

# MAPPING AND ANALYSING THE PROTECTION SITUATION OF UNACCOMPANIED AND SEPARATED CHILDREN (UASC) IN INDONESIA, MALAYSIA AND THAILAND

## REGIONAL OVERVIEW AND ANALYSIS

The Institute for Human Rights and Peace Studies, Mahidol University

ECPAT International

Centre for Southeast Asian Studies, Universitas Gadjah Mada, Indonesia

The Research and Education for Peace, University of Sains Malaysia



Commissioned by: United Nations High Commissioner for Refugees (UNHCR)  
Funded in the 2012-13 Financial Year by:  
Australian Government Department of Immigration and Citizenship



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Institute of Human Rights  
and Peace Studies



Universitas  
Gadjah Mada



UNIVERSITI SAINS MALAYSIA



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The research report could not have been successfully prepared without the hard work and perseverance of the three research teams in Indonesia, Malaysia and Thailand who produced the three very detailed country reports. Constraints and limitations, although existing, did not discourage them from pursuing the research work until the end product was properly produced. We thank them wholeheartedly.

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# PREFACE

In September 2012, UNHCR commissioned a major research project with the aim of Mapping and Analysing the Protection Situation of Unaccompanied and Separated Children in Southeast Asia. The research project was coordinated by the Institute for Human Rights and Peace Studies, Mahidol University in collaboration with ECPAT International, the Research and Education for Peace, University of Sains Malaysia and the Centre for Southeast Asia Social Studies, Gadjah Mada University, Indonesia. The project was jointly led by Dr. Sriprapha Petcharamesree (IHRP, Mahidol University) and Mark Capaldi (ECPAT International) and researchers were engaged from the three target countries, namely Indonesia, Malaysia and Thailand. The research project had two main objectives: a) map and analyse the situation and treatment of the mixed flows of unaccompanied and separated children (UASC) who move irregularly into the three countries; and b) make recommendations for improvements in governmental and organisational responses including through the development of regional guidelines that could lead to a more harmonised approach towards UASC.

This Regional Report is based on the outcome of the three research teams in Indonesia, Malaysia and Thailand. We cannot and will not claim that we did justice to the rich and detailed reports that each national team produced. We tried our best to reflect, as much as possible, the key elements of the findings from an analytical viewpoint. Throughout the research process, relevant government agencies, law enforcement agencies, civil society organisations, international agencies, institutions where children were located, unaccompanied and separated child migrants, children and young people in general, and academics, involved directly or indirectly, in responding to the rights of the UASC were engaged and consulted. The engagement has created, to a certain extent, a potential for collaboration which we hope will be realised.

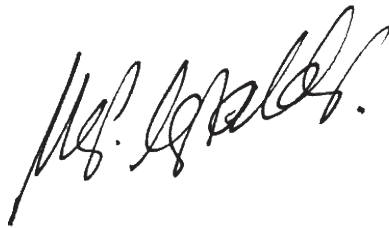
From the regional report, one can see that the scope of the field research varied somewhat in each of the countries. The research in Indonesia confirmed that UASC are mainly from the refugee/asylum seekers category, whereas in Thailand, the research team was able to collate data from all groups of UASC (child migrant workers, refugees, stateless persons, street children and child trafficking victims). The field research in Malaysia was also generally limited to refugee children, although some data from refugee, stateless, irregular migrants, and asylum seeker children was accessed in the state of Sabah. One significant finding, which impacts the protection of the rights of UASC, is that despite a growing presence in the region, the concept of “unaccompanied and separated children” is not particularly known, used or well understood. In the absence of an agreed upon definition of refugees and UASC, in many instances, these children are treated as “illegal migrants” and placed in detention centres.

Crucially, this research report informed and fed into the development of the other research project outputs which include a *Directory of Organisations in Indonesia, Malaysia and Thailand with the Potential to Respond to the Rights and Needs of Unaccompanied and Separated Children* as well as the *Regional Guidelines for Responding to the Rights and Needs of Unaccompanied and Separated Children* for governments and service providers that deal with profiling, registration, documentation, guardianship, care arrangements and the search for durable solutions for UASC. We sincerely hope that the various publications emerging from this research project will help increase the prioritisation of the concerns of UASC on the political agenda of countries in the region, improve coordination and cooperation and help build the capacity of the various duty-bearers in responding to the rights which all unaccompanied and separated children are entitled.

The protection of the rights of UASC is about assisting UASC to regain their dignity lost due to the lack of health, education, housing, social security, work or a quality of life that embodies and perpetuates their vulnerability. Although circumstances vary greatly from one country to another and no unified good practices were found by the researchers, we still hope to see an exchange of learning and sharing among those dealing with the protection of UASC. Actual learning in using this report, regional guidelines, and directory of organisations will occur best through interactions among relevant agencies, institutions and individuals. Although these relevant agencies tend to work individually, we think they cannot afford to maintain such a strict separation between them. Given certain conditions, responding to this challenge may require forming coalitions and partnerships among those having responsibilities, directly or indirectly, for protecting the rights of UASC.



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# AN EXECUTIVE SUMMARY

## ***Mapping and Analysing the Protection Situation of Unaccompanied and Separated Children in Indonesia, Malaysia and Thailand***

Children in Southeast Asia, as in many parts of the world, are seen as the “leaders of tomorrow.” At the onset, families, communities, and States have sought for the promotion and protection of their well-being and education. Yet, throughout recent decades, challenges have directly impeded children from realising their dreams and aspirations and fully exercising their human rights. Some countries in the region played host to a number of socio-economic and political upheavals; making it more difficult for children to enjoy a life free from violence, worries and fear. Many have fled or separated themselves from their families, communities and homelands to find peace and security at a very young age. Their diaspora and irregular movements make them more vulnerable to many forms of human rights violations.

The phenomenon of unaccompanied and separated children (UASC) in Southeast Asia, specifically in Indonesia, Thailand and Malaysia, is increasing in number and is attracting growing risks. While this has caught the attention of governments and international agencies, there is still an urgent need to sharpen existing knowledge and to further enhance local, national, regional and international responses and actions to address this critical human rights issue. A team of academics, advocates and researchers from The Institute for Human Rights and Peace Studies, Mahidol University in Thailand; ECPAT International; Centre for Southeast Asian Studies, Universitas Gadjah Mada in Indonesia; and The Research and Education for Peace, University of Sains Malaysia have implemented a new study that attempts to identify and assess the situation of foreign UASC in three Southeast Asian countries.

The research project of *Mapping and Analysing the Protection Situation of Unaccompanied and Separated Children in Southeast Asia* is committed to achieving two main objectives: 1) map and analyse the situation and treatment of the mixed flows of foreign unaccompanied and separated children (UASC) who move irregularly into Indonesia, Malaysia and Thailand; and 2) make recommendations for improvements in governmental and organisational responses including through the development of standard operating procedures/regional guidelines that could lead to a more harmonised approach towards UASC.

## **Levelling off: Understanding UASC and the Various Efforts for their Protection**

Before engaging in actual field research in the region, the research team explored current discourses and perspectives on UASC. Furthermore, factors causing the phenomenon were identified and studied in order to strengthen ways to promote and protect the rights of these children. The UN and relevant organisations working on the rights of children have advanced efforts to provide a safer, more secure world for UASC. Existing international documents and programmes generally tend to view UASC from an approach of vulnerability and marginalization in the midst of irregular migration.

The Committee on the Rights of the Child (the Committee) has provided definitions of both unaccompanied and separated children:

“Unaccompanied children (also called unaccompanied minors) (are) children who have been separated from both parents and other relatives and are not being cared for by an adult, who by law or custom, is responsible for doing so.”

“Separated children are those who have been separated from both parents or from their previous legal or customary caregivers, but not necessarily their relatives. These may, therefore, include children accompanied by other adult family members.”

These concepts were further fleshed out to reveal factors that bring about UASC. The Committee’s general comments attempt to expand the discourse. General Comment No.6 asserts the importance of acknowledging that the definition applies to unaccompanied and separated children who find themselves outside of their country of nationality, or, if stateless, outside their country of habitual residence. The General Comment applies to all such children irrespective of their residence status and reasons for being abroad, and whether they are unaccompanied or separated. Moreover, these children may have varying and different reasons for being unaccompanied or separated including persecution of the child or the parents, international conflicts and civil war, trafficking in various contexts and forms, including sale by parents; and the search for economic opportunities.

This study also unravelled the dynamics and debates on how terms are employed and understood by various organisations and international agencies. It has been found that most international organisations, including international NGOs, tend to use the term “separated” rather than “unaccompanied children/minors” and that the terminology “separated children” is increasingly preferred. For example, Save the Children focuses more on “separation” based on the fact that “they lack care and protection of their parents or primary caregivers, and, as a consequence are harmed by this separation and exposed to risk of even greater harm as a result of this separation.” However, at the UN agencies and within Europe, both terms are used together and interchangeably. The Committee and academics have also touched upon the significance of the presence (or absence) of care and guardianship over the child. Five key elements are generally adopted in mapping and analysing policies and situations that are relevant to UASC:

- Children below 18 years of age as defined by Art. 1 of the Convention on the Rights of the Child;
- Children who migrate outside their country of origin “alone or with insufficient care.” In the case of stateless children, it includes those who are outside their country of habitual residence;
- Children who are not accompanied by or separated from parent(s) or people who are responsible for them by law or by custom or by cultural, social or other arrangements;
- Children who enter into a territory in an irregular manner or seeking asylum or a better life;
- Children who are left to the care of an accompanied person, without state’s assessment of his/her suitability for doing so.

In the midst of migration caused by conflicts, deprivation and globalisation, Southeast Asia has been witnessing the emergence of the phenomenon of unaccompanied and separated children. Indonesia, Malaysia and Thailand are parties to the UN Convention on the Rights of the Child. Yet there remain conflicting definitions of the child which greatly affect social understanding and targeted policies for those who are in vulnerable situations. While it has been challenging to establish and acknowledge UASC, as neither the term nor concept of UASC is well understood or defined by the states in the region, the main issue in Southeast Asia is the problems faced by the children and the condition of their care. In pursuit of localising the study, the term “separated” is much preferred in

the research. It is inclusive of trafficked and smuggled children, independent child migrant workers, as well as children seeking asylum alone or accompanied by an adult who is not able or willing to take “good or effective care” of them. The status of statelessness is also taken into account, with respect to stateless children crossing international borders. The quality of care and the relationship between the child and the caregiver is the primary concern in this research. Since the quality of care is an issue, this research on UASC does not consider duration of separation as important as the ability and willingness of care. Moreover, in the case that both parties are not able or willing to contact one another, and contact is lost, a child will be considered separated.

It also tackles elements that affect a child’s decision making power to move (voluntary or forced) in the midst of vulnerability.

The need for protecting the rights of the child, although universal, is at the same time controversial when it comes to children who have crossed international borders. It is hoped that this study expands the current knowledge and also provides relevant recommendations that assure the full promotion and protection of the rights of UASC.

### Setting the Foundation: The Research Process

Staying true to the vision of this study conducted in 2012-2013, a human rights perspective which recognises that all human beings, including refugees, asylum seekers, migrants, and specifically UASC are equal and have the same right to protection was placed at the heart of this research. Moreover, the inclusion of children in the research was prioritised. As an analytical tool, the research used a rights-based approach which ensured the states’ involvement and responsibility to sustainably provide protection and guarantee rights to all children in their territory, including foreign children such as UASC.

Research analysis was supported by both qualitative and quantitative data. The team collected data from available studies, news reports, relevant legislation and regulations for care services as relate to child protection and unaccompanied and separated children. An analysis of legal frameworks of the three countries related to UASC was conducted. Field research guided by Child Protection Guiding Principles and research protocols and methodology took place to ensure comprehensiveness of the study. Methodologies employed were group observations, focus group discussions, and one-on-one and key informant interviews with children, civil society groups, government agencies, academics and other relevant stakeholders. Research data collection was done in migrant communities, detention centres, and schools which are found in major cities and/or border areas where UASC are usually located. The following main guiding questions served as the basis of research discussions:

- What are the estimations of the number of unaccompanied and separated children, what is the basis for these estimates and how does each organisation establish a reliable statistic?
- What are the situations and conditions faced by unaccompanied and separated children in relation to the vulnerabilities that they face and their care needs?
- How do the larger structural and policy issues affect the experiences of UASC and impact their vulnerability and the provision of care arrangements?
- What are the relevant strategies and responses needed to ensure the realisation of the rights of UASC?

National and regional consultations were also held to increase awareness and further validate outputs during the research process. They also served as advocacy channels that aimed to educate and strengthen collaborative actions.

As expected, based on the UASC context in the region, the research process had to embrace certain limitations. Existing debates and limited conceptual understanding of UASC terminology posed a significant challenge to the study. Thus, data on the local and national levels are scarce, rather outdated and generally not sufficiently disaggregated. Furthermore, national legal frameworks conflict with the agenda of promoting and protecting the rights of UASC. Time constraints and the capacity of researchers to cover all areas also limited the research process. Lastly, dealing with children and their sensitive experiences has always been an ethical issue that the research teams had to carefully handle.

## Uncovering the Realities of UASC in Indonesia, Malaysia and Thailand

Migration among children in Southeast Asia has paved the way towards both emancipation and marginalisation. Their dispersion has generally resulted from a number of causes – migration with family, education, labour, trafficking, political conflicts, etc. Throughout recent years, it has become more difficult to trace their movements due to the lack of efficient documentation and policies that assure their protection. Current records and statistics reveal gaps in age disaggregation and specific motives of migration, especially regarding UASC. Moreover, based on the studies of UASC in Indonesia, Malaysia and Thailand, a general agreement can be reached that there is an increase of children crossing national borders including those unaccompanied and separated from their parents and caregivers. Research findings expose elements that provide a better understanding of gaps, as well as achievements, in the protection and promotion of the rights of UASC in the three countries.

### *Determining and Documenting UASC*

A first key finding that emerged from all three research reports is that the concept of “unaccompanied and separated children” is not widely known, used or well understood. UASC is not perceived as a separate category of children. They are often regarded as refugees, migrant children, trafficked children (Thailand); undocumented, stateless children, victims of trafficking (Malaysia); refugee and asylum seeking children (Indonesia). This has led to a situation and societal perception of vulnerability and disempowerment. Moreover, they are normally viewed as “illegal” individuals in their respective host countries. Such mindsets prevent governments and their relevant agencies from providing targeted and effective measures to uphold the rights and freedoms of UASC.

Their invisible and/or “illegal status” could be the result of a lack of proper documentation of their situation. This continues to pose more risks to UASC, especially those in detention facilities and refugee/asylum camps. It should be noted that all three countries receive and host a variety of UASC ranging from the neighbouring countries of Cambodia, Indonesia, Lao PDR, Myanmar, and the Philippines, to conflict states such as Afghanistan, Sri Lanka and Somalia.

Accurate government statistics on UASC as a specific group of children are unavailable in all three countries studied (due *inter alia* to the lack of an agreed legal definition) and data on the different categories of UASC are scattered and incomplete. This lack of disaggregated data remains a challenge for the proper implementation and enforcement of existing laws. There have also been inconsistencies in information and statistics provided by international organisations, NGOs and national governments.

In Thailand, recorded cases are mostly those of refugees and asylum seekers based in camps and fishing communities – of whom only a fraction directly fit into the UASC category. ECPAT International discovered trafficked child sex workers in Chiang Mai, Pattaya and Phuket. It is the same in Indonesia, which documents mostly refugee and asylum seeking children found in immigration detention centres. Malaysia hosts trafficked

children, stateless children and children of undocumented migrant workers. Though it has established an immigration registration scheme, thousands remain hidden and undocumented, specifically in East Malaysia.

