them to stay temporarily while waiting for their papers to be processed by the UNHCR. However, they are not allowed to work, travel or study while in Indonesia (Missbach 2014). On the other hand, non-citizens who enter and reside in Indonesia without valid documents, thereby violating Indonesian law, will be placed in one of the 12 IDCs across the country. These centres are referred to as temporary shelters by government officials (Human Rights Watch 2013; Missbach et al 2018). Law enforcement officials only see 'the irregularity and clandestine nature of migrants' mobility and movement' (Missbach 2015: 64). In this regard, the objective of the immigration law is to 'immobilise illegalised travellers' (Weber & Pickering 2011: 17). Schuster and Majidi describe immigration detention as one effective means for 'rendering undesirable people immobile' (Schuster & Majidi 2013: 222). When arrested, migrant children will be sent to the IDCs. The authorities often argue that detention is not considered a punishment but rather as a 'means of protection' since they can ensure that detainees are given access to international organisations (Missbach 2015: 74-75).

Although detaining migrant children is very costly and has a harmful impact on children's well-being, Indonesia continues to maintain this practice. Political and diplomatic pressure from destination countries lead transit states to intensify law enforcement and to crack down on clandestine border entry and exit (Missbach 2015: 154). Destination countries provide financial support and put pressure diplomatically on transit countries to 'control their borders and detain transit migrants' (Kimball 2007: 39). The diplomatic pressure includes cash distribution, aid programmes, training programmes and capacity-building equipment (Nethery, Rafferty-Brown & Taylor 2013). The Australian government, for example, pressures Indonesia to detain transit migrant children. It has been in Australia's political interests, as a final destination country, to encourage the development and fund the expansion of the Indonesian immigration detention system (Nethery, Rafferty-Brown & Taylor 2013).

The geographic dimensions and extremely long coast line make it difficult for Indonesia to control its borders and requires both financial and human resources (Missbach 2015). Indonesian authorities rely on information about the suspected irregular migrant movements from overseas sources, such as the Australian Federal Police (AFP) and the Australian Maritime Safety Authority (AMSA) (Missbach 2015: 72). Australia also funds Indonesian officers to intercept refugees who want to enter Australia by boat as well as providing surveillance equipment and vehicles, supporting police, patrol boats, and fuel costs (Missbach 2015). For example, in 2008 the Australian government provided AUD \$7,9 million to further develop Indonesia's border movement alert system (CEKAL) which would improve the detection of people of concern and help prevent people-smuggling and irregular migration (Missbach 2015).

The Australian government also funded the International Organisation for Migration (IOM) in Jakarta to sustain the organisation's activities. Since 2001 the Australian government has provided AUD 338 million to IOM under the Regional Cooperation Agreement, which includes providing care for detainees, community housing facilities and training for local authorities (Missbach 2018). In March 2018, when the Australian government announced the reduction of the fund, approximately 1 600 refugees, including children, were released from the Indonesian immigration detention centres (Missbach 2018).

Over these past years, children arriving in Indonesia with their parents or alone without valid proof of documents have been put in detention centres where there is no special assistance for unaccompanied children (Missbach et al 2018). As a result, these children are discriminated against based on their nationality and ethnicity, primarily for political and security reasons. According to the laws, detained children could be subjected to unlawful, arbitrary detention and can be arrested indefinitely without



proper access to the court. In practice, arrested migrant children are not even treated the same as criminals because they are detained without judicial review or bail, and often for an unspecified period of time. In Indonesia, there is no independent complaints mechanism for detainees to access and no system to check whether officers at the centres adhered to the regulations for the child's best interests. Children are usually kept with their families in the immigration detention centres, while unaccompanied minors are hosted in the same facilities as adult men (Missbach 2015). In Indonesian IDCs the conditions are poor. Children are exposed to the risk of abuse and violence, which can eventually lead to stress disorders or depression (HRW 2013). Such prolonged and indefinite immigration detention, therefore, can cause severe problems for children.

### **3.2 Case study: Detained children in Malaysia**

As of June 2020 there were 177 940 refugees and asylum seekers in Malaysia (UNHCR 2020). This figure reflects the fact that Malaysia serves as one of the key host, transit and destination countries in Southeast Asia. The above figure includes many Rohingyas escaping genocide, Pakistanis fleeing religious persecution, and Yemenis seeking safety from war. Among these, 46 370 are children below the age of 18 years (UNHCR 2020), who are either accompanied by their parents or on their own, and face the prospect of indefinite detention after having made a dangerous journey. The non-ratification of the Refugee Convention and its Protocol, the lack of domestic legal framework, and restrictive policies have allowed the Malaysian government to treat undocumented migrants, including refugees and asylum seekers, as 'illegal' and subsequently subject them to criminal prosecution. According to Nah, Malaysia uses IDCs extensively as an integral part of migration management and justifies it on national-security grounds (Nah 2015: 125). Individuals without documents are detained for investigation to determine a course of action, and are subjected to physical punishment to discourage them from returning to Malaysia.

Arbitrary immigration regulations and regressive practices have exacerbated the vulnerabilities of the refugee and migrant population. The Malaysian Government Immigration Regulations (1963-1959) permit the arrest and detention of any person understood to have entered the country unlawfully for up to 30 days without trial under the Criminal Procedure Code (SUARAM 2008). These persons can face judicial caning, incarceration for up to five years, fines of up to 10 000 ringgit and even deportation, as per the Malaysia Immigration Act. Although courts have prohibited judicial caning, the measure is still actively being used by the immigration officers (Amnesty International 2020). The Act also employs a 'prohibitive' category for undocumented immigrants, which does not clarify children's status. In the absence of legal protection, all refugee children are treated similarly to other 'illegal' immigrants.

Since refugee and asylum-seeking children in Malaysia have no legal documents, they are likely to be arrested and detained for extended periods of time without bail. Undocumented individuals, including children, making 'illegal' entry can spend lengthy periods in custody before being transferred to one of the 13 IDCs in Malaysia. The lack of alternative facilities for children also results in them being held in the IDCs. In fact, there were 647 children in the IDCs in Malaysia in 2016 (Save the Children 2017). The number is said to have decreased since 2013, but this has been attributed to the resettlement programme, particularly in the United States (UNHCR 2017).

The Malaysian government also places strict limits on the judicial review of immigration-related decisions, including those relating to detentions (Nah 2015: 125). Once arrested, individuals have no right to contact anyone outside for up to 14 days, including the UNHRC. Moreover, there is a long wait for the investigation of detention cases relating to children, sometimes leading to indefinite detention (Malaysiakini 2019a). The denial of the right to be heard violates the right to an effective remedy and fair trial. Similarly, miscommunication and a lack of coordination between different immigration units have also been reported to obstruct cases relating to children in detention resulting in children's extended detention (Malaysiakini 2019b). Moreover, cases that are not heard are usually those regarding the deportation of children to their countries of origin. This, however, can create problems in relation to refugee children or children whose parents cannot be traced.

Part of the problem lies in Malaysia's selective application of its own laws. For example, although Malaysia has a zero-reject policy regarding the right to education, children under detention have no access to formal education and rely on inadequate educational facilities (APRRN 2019). These children are also barred from receiving public education as the government does not recognise them due to a lack of documentation (Prathibhan & Hooi 2019: 66). Although the Malaysian government considers all under the age of 18 as children and, therefore, is legally mandated to protect them from imprisonment, children are still detained with their parents in IDCs citing a lack of alternatives to detention. Although children below the age of 12 are kept in adult female facilities along with their mothers, once they reach the age of 13, they are placed in adult facilities according to their gender (Parthiban & Hooi 2019). This often results in children facing different kinds of abuses.

Such treatment of children indicates that the government of Malaysia is looking at them merely from a security perspective, and is primarily interested in controlling the influx of undocumented people. It does not approach the situation from a rights perspective by providing effective remedies that are in the best interests of the child. Hundreds of children

have escaped war, hunger and other forms of violence only to end up detained in overcrowded facilities without nutritious food, clean water, proper health care and sanitation. These conditions can put children at risk of sexual abuse and violence (Reuters 2017). According to Arshad (2005), these incarcerated children face traumatic experiences, including severe depression, and are also subjected to physical abuse.