#### *Status of Protecting UASC*

The lack of documentation and persistent status of illegality greatly effects how UASC are treated and protected by their host countries. They have been geographically marginalised in detention centres and refugee camps. Many irregularly shift locations to avoid harsh penalties, stigma or because they are in search of work. Certainly, limited access to legal protection represents another serious concern for all categories of child migrants, including UASC. Not having proper documents or being properly registered prevents these children from access to legal protection and basic services.

Even those who are documented or have recognised statuses endure difficulties in enjoying their rights and freedom of movement. Many of them have been forcefully displaced due to political conflicts such as the Rohingyas in Thailand and Malaysia. UASC are indeed in a very vulnerable situation. On the one hand, they may not be able to access basic health, education, labour services and benefits. On the other, they face hazardous working conditions, abusive employers and conflicts with the law in their respective locales. In Indonesia and Thailand, while there have been efforts by civil society to provide basic services, the growing number of UASC challenge the capacity of these programmes to accommodate every child.

#### *National Commitments: International Standards and State Rhetoric*

At the core of effectively promoting and protecting the rights of UASC is the strong implementation and enforcement of policies and legislation. This research acknowledges the important need to identify and assess national compliance with international standards on UASC.

While the basic definition of the child has been domestically applied, uniformity with regards to a definition of unaccompanied and separated children has proven to be more challenging. Indonesia has not embraced this in its national laws and policies. Thailand employs a definition and provisions related to care and reasons for separation which are sub-par to international standards. This is greatly attributed to the absence of definitions on vulnerable groups such as refugees and those who are stateless. The same is said for Malaysia which does not clearly differentiate between refugees, asylum seekers, stateless persons and undocumented migrants. These factors hinder possibilities of documentation which have led these vulnerable children to embody “illegal” personalities in the eyes of the respective laws.

Indonesia, Malaysia and Thailand have ratified the key international human rights instrument for children, the Convention on the Rights of the Child (CRC). However, only Indonesia ratified it without any reservations. Thailand and Malaysia still hold reservations on provisions that greatly affect UASC. While there have been improvements in terms of lifting certain reservations, Thailand is still reluctant to ensure appropriate measures to protect children seeking refugee status, while Malaysia does not have clear policy or legislation on the prohibition to non-discrimination, birthright and nationality, right to education and prohibition against torture. Interestingly, Thailand has recently advanced its commitment by ratifying the CRC Optional Protocol on Individual Communications.

In terms of domestic application of international standards, there are still gaps that exist in these three countries. Malaysia's Child Act of 2001 has yet to be fully harmonised with the CRC provisions. Indonesia's Law on Child Protection exhibits international standards but is only applicable to citizens. Thailand refuses to place international law above its constitution; a breach of its commitment to the CRC. Moreover, all countries have yet

to recognise and apply refugee rights in their domestic laws and policies. None of the three countries are Parties to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol or the 1954 Convention relating to the Status of Stateless Persons and their successive Conventions and Protocols. At this point, it is very challenging for UASC to forge a space in the legal frameworks of these three Southeast Asian countries.

The effective application of the law with respect to UASC starts with an effort to identify them upon their arrival. Reviews conducted show that all three countries examined lag behind in the implementation of these measures. Formal legal provisions for the identification of children or different groups of UASC upon arrival at the ports of entry have not been developed in any of the national contexts analysed, with UNHCR being the only agency engaged in identifying, registering and documenting UASC who fall under the Office's mandate and accordingly addressing their special needs.

It has been discovered that there have been many cases of arrest, detention and deportation of migrant children in these three countries. Particularly in Malaysia, those who escape harsh treatments only enjoy partial or temporary protection from international agencies such as UNHCR. Moreover, identification of UASC is particularly challenging for those who are victims of trafficking as these children generally remain hidden from public view and the authorities. They fear legal consequences as they know they entered and are staying in the country "illegally." UASC in Thailand remain fearful of authorities who mistreat them as irregular migrants.

Registration has also been elusive for most UASC, especially stateless children. UASC refugee children, asylum seeking children and other migrant children who have not acquired the nationality in their state of origin or a third state, remain stateless in Thailand. Under Indonesian law, citizenship should be granted to children who are born in Indonesia whose parents' citizenship is not defined or are stateless and to infants who have been found in Indonesia whose parents' whereabouts are unknown. Additionally, a foreign child who has not attained five years of age and is adopted by an Indonesian citizen is granted citizenship. These provisions have been found to be of little use to UASC who cross international borders, as they are not born in Indonesia, most are not infants, and most are not adopted by an Indonesian citizen. In Malaysia, birth certificates issued to non-Malaysian children are stamped with the words "orang asing", meaning "foreigner", therefore rendering them unable to access public schools and health services.

#### *Elements of UASC's Rights and Freedoms: Short-Term and Long-Term*

Protection and care mechanisms must be put in place in order to meet the special needs of UASC. Irrespective of their legal status, UASC are entitled to receive temporary care arrangements including, appointment of a guardian, child-appropriate accommodation, access to education, and access to health care.

With respect to guardianship, the identified guardian must be informed and consulted in all processes affecting UASC. Access to information is key to effectively promote the rights of the child. Thailand presents some good provisions on providing guardianship support. Malaysia does not have specific provisions with regards to guardians for trafficked children. The nationality limits of the Law on Child Protection in Indonesia hinder UASC's ability to enjoy such a right. Legal representation is also crucial for UASC to access justice. This continues to be a challenge in the three countries studied.

The provision of care and accommodation are also obligations of State Parties to the CRC. Based on this study, these three countries have failed to enforce this standard. Many UASC are usually placed in immigration detention centres, restricting their movements and stripping them of their basic rights. While there have been a few programmes that promote their right to shelter, most of the UASC in Thailand, Indonesia and Malaysia live outside of shelter care and do not receive any protection.

The access to quality education for UASC should be maintained during all phases of the migration cycle and should also include vocational training for both girls and boys. Similarly, UASC should have the same right to access employment and health care as national children. The health facilities should be capable of taking in due consideration the particular mental and physical vulnerabilities of these children. Yet, access to these basic rights has remained limited for UASC in Indonesia, Malaysia and Thailand. Their undocumented status hinders them from fully enjoying these rights which can push them to accept hazardous opportunities for survival.

Sustainability of the protection and promotion of rights must be enjoyed and easily accessed by UASC. Durable solutions enable one to maintain the level of necessary care and protection afforded to these children. This includes family reunification, various forms of settlement including safe return, resettlement in a third country and inter-country adoption. Unfortunately, none of the three countries examined appear to meet international standards in the implementation of these measures.

Thailand's laws and policies have been weak in terms of return, resettlement and reintegration opportunities for UASC; this option has been limited to child victims of trafficking. This is also the case for Indonesia. While UNHCR and IOM have unofficial programmes from voluntary repatriation, government efforts for resettlement have been scarce. UNHCR and IOM are also working in Malaysia for durable solutions related to trafficked children and refugees, but the process has been tedious and time consuming. The government's Adoption Act excludes non-nationals from enjoying such rights.

#### *Relevant Stakeholders Addressing Issues of UASC*

Numerous government agencies are generally found to be involved in the response to UASC including the Ministries of Interior, Foreign Affairs, Justice and Social Welfare/ Development, Immigration Departments, the Police and local government departments. Their "illegal" status had led governments to strengthen enforcement of their laws regarding security. The Ministry of Interior usually takes the initial lead in addressing UASC cases while immigration officers, army and police respond to cases on the ground. Ministries of Welfare and Social Development are responsible for sheltering trafficked victims as in the case of Malaysia and Thailand. It has been observed that these agencies tend to focus on prevention and enforcement to address irregular migration of children.

UN agencies have also done a great amount of work to address cases related to UASC. UNHCR has been providing services in camps based in Thailand. It has been documenting, registering and interviewing prospective refugees and asylum seekers in Malaysia. In Indonesia, UNHCR has been the primary actor in providing basic education services, protection, assistance and facilitating access to durable solutions in the form of resettlement. IOM has a role in the care and assistance of UASC in each of the three countries. Other UN agencies such as ILO and UNIAP have focussed their efforts on combating human trafficking. UNICEF has done work on child protection programmes in Thailand and Malaysia.

Civil society movements and organisations have done a fair share in the promotion and protection of the rights and needs of children. Although it should be stressed that there are no organisations identified whose only priority or focus is unaccompanied and separated children (with the exception of COERR, a NGO partner of UNHCR working along the Thai-Myanmar border). International NGOs such as Save the Children, WorldVision and ECPAT International have programmes focusing on child protection in Thailand and Indonesia. Malaysia hosts a number of NGOs working on issues affecting refugees, ethnic children, migrant children and street children. There are also faith-based organisations working with refugees and asylum seekers and are normally based in border areas (Thailand).

### *Challenges in Coordination, Cooperation and other Limitations*

It has to be reiterated that efforts to address issues concerning unaccompanied and separated children lack strength and focus in Indonesia, Malaysia and Thailand. Civil society groups, which have limited technical, financial and human resources, have carried most of the burden in responding to the needs of UASC, especially refugees. Coordination among government agencies and with international organisations remains a huge challenge. In Indonesia, this has resulted in limited access to education and overcrowding in UN-sanctioned shelters and detention centres. The lack of cooperation had brought about poor access to data and distrust among stakeholders in Malaysia.

Corruption in government agencies continues to plague policies and programmes for UASC. In Thailand, it was found that some law enforcers are actually protecting establishments that promote sex work and forced labour. Some local government officers have impeded the implementation of national policies for children on the move in Indonesia. Distrust carried by civil society in Malaysia was borne out of abuse of power by some government officials in responding to UASC and refugees.

### *Pockets of Hope: Good Practices*

A number of good practices in responding to different issues of various categories of UASC were identified in each of the three countries during this research project. Predominantly, the most documented examples were found around areas dealing with refugee/asylum seeking children or trafficked children – particularly around interim care arrangements.

- A multi-disciplinary team system to determine child victims of trafficking is now being employed in Thailand. Indonesia and Malaysia have also set up task forces and coordinating agencies to monitor, document and eventually combat trafficking among children.
- Family tracing and contact programmes were initiated by various government agencies with the support of relevant UN agencies and national NGOs.
- Interim care accommodations have already been established by the Ministry of Social Development and Human Security (Thailand), while NGOs have taken the lead to provide decent shelter to UASC in Indonesia and Malaysia.
- Some provision of legal representation and assistance is occurring in these three countries. In Thailand, each Karen camp has established a Sexual and Gender Based Violence Committee to respond in cases of sexual abuse and work to prevent its occurrence. Legal assistance in refugee determination interviews is being provided by an NGO and UNHCR in Indonesia. While in Malaysia, the high court allowed a UNHCR representative to be present in a case involving a UASC.

## **Advancing UASC at the Regional Level**

It is impossible to perceive and understand the phenomenon of UASC merely through local and national parlances. This controversial issue certainly surpasses boundaries set by national territories and sovereignty. An assessment of regional discourse and efforts has to be conducted to reveal gaps and potential spaces to enhance efforts of promoting and protecting the rights of UASC.

### *The CRC as Implemented in Southeast Asia*

All Southeast Asian countries are parties to the CRC. Although these countries have committed themselves to abide by the CRC, four countries still keep declarations and/or reservations to certain articles prescribed by the CRC. Singapore, for example, has kept



a blanket reservation that limits CRC standards in its national legislation and policies. Some countries have progressed further in their commitments to the rights of the child by ratifying Optional Protocols to the CRC.

In terms of domestic application, Member States of ASEAN have established and amended laws to abide by the standards set by the CRC. Cambodia sets a great example by directly referring to the CRC in its constitution. The Philippines has pursued laws specifically pertaining to trafficking, violence against children and child labour. Vietnam has indigenised the CRC by addressing issues related to street children and sexually abused children. Line Ministries and concerned agencies have also been set up in many countries as a commitment to the CRC.

Amid advances in the region, there still exists a myriad of challenges, especially when addressing issues related to the four pillars enshrined in the CRC: (1) non-discrimination; (2) the best interests of the child; (3) child survival and child development; and (4) child participation. Diversity in nationalities, ethnicities, age, and socio-economic status among children has complicated enforcement of laws and policies. Moreover, limited technical and financial capacities, as well as political will, impede the proper implementation of laws on children, including UASC.

#### *Commitment to the Rights of the Child in ASEAN and the Asia-Pacific*

The discourse of children, in general, has been closely associated with the youth at the ASEAN level. In principle, this had sidelined issues requiring specific attention from the regional association of Southeast Asia. While youth matters are given priority in ASEAN as compared to children issues, the commitment of ASEAN to the development and welfare of children is not negligible. The Resolution on the ASEAN Plan of Action for Children adopted in Manila, Philippines, on 2 December 1993, is the first document in ASEAN dealing directly with children's issues. This Plan of Action led to the proposed establishment of a Children's Desk Officer, which never materialised. However, the ASEAN Commission on Women and Children was established.

In the succeeding years, more documents and declarations pertaining to children were realised by ASEAN. They mainly tackled juvenile justice, child abuse, early child care and development. With respect to UASC, a landmark document forged by ASEAN was the ASEAN Declaration against Trafficking in Persons, particularly Women and Children of 2004. This expressed the serious concern and commitment of ASEAN Member States to control and combat abusive movements of women and children in the region. Furthermore, this also catalysed bilateral agreements among countries which are greatly impacted by human trafficking. Labour migration is also a relevant yet very controversial issue concerning children in the region. An ASEAN Declaration on the Rights of Migrant Workers was adopted in 2007 but has acquired little support to make it a legally binding document from many Member States, especially receiving countries. The Socio-Cultural Blueprint for an ASEAN Community is a silver lining for migrant workers, specifically children on the move. It provides strategies and activities related to "social justice and welfare" specifically targeting children in vulnerable situations, social welfare and access to justice for children.

With respect to the rights and freedoms of children, the ASEAN Human Rights Declaration (AHRD) has specific provisions on the rights of the child – recognising non-discrimination and equality for all regardless of age, economic status and national and social origin.

The establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009 and the ASEAN Intergovernmental Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) in April 2010 presented a step towards the protection and promotion of the rights of women and children. Due to the fact that each country has one representative on children sitting in the ACWC, it is hoped that the rights of children can be better promoted and protected. The ACWC

has mandates to forge ways to eliminate violence against children, review existing laws and policies against trafficking and develop a work plan on child protection systems which covers the special needs of most UASC.

At the Asia Pacific level, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime of 2002 was borne out of common concerns of irregular migration in the region, especially people smugglings and trafficking in human persons and the need for increased regional cooperation on the issues. Its core objectives centre on strengthening collaboration to eliminate root causes and practices of human trafficking and provide appropriate protection of victims. Until 2009, the Bali Process focused mainly on transnational crime (including people smuggling and trafficking in human persons). It is in 2009 that concrete progress was made by the Bali Process due to the wave of refugees from Afghanistan, Sri Lanka as well as the Rohingya people which became a “mini-crisis” in the region. The persistent efforts of UNHCR bore some fruit as, from 2009 onward, the protection of refugees was included in the agenda of the Bali Process and has remained since then. The “mini crisis” in Southeast Asia led the Bali Process to find “regional responses to current situations concerning the irregular movement of people in the Asia-Pacific region.” It also led to the development of a “Regional Cooperation Framework” that strongly recognises the need to solve issues related to irregular migration and refugees. It is crucial to point out that the Bali Process is a state-led initiative and will only function completely if generated by sheer political will. So far, little has materialized to implement its agreed provisions, although small steps have been achieved.