Another challenge has been the Malaysian government's ability to sidestep its international commitments. For instance, despite having ratified CRC, its reservations on various articles of the Convention have permitted the detention of children without trial and judicial review for an extended period. The reservation on article 37, which protects children from cruel treatment and ensures their liberty (regardless of their citizenship status), has allowed the government to justify the detention of refugee children. According to Save the Children (2017), countries such as Malaysia cite the lack of this legal framework to justify their inactions in matters related to refugee children. Although Malaysia has no reservation on article 22 of CRC, which requires that state parties seek appropriate measures for children seeking refuge, their security-centric approach, a lack of legislation and incompatible administrative practices contradict their obligation to the Convention (UPR 2013).

Malaysia also recognises several regional policies that protect refugees, such as the Bangkok Principles and the Bali Process, which provide guidelines for managing refugees and providing them with temporary shelter (Taylor 2018). As an ASEAN nation, Malaysia also adopted the ASEAN Declaration on the Rights of Children in the Context of Migration, which safeguards the rights of children. These declarations, however, are not effective when it comes to refugee children, since they are not legally binding and because ASEAN countries continue to emphasise non-interference. In fact, the Malaysian government has often projected the immigration crisis as an international issue that requires external interventions.

However, given the constraints on international organisations' role in the country, that framing appears more evasive than substantial. Consider, for example, the limited impact of the UNHCR, whose intervention often is essential for refugees and asylum seekers to stay outside of the detention centres. The UNHCR's Refugee Status Determination (RSD) process provides people with either refugee or asylum-seeker cards, which are the only form of legal documentation for such individuals. As a result of UNHCR intervention, some unregistered asylum-seeking children have also been released from the detention centres. This, however, depends on the immigration officers' discretion (Nah 2015). In fact, it has often been reported that authorities have even confiscated or destroyed the POC cards and arrested their holders (Nah 2015). Meanwhile, the waiting time

for registration with the UNHCR is quite long, and especially difficult for children with undetermined nationality who remain in the IDCs indefinitely, as there are no alternative spaces available (SUKA 2020).

The 'cruel, inhumane and degrading situation' of children in detention centres is open to investigation by the law but, in practice, it often is at the discretion of the officer in charge (US Department of State 2018). The centres have substandard facilities that lead to harrowing living conditions but it is difficult to assess the situation and hold the government accountable – especially because there are no monitoring mechanisms and access to oversee that these IDCs are controlled (APRRN 2018). Since August 2019 the government has barred even the UNHCR from accessing the detention centres (UNHCR 2019). This failure of the Malaysian government to treat the situation of refugees as a domestic concern, and instead frame it as a global problem over which they have no control, continues to make the problem intractable (Parthiban & Hooi 2019).

The country's own internal politics have also in recent times shaped and influenced the fate of undocumented children. Despite some momentum in the direction of reforms in the past, as seen in the election manifesto of Pakatan Harapan, the former ruling party which pledged to ratify core international human rights treaties (Human Rights Watch 2019), recent developments have been of concern. The incumbent government, which is pre-dominantly Malay-Muslim, has changed its policies regarding refugees (*The Diplomat* 2020). Top government officials have openly claimed that the Rohingya, the largest refugee population in Malaysia, are illegal immigrants with no rights in the country (*The Star* 2020). In fact, the Malaysian government has declined to accept several incoming boats with hundreds of refugees. Moreover, under the recently-initiated Movement Control Order (MCO), intended for COVID-19 control, many refugees, including women and children, have been detained (*The New Humanitarian* 2020). According to some research, as a result of securitisation of the refugees by the government, the Malaysian public also perceives the presence of refugees as threatening (Zainuddin & Duasa 2012). This has led to an increase in hate speech and xenophobic attitudes towards the Rohingya people, especially online (*Bangkok Post* 2020). In the absence of a changed political and social climate, which is aided by systemic policy reforms, it is unlikely that there will be a significant overhaul in Malaysia's treatment of children of undocumented origin.

### 3.3 Case study: Detained children in Thailand

Thailand is one of the major transit and destination countries for human mobility, ranging from refugees and asylum seekers to migrant workers. However, the country has an infamous reputation in relation to the detention of an unconfirmed number of refugee children and child asylum seekers in its IDCs (Save the Children 2013). These children, regardless

of whether they are accompanying their families or travelling alone, are subjected to the deprivation of liberty as a result of arbitrary arrests and detention sanctioned by the state. As a signatory state to CRC, Thailand has an obligation to ensure the best interests of the child as primary consideration – as informed by the aforementioned articles 3(1) and 37(b). Moreover, for those cases where children arrive for migration-related reasons, research suggests that detention is never in the best interests of the child (Nowak 2019: 12). Yet, Thailand has been reluctant to withdraw its reservation to article 22, which ensures legal protection and humanitarian assistance to refugee children and child asylum seekers. Even though Thailand legislated the Child Protection Act in 2003, none of its clauses addresses the protection of refugee children and child asylum seekers. Since Thailand has failed to apply international standards to its legal and practical measures, children in this category remain marginalised and vulnerable to a multitude of human rights violations.

Refugees and asylum seekers normally arrive in Thailand as tourists with proper identification documents. However, when their visas expire, they are considered illegal migrants and according to the 1979 Immigration Act (Harkins 2019: 19) they can be taken to court after arrest. Due to the absence of a legal framework for dealing with refugees and asylum seekers, Thailand follows customary international norms on *non-refoulement*.<sup>1</sup> As soon as refugees and asylum seekers fail to pay fines, they are immediately detained in IDCs (Save the Children 2017: 27-28). For example, in October 2017 Thai police raided several residences in Bangkok that housed Pakistani and Somali asylum seekers (Fortify Rights 2017). After the raid, all these persons were placed in immigration detention centres. A total of 35 individuals were arrested, 19 of whom were children. Many were in possession of the so-called ‘person of concern’ document issued by the United Nations High Commissioner for Refugees, but the authorities confiscated each document. Consequently, some of them had to go to court and wait for bail (Fortify Rights 2017; Fortify Rights 2019: 2).

When admitted to the immigration detention centres, all children receive criminal records as they are regarded as illegal migrants (Surapong Kongchantuk et al: 41). According to the Immigration Bureau of Thailand, there are 14 IDCs located nationwide (Immigration Bureau of Thailand 2010). Suan Phlu immigration detention centre is the largest detention centre in Bangkok. It is designed for long-term detainees, while they wait for the UNHCR documentation (Human Rights Watch 2014). The Bangkok centre is small and designed as a short-term detention centre, although many detainees routinely spend up to four to five years there

1 The principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. It is applied to all types of migrants. See UN OHCHR (2018).

(Save the Children 2017: 29-30). The number of children detained in Thai IDCs remain unconfirmed. Some reports find that 49 children were detained in the Thai IDCs in December 2015, while the number decreased to 43 at the end of 2016 (Save the Children 2017: 1). It is also reported that 38 and 113 children were out on bail in 2015 and 2016 respectively (Save the Children 2017: 64). However, it is also acknowledged that these numbers do not capture the true extent of the situation. In reality, the number of children deprived of liberty is significantly higher.