## Conclusions – Emerging Issues, Challenges and Recommendations

This study has validated the serious challenges and controversies that continue to weaken efforts in addressing the vulnerabilities and marginalization of UASC. It has been proven that the promotion and protection of the rights of UASC in Southeast Asia is in urgent need of political commitment, proper enforcement and implementation of international standards and enhanced understanding and actions by relevant stakeholders. Across the different contexts analysed, the country reports exposed similar findings and identified comparable shortcomings which require urgent action:

- Although there is a lack of estimations and data on the different groups of UASC, UNHCR has reported an increase in the number of refugees and asylum seekers, including those who are unregistered. Moreover, this scenario suggests that there is a growing presence of UASC children in need of protection;
- Not all international legal instruments that afford protection to UASC have been ratified. This implies that the legal status for refugees, including that of asylum seeking and refugee UASC, remains undefined and unclear;
- In the absence of an agreed upon definition of refugees and UASC, these children are generally treated as “illegal migrants” and placed within detention centres, usually not segregated from adults and in appalling living conditions. There is no recognition that children are the most vulnerable and therefore need special protection;
- All three countries examined fall short of international standards for the protection of UASC. There are no institutionalized mechanisms for the prompt and child-sensitive identification and registration of UASC, including child trafficking victims, nor is there an efficient guardianship system available for them (with the exception of Thailand where the right to have a guardian exists, at least on paper). Besides being accommodated in facilities that are not suitable to meet their needs, UASC have very limited access to quality and specialized medical care and do not enjoy equal access to appropriate education and vocational training. They are not allowed to be

employed as other children are and are often victims of discrimination with little or no opportunity for redress. The implementation of durable solutions in accordance with international requirements is also constrained by a number of challenges with the result that children are left languishing in detention centres for long periods of time;

- There is insufficient coordination and cooperation between the various actors dealing with UASC and their roles and responsibilities remain unclear. The limited coordination may be the result not only of shortcomings or contradictions in the regulatory and institutional frameworks (e.g. absence of protocols), but also of competing and contradicting agendas, work ethics and frames of reference;
- The protection of cross border UASC has not been prioritized in the political agenda of countries in the region and there is very limited awareness of the rights to which UASC are entitled, especially among government officials. A consistent lack of specialized training for care staff, police, immigration officers, judges and other actors who come into contact with UASC has also been reported in all three countries.

Based on the present regional situation, it is imperative to move forward with ways that will help regional and national stakeholders in strengthening their commitment towards UASC. Concrete recommendations provided by the research team aim to touch on important stakeholders and areas that require improvement.

## **UASC Regional Recommendations**

### General Principles and Approaches

- Countries in the region should foster a genuine collaborative approach that actively seeks and sustains the involvement of civil society groups, victim support agencies, international organisations and vulnerable communities, in the design, implementation and monitoring of policies and programmes concerning UASC.
- Efforts must be made to strengthen the capacity of relevant stakeholders across the region to implement coordinated actions and ensure they and their work continues to enjoy strong support from the highest levels of government. Proposed capacity building activities under the auspices of the Bali Process Regional Support Office could be implemented by either AICHR and/or ACWC in partnership with UNHCR and IOM and should include a component on child protection and, in particular, identifying and addressing the needs of UASC.
- Cooperation and collaboration among all organisations concerned is critical for the care and protection of UASC. It is important that all action be coordinated with the relevant government authorities. Dialogue and coordination mechanisms need to start as soon as an UASC is detected and identified, and be maintained throughout the process of determining the steps that should be taken to provide necessary protection in accordance with the best interests of the child. For this reason, it is recommended that a government agency/unit be assigned responsibility for the protection of UASC and facilitation of coordination/cooperation with other agencies.
- Regional level cooperation between governmental and non-governmental sectors should be based on a clear delineation of roles and responsibilities.
- All relevant ministries and government bodies (including judicial, police, migration, asylum, and social service authorities, Ministry of Social Affairs, Ministry of Home Affairs and Ministry of Foreign Affairs) involved in the protection of UASC should adopt policies and procedures which promote information sharing and networking between agencies, states and individuals working with UASC.

- Cross-border cooperation of law enforcement officials should be strengthened to increase the flow of information across borders. Clear guidelines should be established for investigations of child trafficking cases and to ensure that child victims are treated as children and victims in need of protection, and not as criminals.
- States should strive to regularise the status of their migrant populations and improve working conditions and protection mechanisms through international or bilateral negotiations and agreements.
- National governments should focus on designing and implementing co-development strategies between countries within particular migration routes. Policies and legal frameworks should focus primarily on reducing social, economic, educational, and health inequalities between countries while maximizing migration's developmental potentials for both receiving and sending countries.
- The underlying factors causing UASC to cross borders to flee persecution and seek asylum in neighbouring countries and the consequences of this migration should be recognised and addressed by countries within the region. Particular care should be taken to address the situation of Rohingya refugees who have no access to citizenship in their country of origin and whose refugee status is not recognised by the authorities in Thailand, Malaysia or Indonesia.

#### Identifying/Registering/Documenting UASC

- There should be coordination on a (ASEAN) regional level between Immigration, other government agencies, UN agencies, and international and national NGOs in order to create standardized regional guidelines and mechanisms for identification, registration and documentation of UASC. AICHR and ACWC would be the best partners for the Bali Process for such a regional implementing agency.
- There should be agreed on baseline, minimum standards regionally on how to perform initial assessments of UASC's situations. These assessments should be conducted jointly by two or more agencies, as inter-agency cooperation at the beginning involving the initial assessment paves the way for a strong coordinated response later on. In cases where joint assessments are not possible, findings should be shared between concerned agencies.
- There should also be agreement on similar minimum standards regionally on the steps to be taken after the identification of UASC, such as the adoption of a comprehensive and systematic approach to the registration and documentation of UASC as well as referral to relevant agencies.
- Emphasis should be placed on cross-border collaboration to train border officials to properly identify and interview UASC, especially UASC asylum seeking and trafficking victims. Cross-border cooperation of law enforcement officials should be strengthened, for example by establishing coordinating units with a mandate to issue clear guidelines for child-centred investigation of cases of trafficking of children. The systematic disincentives which make UASC who are victims of trafficking hesitant to communicate with authorities, such as law enforcement corruption and fear of legal consequences from authorities or traffickers, should be recognised and addressed.

#### Family Tracing

- In situations where tracing activities take place between a number of countries, there should be close coordination, cooperation and joint planning and centralisation of information between the governments, the ICRC, UNHCR, UNICEF and other implementing agencies in all countries concerned.

- All those engaged in tracing should use the same, systematic approach, with standardised forms and mutually compatible systems which, at a minimum, should promote and utilise the principles of the right to privacy and confidentiality and the best interests of the child. This will facilitate cooperation and information sharing (particularly across borders) and prevent duplication of activities.

#### Guardianship, Care and Accommodation

- A region-wide harmonised approach should be in place on basic minimum standards of support for UASC in response to their specific needs and protection concerns. This includes: community-based shelter (not in a detention centre), food, health (access to free and equal health care), legal advice (guaranteed for those UASC in legal proceedings or those facing deportation), education (free access) and care and protection through guardianship arrangements.
- A region-wide harmonised approach should be in place to ensure that UASC will not be placed in detention centres.
- Provisions should be enacted to guarantee that a suitably qualified guardian or adviser is appointed to UASC as soon as they are identified as such. All necessary regulatory means should be taken to introduce a review mechanism to monitor the quality of the exercise of guardianship to ensure the best interests of the child are being represented and to prevent abuse.

#### Repatriation and Reintegration

- Bilateral/Multilateral agreements and/or Memoranda of Understanding should be established to facilitate a comprehensive and uniform system of repatriation and reintegration of child trafficking victims, if it is in the best interests of the child. There should be regional cooperation ensuring that repatriated UASC receive the support needed for full long-term recovery and social reintegration.
- All relevant stakeholders should collaborate to develop consistent/uniform Best Interest Assessments (BiA) and Best Interest Determination (BID) procedures. These BiA and BID assessments should be based on the individual circumstances of each child. The following should be considered when conducting a BiA: living and care arrangements; access to health and medical care, food, water, sanitation, and education; as well as assessing the child's safety, psychosocial wellbeing and protection. Under a BID, the following should be considered: the child's family situation; the situation in his or her country of origin; particular vulnerabilities; safety and the risks he or she is exposed to and his or her protection needs; level of integration in the host country; and the child's mental and physical health, education and socio-economic conditions. It is important to obtain the views of the child on his/her care arrangement and long-term or durable solutions. Training should be given to those responsible for conducting the BID assessments.

### **General National Level Recommendations**

- National governments should make it a priority to ratify all relevant international human rights instruments and ensure incorporation into their domestic legislation accordingly. Governments should also lift any reservations they have to relevant international human rights instruments, especially the Convention on the Rights of the Child.
- In order to ensure comprehensive protection for UASC in each country, governments should identify one stakeholder that is responsible for overseeing, coordinating and prioritising all UASC programming: ensuring full range of UASC services in border camps including identification, documentation, tracing, BID, monitoring,

etc.; coordinating programming with government, NGOs, and community-based organisations; organising and facilitating training for relevant stakeholders; identifying and coordinating responses to gaps in UASC programming and capacity; developing an effective strategy for programme monitoring and evaluation.

- The education of child migrant workers on their rights, their employers' obligations to them and the legal recourses available to child victims of trafficking should be promoted.
- Governments should take significant and concrete steps to improve communication and coordination between government and NGOs/civil society organisations to implement programmes specifically addressing protection for UASC. At the national level, an Interdisciplinary Steering Committee or Working Group could be set up and this could also be replicated at the regional level.
- National legislation ought to be strengthened to comply with the international minimum standards and good practice principles on guardianship to better protect the rights of UASC.
- In accordance with international standards and in order to ensure the safety and protection of UASC, the practice of placing UASC in detention centres should be eliminated. When detention is used as a last resort, monitoring and evaluation measures/provisions should be implemented to ensure that UASC are separated from adult detainees and are afforded special treatment according to their vulnerabilities. Alternatives to detention should be identified and promoted.
- Legal representation should be guaranteed and provided to UASC, especially those facing legal proceedings or deportation.
- Legal provisions, policies and programmes should be enacted giving effect to the international minimum standards for UASC family tracing, repatriation and reunification.
- Every UASC should be provided with the necessary economic and psycho-social support for full and long lasting recovery and social reintegration (in line with UNHCR Guidelines on Formal Determination of the Best Interests of the Child).

# ACRONYMS

ACMW	ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers
ACWC	ASEAN Intergovernmental Commission on the Promotion and Protection of the Rights of Women and Children
AHG	Ad Hoc Group
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMI	Aide Médicale Internationale
AMS	ASEAN Member States
ASEAN	Association of Southeast Asian Nations
BiA	Best Interest Assessment
BID	Best Interest Determination
CCSDPT	Committee for Coordination of Services to Displaced Persons in Thailand
CESASS	Centre for Southeast Asian Social Studies
COERR	Catholic Office for Emergency Relief and Refugees
COMMIT	Coordinated Mekong Ministerial Initiative Against Trafficking
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
CWC	Council for the Welfare of Children
CWS	Church World Service
EC	European Commission
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
EVI	Extremely Vulnerable Individuals
FGD	Focus Group Discussion
GMS	Greater Mekong Sub-Region
GoI	Government of Indonesia
HIV/AIDS	Human Immunodeficiency Virus Infection/Acquired Immunodeficiency Syndrome
ICRC	International Committee of the Red Cross
IDC	Immigration Detention Centre
IDP	Internally Displaced Person
IFLA	Islamic Federal Law Act (Federal Territory) 1984
ILO	International Labour Organisation
ILO-IPEC	International Labour Organisation's International Programme on the Elimination of Child Labour
IO	International Organisation
IOM	International Organisation for Migration
IRC	International Rescue Committee
JARAK	Child Labour Eradication Network
JKM	Welfare Department
JRS	Jesuit Refugee Service
Lao PDR	Lao People's Democratic Republic
LBH	Jakarta Legal Aid Institution
LIRS	Lutheran Immigration and Refugee Service
MAPO	Council for Anti-Trafficking of Persons and Anti-Smuggling of Migrants
MoU	Memorandum of Understanding
MSDHS	Ministry of Social Development and Human Security
MSF	Médecins Sans Frontières
NCRC	National Committee on the Rights of the Child
NGO	Non-Governmental Organisation

OHRSD	Office of Human Rights Studies and Social Development
P2MP2S	Ministry for Political, Legal and Security Affairs' Desk on People Smuggling, Refugee and Asylum Seekers
PAB	Provincial Admission Board
RCF	Regional Cooperation Framework
RM	Malaysian Ringgit
RSD	Refugee Status Determination
SCEP	Separated Children in Europe Programme
SEA	Southeast Asia
SLOM	Senior Labour Officials Meeting
SoP	Standard Operating Procedure
SPA	Sub-Regional Plan of Action
TBBC	Thai Burma Border Consortium
TICSA	Regional Project to Combat Trafficking in Children for Labour and Sexual Exploitation
TICW	Mekong Project to Combat Trafficking in Children and Women Project
TIP	Trafficking in Persons
TOR	Term of Reference
UAM	Unaccompanied Minors
UASC	Unaccompanied and Separated Children
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
UNIAP	United Nations Inter-Agency Project on Human Trafficking
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
US	United States
VAC	Violence Against Children
VAW	Violence Against Women
WHO	World Health Organisation
WVI	World Vision International



# INTRODUCTION

The research project of Mapping and Analysing the Protection Situation of Unaccompanied and Separated Children in Southeast Asia had two main objectives: a) map and analyse the situation and treatment of the mixed flows of unaccompanied and separated children (UASC) moving irregularly into Indonesia, Malaysia and Thailand; and b) make recommendations for improvements in governmental and organisational responses including the development of standard operating procedures/regional guidelines that could lead to a more harmonised approach towards UASC.

The expected outcomes of the project included a study analysing the protection situation, framework arrangements and stakeholders with respect to identification, referral procedures, monitoring and legal support, and protection and care arrangements for UASC as well as Regional Guidelines on the Protection and Care of Unaccompanied and Separated Children. Additionally, it was proposed that both regional and national level discussions be held to present findings and discuss with relevant stakeholders how to proceed with the development of plans of action to address protection gaps.

This report is divided into five chapters. Chapter one discusses the definition and contextualization of UASC. Chapter two explains the project research methodology, as well as challenges and limitations of the project. Chapter three describes the study and analysis of child migration within a regional context and aims to provide an overview of the migratory situation, along with a synthesis of UASC case studies conducted in Indonesia, Malaysia and Thailand. The regional child protection framework and arrangements outlined in chapter four. The final chapter offers conclusions and legal and policy recommendations.

# CHAPTER I

## INTRODUCTION: UASC-CONCEPTUALIZING AND DEFINING THE DEFINITION-SETTING THE CONTEXT

The UN Committee on the Rights of the Child (the Committee) defines unaccompanied children (also called unaccompanied minors) as “children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”<sup>1</sup> The Committee goes on to define separated children as those “who have been separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.”<sup>2</sup> These definitions, as provided by the Committee, refer to unaccompanied and separated children as being outside their country of origin. According to the Committee, in paragraph 9 of its General Comments, a child refers to “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” The same General Comment states in paragraph 5 that the definition applies to unaccompanied and separated children who find themselves outside of their country of nationality, or, if stateless, outside their country of habitual residence.<sup>3</sup> The General Comment applies to all such children irrespective of their residence status and reasons for being abroad, and whether they are unaccompanied or separated. These children may have vastly different reasons for being unaccompanied or separated. These reasons may include persecution of the child or parents, international or national conflict, trafficking in various contexts and forms, including sales by parents and the search for economic opportunities.<sup>4</sup> Although the General Comment does not apply to children who have not crossed an international border, the Committee strongly encourages states to adopt relevant aspects of the General Comment in relation to the protection, care, and treatment of unaccompanied and separated children who are displaced within their own country.