Immigration detention centres are overcrowded, thus forcing children to stay in sub-standard living facilities and conditions. They cannot be released, unless their cases are clarified and/or overstay fines are paid (Save the Children 2017: 30). According to article 28 of CRC, children have the right to education regardless of any circumstances. However, children in IDCs are denied this fundamental right (Human Rights Watch 2014). Furthermore, based on the Immigration Bureau Order 148/2010, children older than 12 years are routinely separated from their parents against their will – an act that stands in direct violation of article 9 of CRC. They are allowed to meet one another only once a week (Surapong Kongchantuk et al 2013: 40). In provincial immigration detention centres, all are detained according to gender (Mekong Migration Network and Asian Migrant Centre 2008: 130). Moreover, children in Thai IDCs particularly face difficulties with nutrition and healthcare accessibility due to their family's lack of resources (Human Rights Watch 2014). In terms of recreational facilities, it is impossible for the provincial IDCs to provide such spaces for young children. The only centre that offers such facilities is the Bangkok centre (Save the Children 2017: 31). Finally, freedom of religion or belief among children also becomes problematic, since they find it difficult to practise their religion in the centres (Surapong Kongchantuk et al 2013: 3).

These are only a few reasons why Thailand has failed to uphold its international obligations regarding the best interests of children in IDCs – a fact that has many implications, especially when considering legal, administrative, and socio-political factors. First, Thailand does not *legally* recognise the status of refugees, regardless of age. Additionally, Thailand is not a signatory state to the 1951 Refugee Convention and its Protocol (UNHRC 2020). Consequently, refugee rights and liberties are not guaranteed, while the government is undeterred from delivering refugees back to their countries of origin after a national verification process (Surapong Kongchantuk et al 2013). In order to describe the legal status of refugees in Thailand, the term 'refugee' has also been legally abandoned in favour of the term 'displaced persons or persons who are fleeing from wars'. The Operation Centre for Displaced Persons (OCDP) under the Ministry of Interior was established in 1975 in order to respond to the influx of one million displaced persons escaping from unrest in

Thailand's neighbouring states, including Myanmar, Lao PDR, Cambodia and Vietnam. There are approximately 100 000 displaced persons in the camps along the Thailand-Myanmar border. In general, the conditions in these camps are relatively suitable. Yet beyond these camps, refugee children and child asylum seekers can be arrested and detained in 13 small detention centres across the country which are far worse and do not consider the best interests of the children, as stipulated in article 3 of CRC (Surapong Kongchantuk et al 2013). Currently, the Immigration Bureau of Thailand investigates, arrests and detains immigrants, including adult and child refugees and asylum seekers, instead of the OCDP. Moreover, Thailand's relevant laws to cope with the best interests of children in IDCs are not up to date. For instance, the Immigration Act BE 2522, enacted since 1979, is still in force, despite the fact that the current situation is so different. The Child Protection Act BE 2546, enacted in 2003, also needs reform as the existing law does not specifically refer to 'refugee children' and 'child asylum seekers'. Finally, the Child and Youth Development Promotion Act BE 2550 (legalised since 2007) lacked any meaningful youth participation during the drafting process. This Act was intended to showcase Thailand's pathway to the ASEAN Socio-Cultural Community in child and youth protection (Aek Wonganat et al 2014). Thailand also joined other UN member states in adopting the Global Compact for Safe, Orderly and Regular Migration (GCM) and Global Compact on Refugees (GCR) in 2018 under the 2016 New York Declaration for Refugees and Migrants (Puttanee Kangkun 2019). All these documents highlight the need to consider the best interests of the child when identifying alternatives to detention (UNGA 2018: 11).

Second, the *administrative* process is also inadequate when it comes to children detained in a migratory context. Building new IDCs in Bangkok and other provinces to accommodate more refugees and asylum seekers stands in direct contradiction to the country's refusal to recognise and accept refugee status (Immigration Bureau of Thailand 2010). Therefore, new facilities that could provide family spaces for refugee children or child asylum seekers to stay with their parents or relatives are impossible. In recent years, Thailand has found many refugees and asylum seekers who are Uyghurs of China, Rohingyas of Myanmar, and Africans travelling with children (Human Rights Watch 2014; The Nation Thailand 2019). As both a transit and destination country, Thailand has unfortunately deported many of these to their countries of origin or pushed them away to third countries (Reuters and DPA 2015). Refouling refugee children and child asylum seekers to their original countries would inevitably risk their lives and expose them to harsh punishment and violence. To some extent, the states involved regard deportation as an advantage. On the one hand, Thailand is able to reduce the budget required to care for refugees. On the other hand, China and Myanmar are pleased to prosecute these people

(APF 2013). Sadly, refugee children and child asylum seekers are victims of this cycle.