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1 The Committee on the Rights of the Child, *General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para.7.

2 *Ibid.*, para.8.

3 *Ibid.*, para.5.

4 *Ibid.*, para.2.

Despite these recommendations, different organisations and different states may interpret or modify these definitions to align with their own mandates and priorities. For example, Save the Children, in its Working Paper on separated children, uses the term “separated children” rather than “unaccompanied children” because it focuses on the unique problems that separated children face: that they lack care and protection of their parents or primary caregivers, and, as a consequence are harmed by this separation and exposed to risk of even greater harm as a result of this separation.<sup>5</sup> These terms, as defined by the Committee, focus on the condition of being unaccompanied or separated (which may imply the state of vulnerability and risk), while the definition used by Save the Children emphasises the consequence of the separation rather than the state of separation itself.

Although the Separated Children in Europe Program (SCEP) was established by the United Nations High Commissioner for Refugees (UNHCR) and some member states of the International Save the Children Alliance in 1997, a report prepared by William Spindler on the Situation of Separated Children in Central Europe and the Baltic States finds that none of the 11 countries examined use the term “separated child” in their legislation and the more narrow terms of “unaccompanied child” or “unaccompanied minor” are found to be the norm.<sup>6</sup> This is in line with the definition given in the EC Council Directive 2001/55/EC of 20/July 2001 Art.2 F<sup>7</sup> which states that:

“unaccompanied minors means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States.”<sup>8</sup>

The above definition, which seems to be broader than the one defined by the Committee, refers to “an adult responsible for them whether by law or custom” not necessarily “parents or other relatives.” This may reflect some realities in which, children may decide independently to leave their country of origin because they do not enjoy “effective or adequate care” from their parents. This definition puts the emphasis on “effective care” rather than the state of being “unaccompanied.” Another term, “insufficiently accompanied,” was introduced in Europe, and is defined as “children and adolescents with siblings, relatives or fellow countrymen who are of legal age and in the same situation of being undocumented and/or suffering marginalization.”<sup>9</sup> This definition hinges on the level of risk that the child may be facing.

In a study done by Mehrunnisa A. Ali, the terms “unaccompanied/separated” and “children/minors” are defined as: “Children who live in countries that are not their places of origin without a parent or an adult who is legally responsible for their care. This definition includes children under the age of 18 who may arrive . . . with an older sibling, a family friend or a relative, but upon their arrival or subsequently, it is established that the adult is not willing or not capable of caring for the child. Children trafficked by adults are also included in this category.”<sup>10</sup>

5 Save the Children, *Separated Children: Destination Australia*, Working Paper, May 2012.

6 William Spindler, *The Situation of Separated Children in Central Europe and the Baltic States*, *Separated Children in Europe Program*, p.3. The report was presumably prepared in 2002.

7 Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

8 PowerPoint presentation prepared by Violeta Quiroga, Director of Research Group – Children and Family in Multicultural Environments - Fundació Père Tarrés, Ramon Llull University, Meeting of Experts on Vulnerable Groups, Rabat, 27-29 July 2010.

9 Ibid.

10 Mehrunnisa A. Ali, et al., *Unaccompanied/Separated Children Seeking Refugee Status in Ontario: A Review of Documented Policies and Practices*, CERIS Working paper No.27, August 2003, p. 1.

Again this definition differs from the one used by the Committee, as it refers to “a parent or an adult” not “parents or other relatives.” It also places emphasis on legal responsibility which does not include a customary caregiver. In addition, the definition details situations where children may be considered separated or unaccompanied and focuses on the willingness and ability of the adults present to provide care. The UNHCR Guidelines on Policies and Procedures Dealing with Unaccompanied Children Seeking Asylum, published in February 1997, define an unaccompanied child as “a person under the age of 18 years, unless under the law applicable to the child, majority is attained earlier and who is separated from both parents and not being cared for by an adult who by law or by custom has responsibility to do so.”<sup>11</sup>

This definition recognises that there may be situations in which a child is accompanied by an adult caregiver who is not a parent or relative. Annex 2 of the Guidelines states that “where a child is not with his or her parents in the first asylum country, then, s/he will be, *prima facie*, unaccompanied.” The Guidelines go further by stating:

“The natural responsibilities of a natural parent are the upbringing and development of the child to meet his or her fundamental needs in accordance with the child’s rights under the CRC. For cultural, social, or other reasons, a child may not have been raised by his/her natural parents. If the person assumed principle caretaking responsibilities towards the child, then this arrangement should be respected even if it has not been legally formalized.”

The definition and elaboration made by the UNHCR brings up a number of points. First, the UNHCR definition for “unaccompanied” tends to mean “separated” as defined by the Committee (from both parents and a legal or customary caregiver). Second, the use of the principle of *prima facie* indicates that the use of the term will be based on the initial assessment and that cultural and social arrangements should be respected. Finally, this definition takes into account the quality of relationships between the child and the principal caregiver. It is not clear, however, what the term “arrangement” signifies.

From a number of studies, it seems that most international organisations, including international NGOs, increasingly prefer and use the term “separated” rather than unaccompanied children/minors. However, within UN and European agencies, it is common for these terms to be used interchangeably. In any case, all definitions described and analysed thus far include a number of common elements, namely:

- Children below 18 years of age as defined by the Art. I of the Convention on the Rights of the Child;
- Children who migrate outside their country of origin alone or with insufficient care. In the case of stateless children, they are outside their country of habitual residence;
- Children who are not accompanied by parents or other adults responsible for them by law, custom or by cultural, social or other arrangements;
- Children who enter into a territory in an irregular manner which may include through trafficking or those who enter for the purpose of seeking asylum or a better life;
- Children who are left to the care of an accompanied person, without state’s assessment of his/her suitability for doing so.<sup>12</sup>

Unlike in Europe and other areas of the world, this study reveals that the concept of “unaccompanied and separated children” is not widely known, used or well understood in Southeast Asia by both government officials and those working for NGOs. Children,

<sup>11</sup> This definition is based on UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994.

<sup>12</sup> *Ibid.*

who in other regions would be referred to as unaccompanied or separated, tend to be categorised based on their individual situations. These children may fall into the category of child migrant, child refugee, child victim of trafficking, stateless child, street child, or child beggar, among others.

These labels describe the individual situations, which, in many cases, can change over time. For example, a child refugee may also become a child migrant or a child migrant may qualify for refugee status. Child beggars or street child may also be stateless and could become a child worker or a trafficking victim. The labels assigned to children are significant because this will ultimately determine how they are treated. In all cases, if a child enters or remains in the first country of entry without proper documentation, he or she may be considered “illegal” and potentially subject to arrest, detention and deportation.

In Southeast Asia, the term “parents” usually refers to a child’s biological mother and father, however, according to the cultural and social practices, children may be raised by grandparents or other relatives. In these cases, children will feel more attached to the primary caregiver than their parents. Relatives, first or even second or third generations can also play a very important role in childcare. In addition, the appointment of a legal caregiver is not a common practice in most countries in Southeast Asia. There are also many cases in which children are forced by their parents, through abuse or other means to leave their country of origin unaccompanied in search of livelihood opportunities elsewhere.<sup>13</sup>

One of the challenges of the terms “separated” and “unaccompanied” is determining at which point a child, upon leaving their parent or caregiver, is considered separated or unaccompanied. The duration of separation with regard to these terms was one of the issues brought up by participants at the 2013 Regional Consultation on UASC held in Bangkok.<sup>14</sup> The report, “No Small Matter,” prepared by Lutheran Immigration and Refugee Service (LIRS)<sup>15</sup> drew attention to this challenge by referencing the UNHCR definition of “separated” child. UNHCR defines a separated child as “a child under 18 years of age living in the camp who has no contact with, or has lost contact with, either biological parent for over 6 months.”<sup>16</sup> LIRS explained that this definition excludes a significant population of UASC. Since the quality of care is an issue, this research on UASC does not consider duration of separation as important as the ability and willingness of care. In the case that both parties are not able or willing to contact one another, and contact is lost, a child will be considered separated.

Roy Huijsmans asserted in his study that:

“The understanding of children and migration has largely followed a similar trajectory as that of women and migration. It is a likely assumption that children, like women, have been always part of migration flows, although their presence has, till recently, attracted little specific attention. Yet, it should be noted that many migrants whom we currently consider to be child migrants were unlikely to be seen as child migrants several decades ago. This highlights the main difference between women and children. Whereas distinguishing women from men is in most cases rather unproblematic, in the absence of clear universal markers, it is less clear when one stops being a child.”<sup>17</sup>

13 Roy Huijsmans, *Children, Childhood and Migration*, Working Papers Series No.427, Institute of Social Studies, the Hague, June 2006.

14 14-15 February 2013 at Siam City Hotel, Bangkok, Thailand.

15 Lutheran Immigration and Refugee Service, *No Small Matter: Ensuring Protection & Durable Solutions for Unaccompanied and Separated Refugee Children*, Maryland, May 2007.

16 UNHCR, as quoted in LIRS Report, *Ibid.*, p.13.

17 Roy Huijsmans, *Children, Childhood and Migration*, Working Papers Series No.427, Institute of Social Studies, the Hague, June 2006.

Roy Huijsmans further points out that:

“The near universally ratified UN Convention on the Rights of the Child (UN CRC) has brought legal clarity by drawing the line between childhood and adulthood universally at the age of eighteen. Yet, such universal legal standards are ultimately applied to diverse socio-cultural realities. This is likely to cause some friction between legal concepts and local realities.”<sup>18</sup>

It is because it isn't clear when one stops being a child that the age of child migrants is often the subject of debate. In Southeast Asia, age is both a cultural and legal construction. Different countries and different cultures may define a child in different way. Even within the same country, a child may be defined differently, depending on the context. For example, in Indonesia, the definition of a child in national legislation follows the standard set forth in the CRC, but several laws (e.g. the Employment Act 1995, the Marriage Act 1974, the Juvenile Court Act 1997, the Defense and Security Act 1982), define the age of a child differently - ranging from seven years for criminal responsibility to 15 for employment, and 21 years for inheritance and for the conduct of property transactions.<sup>19</sup>

In Malaysia, while various laws use a definition of a child consistent with Art. I of the CRC, the definition is governed differently under the legislation in accordance with its respective purposes. For example, the Age of Majority Act 1971 [Act 21], the age of majority is eighteen years, whereas the Young Persons (Employment) Act 1966 [Act 350] defines a child as any person who has not completed his or her fourteenth year of age. Under the Law Reform (Marriage and Divorce) Act 1976 [Act 164], the minimum age for marriage is eighteen years and the Islamic Family Law Act (Federal Territory) 1984 (IFLA) states that the minimum age for marriage is eighteen years for males and sixteen years for females. However, Section 82 of the Penal Code [Act 374] stipulates the minimum age of criminal responsibility is ten years old.<sup>20</sup>

In Thailand, although the Child Protection Act defines a child in accordance with the Art. I of the CRC, like Indonesia and Malaysia, other laws are inconsistent with this definition. This leads to the conclusion that for the best interests of the child, there should be only one definition of a child from an age dimension. A child for the purpose of this report is defined as a person below 18 years of age. However, it would be unreasonable if on the day the child reaches 18 years old he/she suddenly becomes an adult. In the case of protection needs, a stage of transition might need to be accorded to ease the move to adulthood and full independence.

The definition of a child has important implications for applying UASC status. In this research, the five elements mentioned above are used to determine UASC status. Although this report uses the term unaccompanied and separated children (UASC) the term and concept of “separated” is preferred as it better defines the problem faced by these children. The term separated children is also inclusive of trafficked and smuggled children, independent child migrant workers, as well as children seeking asylum alone or accompanied by an adult who is not able or willing to take “good or effective care” of them. The status of statelessness is also taken into account, with respect to stateless children crossing international borders. The quality of care and the relationship between the child and the caregiver is the primary concern in this research.

<sup>18</sup> Ibid.

<sup>19</sup> Committee on the Rights of the Child, Second periodic reports of States parties: Indonesia, CRC/C/65/Add.23, 7 July 2003.

<sup>20</sup> See details in Committee on the Rights of the Child, Initial reports of States parties: Malaysia, CRC/C/MYS/1, 22 December 2006.

Another critical issue that arises with defining the term UASC is whether or not the child is forced (by any circumstances) or voluntarily leaves his/her own family. Studies demonstrate that, regardless of the motivation for leaving, both categories of children should be considered “vulnerable.” The responses may not be the same, however, as the concept of empowerment has been introduced as one of the solutions to the problem for women, while in the case of children, it’s more about being “rehabilitated” and returned to their traditional roles in society. In some migration situations children may have personal and legitimate reasons for migrating and may be actively mitigating the risks that migration entails. In addition, it is difficult to draw a clear distinction between voluntary migration and forced movements such as human trafficking and refugee situations.<sup>21</sup> As a result, binary thinking still shapes the responses to migration, including responses in this study. In this research, UASC are regarded as persons in need of protection, even if the decision to leave their families and cross borders unaccompanied was made independently.

Children on the move are not a new phenomenon. However, since the adoption and entry into force of the CRC, child migration has taken on new characteristics and dimensions. The near universal ratification of the CRC has led to a growing awareness about the protection of the rights of the child, but the transformation of migration movements has been accelerated by globalization. The sheer number of migrants is growing, migratory networks have expanded and the types of migration are diversified. As a result of these developments, the situation of UASC should be framed within the current social, economic and political climate.

It is within the current context that the mapping and analysis of the protection of UASC in Southeast Asia has been conducted. The need for protecting the rights of the child, although universal, is controversial when it comes to children who have crossed international borders. Often concerns relating to state security prevail over child protection concerns, putting the rights of children at stake.

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21 Ibid.

## CHAPTER 2

# THE PROJECT, RESEARCH METHODS AND LIMITATIONS

As stated in the introduction, this project had two primary objectives. The first was to map and analyse the situation and treatment of the mixed flows of UASC who move irregularly into Indonesia, Malaysia and Thailand. The second was to make recommendations for improvements in governmental and organisational responses including the development of standard operating procedures or regional guidelines that could lead to a more harmonised approach towards UASC.

Specific objectives have been established in order to develop a comprehensive report(s). These objectives are as follows:

- Develop an overview of the current situation and condition of UASC by reviewing and examining available data to determine the number of UASC arriving irregularly in the three targeted countries, along with nationalities and individual profiles;
- Examine the national legal and institutional frameworks pertaining to the care and protection of UASC, including guardianship and care arrangements, access to legal representation during the asylum process or in the context of deportation proceedings, and access to documentation;
- Map key actors, along with their capacity and level of engagement with respect to UASC identification, referral procedures, monitoring and legal support, and care and protection. These actors will include applicable government departments, NGOs, international and community organisations and UNHCR or other UN agencies;
- Assess the effectiveness of available profiling, registration, documentation and referral mechanisms, including protection gaps and age and gender appropriateness, with respect to the early identification and prioritisation of UASC and document good practices;
- Assess arrangements for the determination of the best interests of UASC, the processing of claims for international protection, the identification of durable solutions, the identification of UASC who may be stateless or at risk of statelessness and document good practices;
- Assess existing care arrangements to determine gender and age appropriateness and if arrangements provide UASC with an adequate standard of living for their physical, mental, spiritual, moral and social development and access to education; and document good practices;



- Provide policy and strategic recommendations, including recommendations for improvements in statutory and organisational responses to the needs of UASC through the appointment of legal guardians, legal counsel and referral to appropriate care and other facilities including child friendly educational facilities that are age and gender appropriate; propose possible operational procedures on the protection of the rights of UASC and the care system;
- Develop standard operating procedures/regional guidelines for responding to the rights and needs of UASC for governments and service providers that deal *inter alia* with profiling, registration, documentation, guardianship and care arrangements as well as the search for durable solutions;
- Organise regional and national level discussions in the three countries to share findings, build networks, discuss strategies to address gaps and work towards a more harmonised approach to the protection and care of UASC in mixed migration flows.

As a result of the project, it was expected that UASC and their protection situation would be mapped and analysed. The existing situation with respect to identification, referral procedures, monitoring and legal support, and protection and care arrangements for UASC were expected to be identified and analysed. At the end, recommendations for improvements in governmental and organisational responses to UASC were made and proper standard operating procedures/regional guidelines for responding to the rights and needs of unaccompanied and separated children were developed with the hope that these guidelines could lead to a more harmonised approach.

Research findings were presented at national level discussions and at a regional roundtable on UASC, attended by relevant actors in an effort to develop a plan of action to address key protection gaps. The research was expected to provide background for the drafting of standard operating procedures/regional guidelines for responding to the rights and needs of UASC. It was also expected to serve as a basis for the development of a more consistent approach to the protection and care of UASC in Indonesia, Malaysia and Thailand through national child protection and welfare systems. In summary, the project was intended to act as a catalyst for the development of regional approaches that are more harmonised, protection sensitive and based on the best interests of the child.

## Research methods used

Research was conducted from a human rights perspective, recognising all human beings, including refugees, asylum seekers, migrants, and specifically UASC as equal and entitled to the same right to protection. As an analytical tool, the research used a rights-based approach which requires the states' involvement and responsibility to sustainably provide protection and guarantee rights to all children in their territory including foreign children such as UASC.

When mapping the current protection situation of UASC in the three identified countries, the following methods were used:

- I. Literature Review and Secondary Data Analysis:** A literature review and data analysis was conducted on the statistics, situations and conditions of UASC, including the reasons and motivations for migrating in the first place. This information was drawn from available research, news reports, legislation and regulations for care services as related to child protection and UASC. Wherever possible, a gender dimension in relation to the migration of children was included. The literature review also included a detailed analysis of the legal frameworks in each of the three countries, comparing and contrasting these frameworks with relevant international human rights standards and instruments.

**2. Field research:** An initial regional planning session was organised by the Institute of Human Rights and Peace Studies, Mahidol University in Thailand, to provide a comprehensive orientation to the mapping teams, including Child Protection Guiding Principles and research protocols and methodology. An initial mapping plan, a mapping time frame and tools for information collection (e.g. stakeholder mapping grid, child protection framework and ethical guidelines, guiding questions to collect information or forms, recording of the information collected, etc.) were also jointly developed in the planning session. These plans were then further elaborated to suit the individual country contexts. A timeframe for field testing of the mapping methods was built into the plan before starting the field level data collection.

*The mapping methodologies used were:*

- *Group Observations:* mapping team members spent time in targeted locations observing children's activities and interactions in their residential environments or care institutions. The basic background information collected through this method was verified during the interview process.
- *One-on-one Interviews and Focus Group discussions:* interviews and focus groups were held to collect in-depth information from identified groups of children, which included children in residential environments, children in the workforce, children in detention centres and children waiting to be deported.
- *Key informant interviews:* expert interviews were conducted with child caregivers, social workers, UN officials, staff from IOs and NGOs and relevant government officials in order to collect information related to individual practices and experiences in the protection of UASC.

Groups targeted for data collection included, but were not limited to, relevant government agencies including health care and law enforcement; civil society organisations; children's institutions; unaccompanied and separated child migrants; children and young people in general; and academics.

The main research questions included, but were not limited to, the following areas:

- *What are the estimations of the number of UASC, what is the basis for these estimates and how has each organisation established a reliable statistic?*
- *What situations and vulnerabilities do UASC face and what needs do they have in relation to care and protection?*
- *How do larger structural and policy issues affect the experiences of UASC and impact their vulnerability and the provision of care arrangements?*
- *What strategies and responses are needed to ensure the realisation of UASC rights?*

Field research locations and sites were chosen in each of the three countries. An explanation of why these sites were selected is as follows:

*Thailand:* The field research was conducted in seven cities: Chiangmai (North), Bangkok and Mahachai (Central), Ranong and Phuket (South), Pataya (East) and Tak (between North and Central). These sites were selected because they border neighbouring countries which allows for a relatively easy flow of immigrants and migrants. The cities selected are also known to have high concentrations of migrant workers, refugees and stateless persons and are locations that can be considered appealing to children and youth. The location and demographics of the above cities led to the conclusion that there would be a high likelihood of finding UASC.

*Indonesia:* The field research was conducted in five cities: Jakarta, Bogor, Medan, Tanjung Pinang and Makassar. These cities were selected because, according to initial secondary data collected, they are home to large numbers of UASC. These cities are also main points of entry and departure for migrant movements, particularly as points of transit for migrants travelling from their country of origin to Australia. Geographically, the five cities selected also represent the big islands in Indonesia's archipelago territory. IOM also has Community Housing in three of the locations, which were used to collect research. Observations were also conducted at immigration detention centres, Church World Service shelters and detention rooms managed by the Directorate General of Immigrations.

*Malaysia:* The research team conducted field research in areas where there was known to be significant numbers of UASC, namely Kuala Lumpur and the surrounding area and in the state of Sabah on Borneo Island. Site visits were made to refugee and migrant communities and to one detention centre.

**3. Compilation and Analysis of Data:** the field mapping team in each participating country compiled, organised and analysed primary data collected from the field, as well as secondary data collected through the literature review. This work was done with support from the Institute of Human Rights and Peace Studies, Mahidol University in Thailand. Each country team submitted a preliminary country report which had been validated through national consultations and a regional consultation (see section below). In a joint effort between the Institute of Human Rights and Peace Studies, Mahidol University and ECPAT International, the information was compiled and a final regional research report was produced, incorporating new comments and input from the country teams.

**4. Regional and National Consultations:** A number of regional and national consultations were hosted by the research partners in order to support the validation of the research findings and dissemination as an advocacy tool to increase awareness. The consultations were also held as a tool to mobilise collaborative actions and resources of relevant stakeholders/key players in the realisation of the rights of UASC. The national consultations were structured as follows:

*Thailand:* A National Consultation was organised on 1 February 2013 in order to gather data and information from different agencies. Participants were selected by the research team and were mainly government officials as well as representatives from a few NGOs working closely with children and UASC. Between 15-20 individuals participated in the National Consultations, with more than half of coming from the provinces where field research was conducted.

*Indonesia:* The research team held focus group discussions (FGDs) as part of a National Consultation on 10 January 2013. The participants were made up of various stakeholders from government institutions, international and national NGOs, CSOs and academics and legal analysts. During the Consultation, in addition to being interviewed, participants shared with the research team relevant data on UASC.

*Malaysia:* A National Consultation was held on 23 January 2013. The Consultation included representatives from human rights organisations, research institutions, NGOs, IOM, government ministries and law enforcement agencies. Malaysia's existing legal framework and its limitations were discussed, as well as regional good and bad practices in relation to UASC.

*Regional Consultation:* A Regional Consultation was also organised on 14-15 February 2013 to help validate the data gathered from the literature review and field studies. Participants from Indonesia, Malaysia, and Thailand discussed and shared country specific experiences regarding UASC. The majority of participants were representatives from concerned government agencies in Malaysia, Indonesia and Thailand

(See **Annex 1** for a participant list). Representatives from international and regional organisations, including international NGOs, were also invited to provide their input. The Consultation provided a platform for sharing both good and bad practices regarding the treatment of UASC and country specific challenges. The difficulty defining certain terms was one of the topics discussed. Participants also discussed elaborating regional guidelines to increase the protection of UASC based on the report findings.

*Regional Roundtable Meeting:* A Regional Roundtable Meeting was held 20 May 2013 and brought together over 20 experts from the region (See **Annex 2** for a participant list) to review and support the development of the draft Regional Guidelines to Protect the Rights and Needs of UASC. The Regional Guidelines outlines international standards and guiding principles for the care and protection of UASC within the Southeast Asia context.

### **Limitations and challenges**

Throughout the national and regional consultation processes, limitations and challenges of the project became clear:

- One of the biggest challenges of the project was determining how to define UASC within the Southeast Asia context. In addition, there was confusion and debate about the process of determining an unaccompanied and separated child and how to identify when the child falls into the category of UASC (victim of trafficking, independent child migrant, or refugee or asylum seeker). The duration of separation also became an area of consideration, for example, how long must a child be separated from family or caregivers to be considered unaccompanied or separated. There were also concerns that effort must be taken to ensure the definition of UASC, for the purpose of this project, was applicable within the Southeast Asia context.
- In general, the term UASC is rarely used in the region and is not used in national laws. This lack of recognition presents challenges for data collection. There is very little data available that focuses on this specific issue. Although mapping the locations of the children entering into the countries irregularly was not necessarily difficult, coming up with near complete and systematically segregated statistics was extremely challenging as few organisations perform segregated statistic compilations and the data often did not distinguish between children and adults.
- The three countries involved also had different experiences researching the different categories of UASC. For example, in Indonesia and Malaysia the resulting research focused primarily on refugee children. This was likely, in part, due to the fact that the research teams had trouble finding and making contact with child trafficking victims and independent child migrants. Another contributing factor may be that there are few foreign born trafficked children or independent child migrants in these two countries. In Thailand, all categories of UASC were identified and information accessed. The result of these different focuses is that the data emerging from the three countries lacks comparability in certain areas and will contain gaps in others.
- Limitations and differences in national legal frameworks were found to hinder the protection of UASC and made it difficult to identify issues of concern. Examples of limitations include child rights legislation that only applies to citizens, a lack of resettlement options for UASC, a lack of recognition of the rights and needs of stateless UASC and children on the move being labelled as “illegal.” Another limitation deals with the fact that stateless children who are unaccompanied or separated may not cross international borders but may face more or less the same protection problems. All of the above mentioned factors complicate the identification of UASC even further.

- Throughout the course of the project, a lack of coordination between relevant stakeholders was also identified (for example, NGOs, government ministries responsible for protecting children, civil society organisations, etc.). This lack of coordination made it difficult to collect data and determine the extent of UASC in each country.
- It should be acknowledged that this research was hugely ambitious, covering several complex categories of children over a large geographic area, and included numerous, significant expected project outcomes. Furthermore, the project was to be completed within a six month time frame on a limited budget. The limited timeframe and budget created challenges and research gaps, considering the time and resources it takes to build trust and relationships with UASC. Furthermore, the wide variety of stakeholders involved in supporting this group of children resulted in limited opportunities for interviews and consultation.
- Finally, a few challenges arose with regards to the collection of primary research by the research team. Despite earlier discussions and training, not all field researchers had a thorough understanding of the UASC definition until there was further discussion at the national and regional consultations. Prior to the consultations, field researchers experienced some difficulties when it came to understanding each specific category of UASC. However, the team later had the opportunity to clarify the terminology which allowed researchers to adjust accordingly and do further follow-up interviews if deemed necessary.

Additionally, due to the short timeframe, researchers faced challenges building the trust needed to have in-depth discussions with the child respondents. As a result, information collected may not accurately reflect exactly what the respondents felt.

## CHAPTER 3

# MAPPING AND ANALYSING UASC IN SOUTHEAST ASIA: CASES OF INDONESIA, MALAYSIA AND THAILAND

### Key Findings and Synthesis

#### *Child Migration in Southeast Asia: An Overview*

At the outset, it is important to reiterate the fact that estimating the number of individuals and families that have migrated and/or have been affected by migration, especially children, is extremely difficult for a number of methodological reasons, including scarcity of data available, the failure of statistics to be collected in any standardized way; and inconsistent UASC registration and documentation systems among countries. Moreover, within Southeast Asia, the irregular and clandestine nature of human migration makes it difficult to compile data. These problems become more pronounced when attempting to estimate the number of children involved because available statistics on migration do not usually distinguish between children and adults. Generally, when statistics are available they have been compiled for a range of purposes by a variety of surveys and stakeholders. There is also a lack of consensus regarding terminology including inconsistent age definitions, which may influence responses, especially in the case of UASC. In addition, a large number of studies tend to focus on particular categories of children, especially trafficked children and refugee children. As a result, other groups of children fall outside the statistical collection. Furthermore, a number of children such as undocumented child migrants are invisible from a statistical point of view.<sup>22</sup> Based on the studies of UASC in Indonesia, Malaysia and Thailand, a general agreement can be reached that there is an increase in the number of children crossing national borders, including those unaccompanied and separated from their parents and caregivers.

Migration of children in Southeast Asia is a complex and multi-faceted issue. Migration can include children travelling with their parents. These children themselves may become workers or dependents. Some children escape internal conflicts in their country of origin while some leave because their means of subsistence is no longer available as a result of natural disasters. There are also children who leave their families for work or education opportunities by choice or are encouraged to leave by their parents. Some children travel alone while others may travel with relatives or brokers.

Children may also be trafficked for labour or sexual exploitation. Even though trafficking and migration are two distinct phenomena, the links between them could not be overlooked. As one study notes, "Migration or the wish to migrate can increase children's vulnerability to exploitation and abuse, including recruitment into trafficking.

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22 See details in Ann Whitehead and Iman Hashim, *Children and Migration*, Background paper for DFID Migration Team, March 2005.

Migration and trafficking routes often coincide, and traffickers operate along those routes.”<sup>23</sup> From various literature reviews, the migration of children is studied and analysed mainly from a vulnerability and risk perspective. This perspective is one of the reasons why national and international attention has been on certain situations like child trafficking, asylum seekers and refugee children. Despite this focus, the rights of children can always be affected by a wide range of migration situations. As confirmed in the study of the situation of UASC in Thailand, child migrant workers and stateless children can also be exploited and abused.

Although the majority of children on the move are in vulnerable situations, various research studies, including this one, reveal stories about the strength and resilience of children. Some children reach the decision to migrate in more or less the same way as adults do. And some are even able to support their families back home. In a review of European research findings on children in migration, Caitlin Farrow states, “Assuming that children can only ever be forced or colluded into migrating is a falsehood that overlooks the reality of many children’s lives.”<sup>24</sup> This statement also rings true in the Southeast Asia context. In any case, the fact remains that these children, as well as all others, should be able to enjoy the same rights as enshrined by the CRC and their views and best interests must be heard and respected. This may be the most critical aspect in the child protection scheme when it comes to children in migration, especially UASC.

## Unaccompanied and separated children - Findings

### *Definitions, understanding and the concept of UASC in Thailand, Malaysia and Indonesia*

The first key finding that emerged from the research in each of the three countries is that the concept of “unaccompanied and separated children” is not widely known, used or well understood. The literature reviews show that the term UASC is mainly used by UN agencies and international NGOs while other agencies tend to classify this group of children differently. In Thailand, government bodies, local civil society and academics use specific categories such as “migrant children”, “displaced children”, “trafficked children” or “refugee children.”<sup>25</sup> In Indonesia, the preferred term is generally “unaccompanied minors” (UAM) and in particular, refugee and asylum seeking children.<sup>26</sup> In the Malaysian context, stakeholders tend to view UASC as undocumented and irregular migrants, stateless persons and victims of trafficking.<sup>27</sup>

The use of different terminologies in different contexts also has implications for the legal status and care and assistance of these children. While UASC may be subjected to different treatments according to their specific situation, children who have entered the national territory without proper documentation are generally considered to be “illegal” and once identified, are predominantly held in detention. This is clearly in contravention of international minimum standards for protection which UASC are entitled to, particularly to the principle that they should not, as a general rule, be detained.<sup>28</sup>

23 Deja Wenke, *A Broader Perspective to Protect Human Rights of Children on the Move—Applying lessons learnt from child trafficking research*, in Susann Sward and Lise Bruun, eds., *Conference Report: Focus on Children in Migration – From a European Research and Method Perspective*, Save the Children Sweden, Separated Children in Europe Program and European Network of Masters in Children’s Rights, May 2007, p.3.