Third, apart from the legal context, Thailand has never accepted and would never accept refugees as part of its *socio-political concerns*. The country has interpreted refugees and asylum seekers as threats to national security (Yonradee Wangcharoenpaisan 2017). Unlike refugees, this highly developing country has a more open door policy towards migrant workers from its neighbouring countries. This, in fact, has led to a high volume of undocumented workers to cross Thai borders, who ended up working in the fishing and seafood processing industry, into which Thais do not wish to be recruited. However, after the military junta had taken over the administration and started to crack down on 'illegal' migrants, these undocumented workers are registered and documented (Harkins 2019). The combination of globalisation and Thai conservatism has played a major role in shaping this national mindset. As a result, those who come from Islamic countries are more likely to receive unfair treatment, including refugee children and child asylum seekers. Fears and worries shape the state to either deport or detain. More importantly, the Thai National Human Rights Commission (NHRC) is weak. It does not occupy a strong position from where it would be able to exercise pressure on other state authorities. It can only provide useful recommendations (National Human Rights Commission Thailand 2020). As a result, the best interests of refugee children and child asylum seekers in IDCs are not emphasised well.

Thai state authorities unfortunately do not fully understand what appropriate treatment of refugee children and child asylum seekers entails. However, they do understand that articles 9(1), 9(3), 9(4) and 14(2) of CRC require refugee children and child asylum seekers to stay with their families. However, in practice the interpretation of these articles results in a blanket approach, where authorities detain entire families, including children, together in the same cell (Surapong Kongchantuk 2013). Consequently, refugee children and child asylum seekers often find themselves in overcrowded immigration detention centres lacking proper child-friendly facilities. In addition, there are not enough female officers to take care of girls, despite the fact that this need is emphasised in article 3(3) of CRC. The situation is even worse for refugee children or child asylum seekers who arrive in Thailand alone. In most cases, they are simply treated as adults. As a result, many children are placed in vulnerable situations where they receive threats or inappropriate advances from adults. This is in direct violation of article 36 of CRC and illustrates the lack of understanding by Thai state authorities as to the extent of their international obligations with regard to the best interests of children under their care.



Nowadays, various non-state actors, such as the International Organisation for Migration's day-care centre, work with Thai authorities to provide necessary assistance to children in detention. Likewise, some non-governmental organisations (NGOs) run fundraising programmes to help children who need funds for bail. Unfortunately, problems persist at the level of implementation. In January 2019 the Thai government signed a Memorandum of Understanding (MoU) with seven other NGOs on the Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centres. This MoU not only protects children from being detained, but also urges the Thai government to implement standardised measures that would ensure the best interests of the child. This includes, for example, family reunification and privately-operated shelters (Human Rights Watch 2019). Although the MoU stipulates that mothers should receive bail with their children, it fails to do the same for fathers with children. It therefore falls short of completely fulfilling the requirements set out by article 9 of CRC on the separation from parents (Fortify Rights 2019: 1). Refugee children and child asylum seekers in Thailand continue to be routinely deprived of their liberty and encounter many violations of their rights along the way.

#### **4 Reflection on the regional situation of migrant children in detention**

##### **4.1 Similarities and differences among the three countries**

Indonesia, Malaysia and Thailand are the three countries in the ASEAN region with the highest number of refugees and asylum seekers. Despite serving as transit countries, none of these states has ratified the Refugee Convention and its Optional Protocol. According to Prathiaban and Hooi (2019), countries such as Malaysia avoid ratification of the UN Refugee Convention and its Optional Protocol as they believe that it will lead directly to an influx of refugees. Moreover, all three countries perceive refugees and asylum seekers as a burden to society while also presenting them as a threat to state security – the latter being one of the main justifications the three states use to detain children (Prathiban & Hooi 2019). As a result, refugee children are exposed to ill-treatment in these transit countries. In Indonesia, for example, the negative attitude of its citizens towards refugees also has a strong impact on the state's policies on children arriving in the country. All three countries lack the required domestic laws and policies to protect refugee children. Significantly also, none of the countries selected for this study make any distinction between refugees/asylum seekers and the broader category of irregular migrants.