24 Caitlin Farrow, *A review of European Research Findings on Children in Migration*, *Ibid.*, p.6.

25 IHRP and ECPAT International, *Unpublished Thailand Report*, 2013, p.3.

26 CESASS, *Unpublished Indonesia Report*, 2013, p.11.

27 REPUSM, *Unpublished Malaysia Report*, 2013, p.10.

28 Committee on the Rights of the Child, *General Comment No.6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para.61.

Despite highlighting the use of different terminologies, all three research reports reach the conclusion that regardless of the label or category assigned to these children, UASC face similar challenges and barriers when it comes to realising their rights.

### **Presence of the different categories of UASC**

Considering the time constraints and challenges accessing the different categories of UASC in each country, the scope of the field level research varied in each of the countries examined.

Thailand's geographic location, with long borders that are difficult to monitor, coupled with its relative economic development has resulted in a diverse population of UASC. The selected research sites were primarily border areas, accessible to immigrants and refugees, allowing the research team to collate data from child migrant workers, refugees, stateless persons, street children and child trafficking victims.<sup>29</sup> While a few may have proper documentation, the majority enter Thailand irregularly. Thailand is a source, destination and transit country for UASC and grey areas within the law with regards to nationality lead to some UASC being considered stateless. This also causes related and exacerbated vulnerabilities, particularly to children from ethnic minorities or hill tribes.<sup>30</sup>

The research in Indonesia confirmed that UASC mainly fall into the refugee/asylum seekers category as Indonesia is a transit country for asylum seekers on route to Australia from the Middle East and other Southeast Asian countries. Other groups of UASC (such as foreign migrant workers and child trafficking victims) are not found in Indonesia. According to JARAK (Child Labour Eradication Network) and other organisations concerned with migrant child workers, there are no foreign children working in Indonesia (although there are many Indonesian child labourers working domestically and in other countries, primarily as domestic workers).<sup>31</sup> Similarly, the Trafficking in Person (TIP) Reports by the US State Department, classify Indonesia as a major source country for persons subjected to human trafficking (including children) who are mostly trafficked to the Middle East, Malaysia, Chile, New Zealand, Philippines, Egypt, and also the United States.<sup>32</sup> ECPAT Indonesia also confirmed that there are no recorded cases of cross border child trafficking from other countries into Indonesian territory.<sup>33</sup>

While data about refugee, stateless, undocumented and irregular migrants and asylum seeker children was accessed in the state of Sabah in Malaysia; field research was generally limited to refugee children. During field visits, anecdotal information on the presence of trafficked children was revealed (including those involved in sexual exploitation); however, the security and protection of these children prevented direct contact.<sup>34</sup>

### **Data, scale and migratory flows**

Estimating the number of UASC is extremely challenging due to the often covert and clandestine nature by which these children cross borders. In the case of irregular migration or child trafficking, mechanisms to avoid detection are used by both children and traffickers. These mechanisms include fake identity papers and illegal networks and connections, which are often facilitated by corrupt authorities.

Accurate government statistics on UASC as a specific group of children are unavailable in all three countries studied (due *inter alia* to the lack of an agreed legal definition) and data on the different categories of UASC are scattered and incomplete. Not surprisingly,

29 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.8-12.

30 Ibid., p.14-58.

31 CESASS, Unpublished Indonesia Report, 2013, p.26.

32 US Department of State, *Trafficking in Persons Reports*, accessed on 14 May 2013 from: <http://www.state.gov/g/tip/rls/tiprpt/>

33 CESASS, Unpublished Indonesia Report, 2013, p.28.

34 REPUSM, Unpublished Malaysia Report, 2013, p.10.



the most comprehensive and recent statistics available on a single category of UASC are those compiled by UNHCR in regard to asylum seeking and refugee children. According to this agency, in 2012, Thailand hosted some 92,000 registered refugees from Myanmar as well as an estimated 54,000 unregistered asylum seekers in the border camps.<sup>35</sup> There are reportedly close to 6,500 children within the border camps who have been identified as “unaccompanied and separated children” and who face specific protection risks.<sup>36</sup>

The latest statistics shared by COERR show that as of 31 May 2013, the UASC population in nine camps along the Thai-Myanmar border accounts for 4,558 children out of whom 2,816 are separated children living with blood relatives, 1,529 are separated children with residential care, 185 are separated children with foster care and 28 are unaccompanied minors (UAM), meaning children separated from both parents and other relatives, as well as their legal or customary caregivers. The number of UASC in the camps fluctuates, as 71.3% of those considered to be UASC are sent to the camps to study. Many of them return to their families during the semester break. The proportion of male to female UASC in these nine camps is more or less equal.

There are an estimated 300,000 irregular child migrants living in Thailand’s border provinces and major cities coming from Myanmar, Laos and Cambodia. This estimate suggests that child migrants may be the largest group of UASC in the country.<sup>37</sup> A significant presence of UASC can be found within Thailand’s fishing and seafood industry, either working on boats or in shrimp peeling plants in ports close to the capital. Samut Sakhon and neighbouring Samut Prakarn and Samut Songkram are particularly well known “hot-spots” where UASC are engaged in forced labour.<sup>38</sup> Information and estimates on UASC do not usually include more clandestine child migrant populations, engaged in agriculture and domestic work.<sup>39</sup>

ECPAT International has identified several cities in Thailand in which the sexual exploitation of children is a significant concern and UASC are particularly vulnerable.<sup>40</sup> In the cities of Pattaya, Chiang Mai and Phuket, the trafficking of children for prostitution is also a significant problem. However, human trafficking statistics are often inaccurate and generally do not disaggregate between adults and children. Furthermore, available information on child trafficked victims is usually collected after the children have been identified and are receiving services. This means that child trafficking victims who have not received care and protection services are not included in available data. Partners interviewed felt that most child trafficked victims in the north of the country had been exploited sexually.

The latest data from UNHCR Indonesia shows that, as of January 2013, 1,827 children, including 372 refugees and 1,403 asylum seekers, have been registered in Indonesia. From these numbers, 631 children are defined as UAM, of whom 109 are refugees and 522 are asylum seekers. From the total number of UAM there are 118 (52 refugees and 66 asylum seekers) who remain in Immigration Detention Centres (IDCs). This data indicates that 34.5% of the total population of children registered by UNHCR Indonesia are UAM. Of all the children who remain in IDCs, 43.4% of them are UAM. Therefore, the participants from the separated children category are only those who were met by the Indonesia research team during the field research.

35 UNHCR, *UNHCR Country Operations Profile – Thailand*, 2012, accessed on 14 May 2013 from: <http://www.unhcr.org/pages/49e489646.html>

36 Haynes, K., *Securing a Future for Separated Children and Unaccompanied Minors*, 2011, International Catholic Migration Commission (ICMC), accessed on 14 May 2013 from: <http://www.icmc.net/article/securing-a-future-separated-children-and-unaccompanied-minors>

37 Save the Children, *Separated Children: Destination Australia*, Working Paper, May 2012.

38 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.18.

39 Ibid., p.18.

40 ECPAT International, *Global Monitoring Report on the Status of Action against Commercial Sexual Exploitation of Children: Thailand*, 2011, accessed on 7 January 2014 from: [http://resources.ecpat.net/EI/Pdf/A4A\\_II/A4A\\_V2\\_EAP\\_THAILAND.pdf](http://resources.ecpat.net/EI/Pdf/A4A_II/A4A_V2_EAP_THAILAND.pdf)

Based on fluctuation trends from the UNCHR January-July 2012 Factsheets, the number of children in IDCs compared to the number of UAM shows a constant correlation. Although there is no data available for the number of UAM from August to December 2012, it is expected that this trend is relatively consistent.

Hardly any accurate data exists for the other categories of UASC in Indonesia. There is no available data on child victims trafficked from other countries into Indonesia and the country is not a destination for child migrants, making data on this category nonexistent.<sup>41</sup>

As of February 2013, there were 101,290 refugees registered with the UNHCR office in Malaysia, most of them being from Myanmar.<sup>42</sup> Refugees from other countries such as Sri Lanka, Somalia, Iraq, Afghanistan and others in smaller numbers are also living in Malaysia. The number of children within with the total refugee population in Malaysia is significant, with some 22,390 individuals below the age of 18.<sup>43</sup> The number of UASC as of November 2012 was 937. According to UNHCR, in recent years there has been a steady increase in refugee flow into Indonesia and Malaysia while in Thailand a gradual growth of asylum seekers who are not from Myanmar has also been observed.<sup>44</sup>

In Malaysia, under the 6P Program undertaken in 2011 by the Immigration Department to encourage the registration and provision of amnesty and legal processing of undocumented foreign workers, more than 62,000 youths were registered, some of whom were victims of human trafficking syndicates. However, the actual number of irregular migrant children is higher as this figure only includes persons who voluntarily registered.<sup>45</sup>

Some research has been published on migrant children in Malaysia. The country has long standing Indonesian squatter communities around Kuala Lumpur, large populations of Filipinos and Indonesians in Sabah and undocumented migrants from Myanmar. Disaggregated data on the number of children trafficked into and out of Malaysia is not available. In March 2012, the government confirmed that between 2008 and 2012, 977 survivors of human trafficking were rescued and placed under a protection order. Of those rescued, 122 were children. It is likely that the number of trafficked children is much higher, considering the clandestine nature of human trafficking.<sup>46</sup>

An unknown number of persons of concern to UNHCR remain unregistered, but are believed to number in the tens of thousands. In 2009, the government reported that a total of 81,000 IMM 13 permits<sup>47</sup> were issued in East Malaysia to persons from Southern Philippines and Indonesia, including children under 13 years of age. The number of irregular migrant children in Malaysia is also unknown, although 62,156 children were registered in the Peninsula of Malaysia through the biometric registration stage of the "6P" programme.<sup>48</sup> It is likely that the number of irregular migrant children is higher as

41 CESASS, Unpublished Indonesia Report, 2013, p.26-27.

42 UNHCR, *Figures at a Glance*, February 2013, accessed on 12 March 2013 from: [http://www.unhcr.org/my/About\\_Us-@-Figures\\_At\\_A\\_Glance.aspx](http://www.unhcr.org/my/About_Us-@-Figures_At_A_Glance.aspx)

43 Ibid.

44 UNHCR, *UNHCR Regional Operations Profile - South-East Asia*, accessed on 14 May 2013 from: <http://www.unhcr.org/pages/49e488116.html>

45 REPUSM, Unpublished Malaysia Report, 2013, p.16 & 21.

46 Child Rights Coalition Malaysia, *Status Report on Children's Rights in Malaysia*, December 2012, Kuala Lumpur, p.16.

47 IMM 13 passes permit refugees to remain in the country and to work in specified industries. Permits must be renewed on an annual basis and there is no discussion of long term durable solutions for this population. Due to the high cost of renewing IMM 13 permits, some families have been unable to renew their permits and their legal status has therefore become irregular. Ibid., p.22.

48 The 6P program is a program under which irregular migrants are required to register with the government to 'regularize' their status. Under the biometric registration process conducted in 2011, irregular migrants were registered using a biometric system in which their fingerprints were taken and personal information stored in a National Enforcement Registration System (NERS). Ibid., p.36.

this figure only includes persons who registered voluntarily.<sup>49</sup> There are no accurate or reliable estimates for the number of stateless people in Malaysia, much less the number of stateless children.<sup>50</sup>

Children considered at risk of becoming stateless in Malaysia include children born out of wedlock, children of Indian descent and children of foreign parents/migrant workers. The situation of the latter is particularly acute for the large number of children of Indonesian and Filipino descent living in Sabah. It is nearly impossible for the children to be registered by their respective consular missions. Other groups known to be stateless in Malaysia are Rohingya and Palestinian refugee children, many of whom have been unable to obtain citizenship elsewhere and have lived for years in protected exile.

The reasons UASC migrate alone vary from one group to another. In brief, the multi-causal phenomenon is largely due to economic and political factors including conflict, violence, ethnic or community tensions, the desire to improve social and cultural expectations – being able to earn a living and have a successful career – family conflict or personal desire for adventure. Some factors that determine where an UASC will travel to, include the proximity or ease of transportation; historical, linguistic and economic ties; a history of migration from a particular country of origin to a country of destination; and the laws and policies of reception in the country of destination. Over 70% of child migrants and UASC in Thailand are from Myanmar and to a lesser extent from Lao PDR and Cambodia. Most migrant children in Malaysia, including UASC, are from Indonesia, Philippines and Myanmar. Indonesia is also a destination country for migrants from Afghanistan, Pakistan and Sri Lanka.

### **The situation of the protection of UASC**

Economic hardship, insecurity and persecution, as well as ongoing violence in home countries of child migrants, child refugees and asylum seekers, stateless children and child victims of trafficking are noted as concerns in the three country reports. Once arriving in a host country, children face more or less the same challenges as adults. Security controls of the host governments put child migrants, including UASC, at a high risk for detention. In fact, as demonstrated in the research from Indonesia and Malaysia, a number of UASC end up in detention centres for extended periods of time. Although official information about the number of UASC in detention in Thailand is unavailable, a number of NGOs assert that over one hundred children are in detention. Limited access to legal protection is another serious concern for all categories of child migrants, including UASC. Lack of proper documents and registration prevent these children from accessing legal protection. In some cases, as shown in the Thailand study, child migrants are obligated to pay officials in order to remain and work in the country.

The difficulties asylum seekers face getting access to UNHCR services and receiving timely responses is a concern that spans the three countries. In Malaysia, despite possessing an UNHCR card, asylum seekers may still be faced with arrest and possible detention. In Malaysia and Thailand, UNHCR's presence is primarily tolerated on humanitarian grounds. For example, since December 2012, UNHCR is not allowed to perform refugee status determination for Rakhine State Rohingya fleeing into Thailand once they are intercepted by the authorities.<sup>51</sup> Due to recent political developments in Myanmar, displaced persons living along the Thai-Myanmar borders are fearful about being forced to return to their

49 Child Rights Coalition Malaysia, *op. cit.*, p.22.

50 *Ibid.*, p.23.

51 Interview with the Director of Baan Sri Surat (Suratthani Shelter's Home for Children) where Rohingya women and children were housed by the Thai authority. The researcher was informed that UNHCR was allowed by the Thai authority to do the registration and profiling but not refugee status determination. (Interview was conducted on April 30, 2013).

country of origin.<sup>52</sup> Other groups of child migrants, including street children (a term which may overlap with trafficked children) and independent child migrant workers may face more or less the same challenges as asylum seekers. Street children, in Thailand in particular, experience neglect and abuse through lack of access to education, health care and appropriate work. Street children can also be subjected to violence, hazardous working conditions, exploitative labour, poverty, and harassment by law enforcement, as well as domestic and sexual abuse.

The protection situation for UASC in Indonesia depends on where they are located. For example, Indonesia's IDCs are among the worst places for UASC as they are "prison like," restricting freedom to move, and do not provide access to formal education. Children held in IDCs are kept in the same rooms as adults and are not provided guardians. Research findings show that Indonesia continues to place refugee/asylum seeker children in detention even though the Indonesian Law on Juvenile Justice (11/2012) states that detention should be the last resort for a child. Logistics, counselling and health services in IDCs are provided by IOM, but this may not be a sustainable mechanism as it depends on IOM as a third party.

The conditions in shelters provided by Church World Service (CWS), under agreement with UNHCR, are better for UASC than in the IDCs. In CWS shelters, children are allowed to leave the shelter during the day, provided they stay in town and obey a curfew. UASC under the care of CWS receive a small allowance (70 US\$/ month), can access health services and are provided with comfortable accommodations. However, UASC still lack access to formal or informal education and recreational activities. Although CWS arranges for facilities for UASC, this organisation does not serve as their legal guardian.

The growing number of unaccompanied children registering in Indonesia, along with a lack of sufficient shelter spaces leads to most UASC living outside shelters, without protection. At the time of finalising this report, UNHCR and CWS were working together to implement better mechanisms to ensure proper monitoring of children outside established shelters. Some of these children have financial support from their families back in their home countries and can afford accommodations and other living expenses while staying in Indonesia. Some form bonds with other UASC living in Indonesia and they attempt to take care of each other. While these children may be more independent, they are also the group most vulnerable to exploitation and extortion by agents or middlemen. Without institutional protection, these children are at risk of becoming victims of child trafficking. It should be noted that IOM has recently established a shelter for unaccompanied children in Medan, which increases the number of available care facilities.

In Malaysia, excerpts from the country report clearly explain the situation of the protection of UASC in the country:

"The Malaysian law views the refugees and asylum seekers, undocumented and irregular migrants, and stateless persons, including UASC, as illegal immigrants and for many years they have been treated as such. They have, however, been allowed to stay as long as they are registered by the UNHCR if they are identified as refugees and asylum seekers.

However, even if these refugees and asylum seekers are allowed to stay, their rights are not clear and there is a lot of confusion, especially before, as to how they should be treated. This results in them being badly treated in this country, with many detained and deported after being arrested illegally entering the country, despite the policy of *non-refoulement*. As "illegal immigrants" they cannot be legally employed by Malaysian employers.

52 News from different sources and rumors within the Shelters on the policy of pushing the displaced persons back to Myanmar have not been confirmed by the Thai authority.

Their children have no access to the formal public schools-system, but only to private schools (which are expensive and beyond the means of the refugees) and NGO-run schools or learning centres (which are informal and do not provide proper/officially recognized qualifications). As a result, there is effectively no future for the refugee in Malaysia. The situation is more difficult for a child refugee, especially one travelling alone or separated or abandoned along the way, and is now living alone or with friends and kinfolk from his/her home country.”<sup>53</sup>

In Thailand, based on existing estimates, foreign child migrant workers make up the largest group of UASC in the country. Many underage workers have been identified in Samut Sakhon, an industrial area with a large non-Thai migrant workforce, made up of mainly Burmese. The Child Protection Act of 2003 forbids work for those less than 15 years of age, however, most of these child migrants are either children aged 12-14 or teenagers between 15-17 years of age. The 15-17 year-old group is also particularly vulnerable to sexual exploitation, sexual harassment and recruitment by drug gangs. Child migrant (workers) face limitations when it comes to enjoying their human rights. Children who enter Thailand undocumented often have limited or no knowledge of the local language and end up working illegally in the worst forms of child labour.

Although there is no national law regarding asylum seekers in Thailand, refugee children are defined by the Thai government as “displaced children fleeing fighting.” There are currently nine camps along the Thai/Myanmar border where Burmese refugees receive food, medical assistance, housing and other basic support from UNHCR, NGOs and other community based organisations. Existing literature suggests that living conditions within the camps are poor due to overcrowding and limited resources. It has been reported that camp food rations have been severely reduced over the past two years and as a result many people have been forced to find alternative income sources. Studies indicate that the recent ration cuts have caused an increasing number of children to leave border camps to look for employment, both during the school year and holidays. Children living in the camps may be exposed to a number of abuses, as proved by the increase in reports of violence against children and related gaps in child protection capacity reported by different sources. Girls are also vulnerable to early and forced marriage and boys may be recruited for military training or to provide assistance to armed groups in Myanmar, particularly during breaks from school.

Research indicates that a proportion of UASC have been subjected to human trafficking. The field study in Chiang Mai, for example, found that children from neighbouring countries are being lured to work in brothels or in commercial sex establishments, masked as karaoke bars, restaurants, pubs or massage parlours. Most of the instances in which children are trafficked, it has been found to be for the purpose of sexual exploitation. Sex trafficking victims in Thailand were also found to be boys and young men, mainly between the ages of 15 and 25. There have also been reports of babies and children under the age of 10 being exploited through street begging and migrant boys from Myanmar, Cambodia and Laos being trafficked into Thailand’s deep-sea fishing industry.

Despite the Thai government’s claim that it is implementing a comprehensive and systematic procedure to screen trafficking victims among vulnerable populations, research suggests that front-line officials and local law enforcement officers are inadequately trained. Consequently, this lack of training regularly leads to the misidentification of victims of trafficking, while failing to identify potential UASC. In an attempt to prevent misidentification of trafficking victims, Malaysia recognises that a 14 day period, following the discovery of a potential UASC, to gather evidence is insufficient because trust cannot be established in this short time frame.

## International Legal Framework

Laws and regulations were key sources when conducting an evaluation of the rights guaranteed to UASC in Indonesia, Malaysia and Thailand. Hard law consists of customary international law which establishes non-derogable peremptory norms applicable to all States; legally binding international treaties that a State has ratified; and national legislation that has been passed by the legislative branch of government. For the purposes of this regional report, the legal framework analysis will concentrate on the domestic legislation of the States to determine the level of compliance with international minimum standards (customary international law and international treaties that States are party to) in affording rights to UASC. The analysis will focus on definitions of UASC and children in general; relevant treaties that bind (or do not bind) States to afford rights and protections to children; and the legal hierarchies of States and harmonisation of domestic legislation with international norms.

## Definitions of a Child and UASC

As Parties to the CRC, Thailand, Indonesia and Malaysia all recognise and are bound by the CRC's definition of a child "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."<sup>54</sup> All three countries have incorporated this definition into their domestic legislation.<sup>55</sup>

Uniformity with regards to a definition of UASC has proven to be more challenging. According to the UN Committee on the Rights of the Child's General Comment Number 6:

"'Unaccompanied children' (also called unaccompanied minors) are children, as defined in Article 1 of the CRC, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so; 'Separated children' are children, as defined in Article 1 of the CRC, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. This may, therefore, include children accompanied by other adult family members."<sup>56</sup>

Despite this recommended language, the definition of UASC is not available under Indonesian law<sup>57</sup> and in Thailand the researchers recognise the concern over the narrowness of the definition and its time frame.<sup>58</sup> The definition provided by UNHCR primarily incorporates those who find themselves crossing international borders and is likely too narrow.<sup>59</sup> Conversely, it is also noted that the original definition of UASC does not expressly include the element of children crossing borders.<sup>60</sup> There are also concerns over other aspects of the definition, namely:

1. There is not a defined time for how long children are required to be separated from parents, relatives and guardians to be considered "separated children."
2. It is not clear if a child receiving inadequate care from relatives is considered unaccompanied or separated.

54 Convention on the Rights of the Child, Art. 1.

55 Thailand Child Protection Act, 2003: a child is a person below 18 years of age who has not attained majority through marriage (p.70); Indonesia Child Protection Law No.23, 2002: a child is anyone who has not attained the age of 18 (p.13); Malaysia Child Act, 2001: a child means a person who is under the age of eighteen years (p.28).

56 The Committee on the Rights of the Child, *General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para.7-8.

57 *Ibid.*, p.13.

58 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.66.

59 It is recognised that in Thailand there are other children in certain circumstances who may not cross borders but are labelled as non-Thais or stateless children, being vulnerable, exploited and lacking opportunity to grow-up with a good quality of life.

60 Although UNHCR makes it clear that the research has to focus only on children who have crossed borders.

3. The most problematic aspect of the definition rests on the fact that the definition is based on the assumption that the children cannot become accompanied or separated unintentionally. However, some children have been forced to leave the family and the country unaccompanied; some children left their families on their own decision; some children once separated from their parents or caregivers no longer want to reunite with the families. It is unclear whether they should be called “unaccompanied and separated children” or an “independent child” with a clear concept of agency.

There are similar discrepancies regarding the term refugee. For example, Thai national legislation does not recognise the term “refugee,” inhibiting the possibility to afford legal protection to all UASC who fall under refugee or asylum seeker classifications. Although the Thai government doesn’t recognise the concept of refugees or include the term in its national legislation, in 2012, the Thai Royal Gazette defined “refugees” or “persons fleeing from persecution” as persons who flee into Thai territory because their life is at risk of persecution in their country of origin.<sup>61</sup> This definition could include UASC.

The lack of clear definitions leads to the subsequent labelling or identification of UASC once they enter any of the three countries as “illegal.” Although international minimum standards for protection of refugee and asylum seeker UASC have been established, under Thailand’s Immigration Act, those who enter the State without relevant documentation are classified as “illegal.”<sup>62</sup> Not only does this prevent UASC from receiving the assistance and protection they are afforded under international minimum standards, it also puts them at risk of arrest, detention and deportation.<sup>63</sup>

The Indonesian Child Protection Law contains the term refugee but due to ambiguous language it has been interpreted to mean internally displaced persons (IDPs).<sup>64</sup> This ambiguity is primarily due to the narrow scope of the Law’s protection measures, which only pertain to Indonesian children.<sup>65</sup> This curtails the protection of UASC and increases their vulnerability.<sup>66</sup> Indonesia’s Immigration Law also classifies undocumented people, including cross border UASC, as “illegal” migrants.<sup>67</sup> This may result in fines, placement in IDCs and deportation.<sup>68</sup>

Malaysia’s Immigration Act does not differentiate between refugees, asylum seekers, stateless persons and undocumented migrants.<sup>69</sup> Malaysia’s Child Act of 2001 suggests that it applies to all children but there are no specific guidelines or mechanisms for non-Malaysian children. The Child Act also doesn’t differentiate between citizens and non-citizens, including refugees.<sup>70</sup> As a result, these groups of people are generally labelled “illegal” immigrants and may be subject to detention, fines and prosecution.<sup>71</sup>

61 Thai Royal Gazette, Vol. 129, Special Section 173 Ngor (173), 16 November 2012.

62 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.68.

63 Ibid., p.68.

64 CESASS, Unpublished Indonesia Report, 2013, p.49.

65 Ibid., p.64.

66 Ibid., p.49.

67 Ibid., p.53.

68 Ibid., p.53.

69 REPUSM, Unpublished Malaysia Report, 2013, p.28-29.

70 Ibid., p.25 & 31.

71 Ibid., p.28-29.

### *International Treaty Obligations and Reservations*

All three countries are Parties to the CRC.<sup>72</sup> However, only Indonesia has ratified it without any reservations.<sup>73</sup> As a result, Indonesia is obligated to take appropriate measures to protect cross border UASC asylum seekers, refugees and victims of trafficking.<sup>74</sup>

Thailand maintains a reservation to Article 22 of the CRC, which obliges Member States to “take appropriate measures” to ensure that a child seeking refugee status, including UASC, receives appropriate protection and humanitarian assistance in the enjoyment of their rights under the Convention, as well as any other international binding law.<sup>75</sup> Malaysia has reservations to several CRC provisions, including Article 2 on the prohibition of non-discrimination; Article 7 on birth registration and the right to a name and nationality; Article 28(1)(a) on primary education being made compulsory and available for free to all; and Article 37 on the prohibition of torture and unlawful or arbitrary deprivation of liberty.<sup>76</sup> These reservations mean that Thai and Malaysian domestic laws do not need to conform to these provisions.<sup>77</sup> These reservations, on provisions vital to UASC protection such as ensuring that refugees receive proper assistance and protection and the right to nationality and prohibition of non-discrimination, represent a barrier in these countries’ legal frameworks to UASC protection.

Encouragingly, Thailand has withdrawn its previous reservation to Article 7, confirming its commitment to the protection of UASC’s rights to nationality,<sup>78</sup> and Malaysia has withdrawn its previous reservations to Articles 1 (definition of a child), 13 (child’s right to freedom of expression) and 15 (child’s right to freedom of association).<sup>79</sup>

None of the three countries are Parties to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol.<sup>80</sup> These instruments not only “recognise the rights of child refugees, afford protection to refugees and impose obligations on the host State of the refugee, [but they] also recognise the existence of a refugee with a comprehensive definition qualifying the status of a refugee.”<sup>81</sup> In Thailand, the government has adopted a narrow interpretation of those who qualify as asylum seekers. Thai law requires the asylum seeker to have fled due to a direct incident of armed conflict, and excludes those who have fled as an indirect consequence or fear of armed conflict. This interpretation does not encompass persecution or other serious human rights violations that the 1951 Convention and its 1967 Protocol cover.<sup>82</sup> Without a comprehensive definition of a refugee, as provided by these legal instruments, there is no clear legal status for refugees, including UASC refugees in Thailand, Indonesia and Malaysia.

In 2012, Thailand ratified the Optional Protocol to the CRC on a communications procedure,<sup>83</sup> but Indonesia and Malaysia have yet to do so.<sup>84</sup> This lack of support by the two countries of a complaint mechanism has been interpreted as an unwillingness to

72 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.68; CESASS, Unpublished Indonesia Report, 2013, p.44; REPUSM, Unpublished Malaysia Report, 2013, p.25.

73 CESASS, Unpublished Indonesia Report, 2013, p.44 & 64.

74 *Ibid.*, p.64-65.

75 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.72.

76 REPUSM, Unpublished Malaysia Report, 2013, p.27-28.

77 *Ibid.*, p.27-28.

78 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.66.

79 REPUSM, Unpublished Malaysia Report, 2013, p.28.

80 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.70; CESASS, Unpublished Indonesia Report, 2013, p.64; REPUSM, Unpublished Malaysia Report, 2013, p.25-26.

81 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.70.

82 *Ibid.*, p.75.

83 *Ibid.*, p.62.

84 CESASS, Unpublished Indonesia Report, 2013, p.45.



protect the rights of children under their jurisdictions, as well as a preservation of the impunity of the state actors (and non-state actors) who violate the rights of children.<sup>85</sup>

The principle of non-refoulement is binding on all states, even if they have not ratified the 1951 Convention and its 1967 Protocol, as non-refoulement is considered a peremptory norm under customary international law.<sup>86</sup> This principle applies to all persons, including children. It entails a requirement for the identification, registration and documentation process of UASC followed by referral to appropriate procedures.<sup>87</sup> In the case of Indonesia, however, there are no legal provisions relating to the identification and registration process of cross border UASC, refugee UASC, asylum seeker UASC and UASC trafficking victims.<sup>88</sup> In Thailand, legislation does not address or implement measures to ensure swift identification or prompt registration of UASC, although evidence of identification and registration practices have been found in some contexts, albeit incomprehensively.<sup>89</sup>

### **Harmonisation of International Obligations with Domestic Law**

The ratification of international treaties addressing the rights of children, and UASC specifically, by Indonesia, Malaysia and Thailand does not signify that all UASC will be protected in these countries. For example, the Constitution of Thailand states that the government “shall comply with human rights conventions in which Thailand is a party thereto as well as international obligations concluded with other countries and international organisations.”<sup>90</sup> However, this provision does not place international law, such as the CRC, above the Thai Constitution.<sup>91</sup> Therefore, where the Constitution does not comply with the CRC, it is not legally in breach of its obligations under the CRC.<sup>92</sup>

The role of international law within Indonesia’s national legal framework and legislative hierarchy is unclear.<sup>93</sup> Indonesian citizens are unable to directly invoke the provisions of international law to claim their rights through the courts, even when relevant international treaties have been ratified.<sup>94</sup> Indonesian law and legislative hierarchy do not recognise the existence of international law or treaties; the top of its legal hierarchy is the Indonesian Basic Constitution.<sup>95</sup> The CRC should be harmonised with State domestic legislation and the protection and rights of cross border UASC should not be reduced or omitted by reason of an unavailable legal basis, as stated in the Vienna Convention on the Law of Treaties 1969.<sup>96</sup>

While Malaysia is a party to the CRC, (one of only three international human rights instruments it has ratified) it maintains eight reservations to the Convention, including reservations to the principle of non-discrimination and the obligation to make primary education compulsory and available to all without cost. In 2009, the Malaysian government stated its intention to review and amend areas of its national law that were incompatible with the CRC, but as of 2012, these amendments have not been made.<sup>97</sup>

85 Ibid., p.45.

86 Ibid., p.69 & 71.

87 Ibid., p.72.

88 Ibid., p.69.

89 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.65-66.