Southeast Asian nations mostly regard refugees as an international rather than a domestic issue and, therefore, expect international

organisations to shoulder the responsibility of the refugee population. They therefore view it as an external issue that requires mainly external collaboration with international organisations such as IOM and UNHCR. Even when such collaborations are in place, limited funding has hindered the effectiveness of many international organisations to officially process refugee children and child asylum seekers. Other times, the functions of these organisations are impeded by laws as in the case of Malaysia where organisations including the UNHCR are denied access to the detention centres, thus severely impacting the availability of data on the children as well as the situation of the detention centres. In some extreme cases, this has led refugees to request local authorities to detain them as otherwise they would be left out on the street without any shelter. As a result, children are placed in these centres with their guardians. The governments of Indonesia and Malaysia have been dealing with the crisis in a more rigid way. Children and their families are allowed to stay in the country. However, they are placed in harsh detention centres while waiting for their resettlement requests. On the other hand, Thailand is in a better position to provide friendlier accommodation for children by allowing them to stay with their mothers and by allowing them to stay in alternative camps with their families.

ASEAN member states are more committed to safeguarding principles of non-interference in member states' domestic matters and consensus in policy decision making (Nethery & Louhnan 2019). Jetschke (2019) similarly argues that ASEAN has a long history of following the norm of non-interference in domestic affairs and state sovereignty. While the ASEAN Declaration of Human Rights and the ASEAN Declaration on the Rights of Children in the Context of Migration stress the rights of refugee children, both are non-binding documents (Petcharamesree 2015). This gives governments the opportunity to bypass the issues altogether or to reach a bilateral agreement rather than committing to build effective regional mechanisms. Therefore, there is no guarantee of upholding the human rights principles, leaving no regional protection mechanism to deal specifically with issues related to refugee children and child asylum seekers. In fact, although the AICHR was established to promote and protect human rights in the region, its terms of reference do 'not include the powers of investigation, monitoring or enforcement, or any rights catalogue' (International IDEA 2014), thus limiting its effectiveness. A prevailing non-binding framework as well as a lack of regional commitment to address the problems highlighted in this article have further led to an absence of any monitoring mechanism to ensure the protection of refugee children. In essence therefore, while the regional mechanism recognises the declarations, it has not moved effectively towards implementation (Hara 2019).

## **4.2 Understanding children deprived of liberty in the context of migration**

The decision of governments to adopt migration policies that penalise undocumented migrants are driven by complex geopolitical reasons as well as conflicts over resources. Additionally, the role of the media, public perception and inadequate information about refugees also influence the way governments react – particularly with regard to children who are in a more vulnerable position. As mentioned, states generally regard non-nationals as a risk to their security. Governing policies thus tend to control non-nationals with strict immigration laws. Additionally, countries are inclined to adopt restrictive systems, which introduce mandatory and/or indefinite detention as a deterrent dissuading potential refugees and asylum seekers from entering their territories in the first place. Laws and policies of the transit countries create a climate where the detention of refugee children and child asylum seekers (both accompanied and unaccompanied) is the first and only option available. Although CRC emphasises that detention centres do not serve the child's best interests, children are routinely detained – and then also for extended periods.

The chance of refugee children and their families finding resettlement is almost impossible. Signatories of the Refugee Convention, such as Australia, several European countries as well as the United States, have imposed highly-restrictive procedures for entry while significantly reducing the number of people being granted refugee status. This has halted international progress on migration and human rights. On the other hand, in Southeast Asian transit countries, non-state actors (for instance, local NGOs and international organisations such as UNHCR and IOM) have become the primary duty bearers towards refugees. However, the attitude of Southeast Asian governments towards refugees has had negative impacts on the ability of international and local NGOs to be effective and they often work as outsiders. This is primarily due to the fact that they perceive refugees largely as a national threat. In addition, governments remain reluctant to work with international NGOs, while local organisations are kept out of the discussion entirely. This of course presents a significant barrier (Prathiban & Hooi 2019: 74). Moreover, the situation is further exacerbated by the position of the UN and international organisations which are either unwilling or unable to challenge the immigration policies of these governments that were crafted with national security in mind, and this further erodes the accountability of these governments.

State authorities usually refer to article 9 of CRC to argue that, by and large, it is in the child's best interests to remain with their parents in detention. Such an argument is, however, not correct because a proper consideration of the child's best interests does not seek to trade off rights against one another when they in fact are compatible (Human Rights and Equal Opportunity Commission 2004). Family unity, which is considered

a critical and integral right under CRC, cannot be used by states to justify decisions to detain children. Nevertheless, states are willing to disregard a child's right only to be detained as a *last resort*, arguing that maintaining the right to family unity is in the child's best interests (Human Rights and Equal Opportunity Commission 2004). In reality, however, this argument bears little practical relevance. Children are likely to be arrested and placed in IDCs for the same reason as their parents – they are, for example, often arrested upon arrival or shortly thereafter simply for having no valid documents (Human Rights and Equal Opportunity Commission 2004: 163-164). This further implies that governments have no other options available. The recently-published *UN Global Study on children deprived of liberty* insists, however, that there are always alternatives to detention and in the case of 'purely migration related reasons' the detention of children is to be prohibited (Nowak 2019: 7). The immigration detention of children is in clear violation of international human rights law since, in effect, states use detention as a means of punishment for the mere act of seeking asylum. As such, the domestic laws and current practices of these countries do not address the particular vulnerabilities of asylum-seeking children, nor do they afford them any special assistance and protection. Consequently, children remain in detention, where they are abused, both physically and mentally. In this regard, unaccompanied children are also placed in violent and exploitative situations, since they are often detained with random adults. It has even been found that officers routinely abuse and violate the rights of these vulnerable children. Such instances, however, are rarely properly investigated. What is more, without a legal guardian and/or special assistance from the state, unaccompanied children end up being detained indefinitely.

## 5 Conclusion

The world is facing a global refugee crisis. Political, domestic and international agendas have cost children their rights and their freedom. Detaining children is no different from locking away their futures and their talents. For refugee children, fleeing to different countries to seek asylum is never their choice. It is their only option. In the hope of finding a better future, children undergo an arduous journey only to be indefinitely detained in either a transit country or in their destination country. With their futures uncertain, these children are locked up in a place that can never be called home. Most of us are lucky enough to take our rights for granted, yet refugee children are not only at risk of being placed in detention, but also risk their fundamental rights being jeopardised. Children risk, for example, being tortured as well as mistreated by state actors, while forced to live in inhumane conditions. It therefore is crucial that states establish and improve right-based monitoring mechanisms to ensure that they comply with their obligations. Effective coordination between countries of origin, transit and destination paired with close cooperation with non-state

actors are key components for adequately protecting children and, thus, is much needed in countries such as Indonesia, Malaysia and Thailand.

While the three countries will not be signing the Refugee Convention any time soon, these countries remain subject to their obligations under international agreements and particularly to abide by CRC and protect refugee children and child asylum seekers. The state has the right to protect its borders, yet the concept of state sovereignty is not an absolute right. The states need to ensure their obligation to protect all children regardless of their status in its jurisdiction and to ensure that they can enjoy the basic human rights that all nations have agreed to uphold by taking the national approach to respect the rights of children within the state territory. Children should not be criminalised due to migration-related issues. The state should end the detention of the children to ensure that no child is deprived of their liberty. Besides, human rights must be recognised as the obligation of the state, not only as a matter of the humanitarian response. It is essential to prohibit all border measures from being deemed unlawful or a disproportionate restriction or a containment of asylum-seeking people. Shared responsibility, effective coordination, communication, and collaboration among countries of origin or nationality, transit, and destination, as well as other non-state actors, are key essential components toward the protection of children and thus are much needed.

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