90 Ibid., p.64

91 Ibid., p.64.

92 Ibid., p.64.

93 CESASS, Unpublished Indonesia Report, 2013, p.45.

94 Ibid., p.45.

95 Ibid., p.47.

96 Ibid., p.61-62. Vienna Convention on the Law of Treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Of the three countries, Malaysia is the only one that is a Party to the Vienna Convention.

97 REPUSM, Unpublished Malaysia Report, 2013, p.18-19.

Some domestic legislation, within the three countries studied, has incorporated international legal norms. In Indonesia, the Law on Child Protection recognises the three basic principles of the CRC: the best interests of the child; the right to be heard; and the right to life, security and development.<sup>98</sup> However, much of the domestic legislation only pertains to citizens of the country in question.

In Thailand, Chapter III of the Constitution confers rights and liberties only to Thai nationals while Article 4 appears to be broader.<sup>99</sup> Article 3 of Indonesia's Law on Child Protection only pertains to Indonesian children and although the Indonesian Basic Constitution recognises that rights apply to everyone, legal resources to access the rights fulfilment and protection are only available to Indonesian children.<sup>100</sup> These provisions are inconsistent with the obligations of each State Party under Article 2 of the CRC.<sup>101</sup>

While Malaysia's Child Act 2001 does not provide specific guidelines for non-Malaysian children, the Act suggests that it applies to all children and does not differentiate between citizens and non-citizens, including refugees.<sup>102</sup> The Child Act's Preamble recognises that every child is entitled to protection and assistance in all circumstances without regard to distinctions of any kind.<sup>103</sup> However, unlike the non-discrimination provision in the CRC, the Act does not mention national origin.<sup>104</sup> These domestic legislative provisions demonstrate how impediments to acquiring nationality can be a serious form of discrimination against a significant portion of UASC, as they are denied protection under the law.<sup>105</sup>

Thailand, Indonesia and Malaysia have all made efforts to ratify and withdraw reservations to international treaties on children's rights, as well as to harmonise domestic legislation with international obligations, including modifying the definition of a child. However, there is still work to be done in order to bring domestic laws in line with international obligations. One critical element missing in the legal frameworks of all three countries is an agreed upon definition of refugees and UASC. The countries could begin to address this issue by ratifying the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Ultimately, no matter how many international child rights treaties are ratified, without harmonising these provisions with domestic legislation to ensure that both citizen and non-citizen UASC are included under national law, UASC will not receive the assistance and protection they are entitled to under international law.

### **Responses to UASC between international legal standards and common practices**

In accordance with international and regional legal standards, UASC are entitled to receive effective protection and assistance in a systematic, comprehensive and integrated way. Measures to meet their unique needs should be developed and available throughout the whole process from identification to the implementation of durable solutions.

98 CESASS, Unpublished Indonesia Report, 2013, p.48.

99 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.67.

100 CESASS, Unpublished Indonesia Report, 2013, p.50-51. For example, Indonesia acknowledges that every individual is entitled to the right to education, but this provision is facilitated with other provisions on free elementary education, which only apply to Indonesian children.

101 Ibid., p.48. Article 2 of the CRC: States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

102 REPUSM, Unpublished Malaysia Report, 2013, p.25 & 31.

103 Ibid., p.32.

104 Ibid., p.30.

105 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.67.

### **Initial assessment and measures: Identification, registration and documentation**

An initial assessment for determining the priority of protection needs and the timeline for measures to be applied should be undertaken in the best interests of the child, upon arrival of the UASC in a country's territory. This should include: a) prioritised identification as a child; b) prioritised identification of a child as separated or unaccompanied; c) best interest assessment and appointment of a guardian. This study found that all three countries examined lag behind in the implementation of these measures. Formal legal provisions for the identification of children or different groups of UASC upon arrival at entry ports have not been developed within the countries analysed. In all three countries, UNHCR is the only agency engaged in identifying, registering and documenting UASC and addressing their unique needs.

In practice, the treatment that UASC receive upon arrival in the three countries very much depends upon if, where and how they are intercepted when they arrive in the country. Nevertheless, as the Committee explains, "detention cannot be justified solely on the basis of the child being unaccompanied or separated."<sup>106</sup> Generally, when children are intercepted by police or Immigration Officers, they will be considered "illegal migrants" and detained in immigration detention centres, without any effort to determine their age or provide for their needs. There have also been reports of migrants, arriving by sea, being refouled before reaching the coast as well as reports of children being deported because of their involvement in illegal employment (e.g. sex work and begging).

If UASC enter Indonesia without interception, they can directly apply for refugee status with the UNHCR office in Jakarta. In Thailand, admission to border camps is controlled by the Thai government and Provincial Admission Boards (PABs). Burmese refugee UASC are only eligible for services and temporary protection as long as they remain in the camps. Outside the camps they are considered "illegal" and are at risk of arrest, detention and deportation.<sup>107</sup> Similarly, in Malaysia, the government allows UNCHR to register and document UASC as asylum seekers and refugees. However, informal protection provided by UNHCR is temporary and insufficient. Even applicants who achieve recognised refugee status are still vulnerable to arrest, detention, corporal punishment and deportation.<sup>108</sup> When UASC remain unregistered, as is the case for 47% of refugees in Thailand camps, according to the Thailand Burma Border Consortium's June 2012 report,<sup>109</sup> they are subjected to unequal rights, limited access to services and are left vulnerable to exploitation. Identification of UASC who are victims of trafficking is particularly challenging, as these children generally remain hidden from the public and authorities. These children often fear legal consequences, as they are likely aware they are staying in the country illegally. In Thailand, the government plans to implement a comprehensive and systematic procedure to screen vulnerable populations for trafficking victims. These plans are welcomed as research suggests that front-line officials and local law enforcement officers are inadequately trained and regularly misidentify victims of trafficking and fail to identify potential UASC.<sup>110</sup>

<sup>106</sup> Committee on the Rights of the Child, *General Comment No.6, op. cit.*, para.61.

<sup>107</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.35.

<sup>108</sup> Lego, J.B.H., *Frameworks for the Protection of Refugees and Asylum-Seekers in Malaysia and Thailand: Implications and Prospects*, 2011, p.3-4, accessed on 14 May 2013 from: <http://www.icird.org/2012/files/papers/Jera%20Beah%20H%20Lego.pdf>

<sup>109</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.38.

<sup>110</sup> *Ibid.*, p.54.

Statelessness has also been identified as a substantial issue in the region.<sup>111</sup> Stateless UASC who have crossed international borders have particularly high protection needs because they have no documentation or identification and are not able to receive protection in their country of origin; yet the procedures to access legal status in the host country is usually challenging. In addition, stateless children are found among child migrants, asylum seeking and refugee children and child victims of trafficking.

One of the main reasons a person is considered stateless is a result of a lack of birth registration which can help to prevent statelessness by recording a child's date and place of birth and his or her parents. In Thailand, the government has recently amended legislation to give all children born in Thailand the right to birth registration, including those born to irregular migrants or migrants that have been granted a temporary right to reside. However, only children of migrant parents who are permanently residing in Thailand acquire Thai nationality automatically under Thailand's national law. UASC refugee children, asylum seeking children and other migrant children who have not acquired the nationality of their state of origin or a third state, remain stateless in Thailand.<sup>112</sup>

Under Indonesian law, citizenship should be granted to children who are born in Indonesia to parents without defined citizenship or are considered stateless and to infants who have been found in Indonesia whose parents' whereabouts are unknown. Additionally, a foreign child under the age of five adopted by an Indonesian citizen is granted citizenship. These provisions don't generally apply to UASC who cross international borders, as they are not born in Indonesia, most are not infants, and are unlikely to be adopted by an Indonesian citizen.<sup>113</sup> In Malaysia, birth certificates issued to non-Malaysian children are stamped with the words "orang asing", meaning "foreigner", making them unable to access public schools and health services.<sup>114</sup>

### **Specific protection needs**

Protection and care mechanisms must be put in place in order to meet the special needs of UASC. Irrespective of their legal status, UASC are entitled to receive temporary care arrangements including appointment of a guardian, child-appropriate accommodation and access to education and health care. The initial research findings across the region suggest that interim care arrangements for UASC are generally poor and availability depends upon whether they have been given the status of "illegal migrants." Even when registered as "asylum seekers" or recognized as "refugees", access and quality of services available remains limited and generally unsatisfactory.

#### **a) Guardianship and legal representation**

In order to ensure that the UASC's best interests are properly considered, a guardian should be appointed as soon as the unaccompanied or separated child is identified. The guardian should be consulted and informed of all actions taken in relation to the child and should be able to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for durable solutions.<sup>115</sup>

111 UNHCR and The National Human Rights Commission of Thailand, regional expert roundtable on good practices for the identification, prevention and reduction of statelessness and the protection of stateless persons in south-east Asia, 28-29 October 2010, accessed on 14 May 2013 from: <http://www.unhcr.org/4d7de5ec9.html>

112 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.67.

113 CESASS, Unpublished Indonesia Report, 2013, p.62.

114 REPUSM, Unpublished Malaysia Report, 2013, p.29-30.

115 Committee on the Rights of the Child, *General Comment No.6, op. cit.*, para.33.

The development of this measure has been highlighted in the Thailand research as a priority. Although the Thai legal framework does not cater specifically to UASC's rights to guardianship, existing provisions on guardianship are broad enough to capture their needs and rights. Currently, UASC in Thailand are entitled to guardianship rights until the age of majority which is reached at 20 years. However, guardians may be absolved of their duties once the child has reached 15 years of age. There are also no provisions in the domestic legislation to guarantee that UASC are appointed a guardian as soon as they are identified.<sup>116</sup> There is limited information about UASC victims of trafficking and it is unclear if a formal guardian is appointed in accordance with international standards. However, presumably the NGO or government department running the shelter where the trafficked child is referred would assume the role of guardian in an unofficial capacity.<sup>117</sup>

In Malaysia, there are no specific provisions for guardianship of trafficked children in the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007<sup>118</sup> and statutes regulating temporary guardianship of abandoned children do not apply to UASC.<sup>119</sup> Similarly, in Indonesia, although guardianship can be taken by persons or legal entities through a court decision in case the parents' whereabouts is unknown, the Child Protection Law containing this provision only applies to Indonesian children.<sup>120</sup>

Another important feature of the protection of UASC is access to legal representation, especially where the child is involved in asylum procedures or judicial proceedings (for their "illegal status").<sup>121</sup> In Thailand, the person exercising parental power (which can be the guardian of the child) is the legal representative of the child. The drawback of this provision is that the guardian may lack the legal expertise and experience required to deal with legal issues involving UASC.<sup>122</sup> In Indonesia, there appears to be no provisions to guarantee the appointment of a qualified legal representative to UASC, particularly where a child faces asylum proceedings or deportation.<sup>123</sup> However, UNHCR Indonesia allows for the participation of a legal representative during the interview process for Refugee Status Determination.<sup>124</sup>

### **b) Care and accommodation arrangements**

The CRC requires State Parties to provide alternative care arrangements to UASC outside their country of origin. When choosing among available care options, priority should be given to community-based solutions that build on existing social structures, whereas institutions should be always considered as a last resort, even during emergencies.<sup>125</sup> The analysis of current policies and practices in the three countries studied reveals a general non-compliance with international protection standards. Instead of receiving suitable accommodation, UASC children who have been given the status of "illegal migrants" are usually placed in IDCs. IDCs are considered the worst place for UASC as they are generally prison-like with restricted freedom to move; no access to formal education; no segregated rooms; and no guardians. The research findings from all three countries show that the average period of time an UASC spends in immigration detention is often

<sup>116</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.76.

<sup>117</sup> *Ibid.*, p.56.

<sup>118</sup> REPUSM, Unpublished Malaysia Report, 2013, p.33.

<sup>119</sup> Act 351, GUARDIANSHIP OF INFANTS, ACT 1961 Incorporating all amendments up to 1 January 2006, accessed on 12 March 2013 from: <http://www.agc.gov.my/Akta/Vol.%208/Act%20351.pdf>

<sup>120</sup> CESASS, Unpublished Indonesia Report, 2013, p.159.

<sup>121</sup> Committee on the Rights of the Child, *General Comment No.6, op. cit.*, para.36.

<sup>122</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.78.

<sup>123</sup> CESASS, Unpublished Indonesia Report, 2013, p.207.

<sup>124</sup> *Ibid.*, p.199.

<sup>125</sup> ICRC, IRC, Save the Children, UNICEF, UNHCR, World Vision, *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, 2004, p.46.

between three and nine months. Indonesia still puts refugee and asylum seeker children in detention even though the Indonesian Law on Juvenile Justice (11/2012) recommends that detention should be the last resort for a child.<sup>126</sup>

In Indonesia, IOM community housing facilities are considered to provide the best care for UASC. Although IOM does not cater to UASC needs specifically, those who live in IOM community housing generally benefit from proper facilities; appropriate accommodation, separated from adults; a sufficient allowance (130 US\$/ month); and health care and access to formal education for those who have documents and are willing to study in an Indonesian school. However, IOM does not provide legal guardianship and these housing facilities do not always suit the needs of UASC who are between the ages of 14 and 17 (the age range of most UASC).

In Thailand, most UASC living in border camps are under the care of relatives through “kinship care-like” arrangements, while others are in residential care (27%) or living with a foster family (6%).<sup>127</sup> Children identified as trafficking victims through the multi-disciplinary team approach adopted at provincial level will be housed in one of the country’s 138 reception centres, provided by both the government and NGO organisations, for adult and child victims of abuse, exploitation, violence and human trafficking.<sup>128</sup> In Malaysia, most cases are handled by Immigration. The Welfare Department (JKM) does not deal with UASC if they are referred by UNHCR (as they are under the jurisdiction of Immigration), but it does accept self-referrals and has a Children’s Home that provides temporary settlement and a number of services for street children, including UASC. JKM also offers shelter, up to a maximum of three months, to non-citizen victims of trafficking.

Nevertheless, most of the UASC in Thailand, Indonesia and Malaysia live outside of shelter care without access to protection. While these children may be more independent, they are also the most vulnerable to exploitation and extortion and can easily become victims of child trafficking.

### **c) Access to education, health care and employment**

Access to education for UASC should be maintained during all phases of the migration cycle and should also include vocational training for both girls and boys.<sup>129</sup> Similarly, UASC should have the same rights to employment and health care as enjoyed by national children.<sup>130</sup> And finally, health facilities should take into consideration the mental and physical vulnerabilities of these children.<sup>131</sup>

The research discovered that UASC have limited access to education, social services and health care across all three countries studied and UASC rarely have the opportunity to enrol in state schools. Although in Thailand the National Education Act 1999 (re-enacted in 2002) stipulates that all children, regardless of nationality or immigration status, can enter the local state formal school system, migrant children are often discriminated against. Furthermore, the child or guardian may be required to cover the costly expenses of uniforms, transportation, school supplies and food.<sup>132</sup>

In Indonesia, access to education is only granted to Indonesian citizens by the Indonesian Basic Constitution and students of other nationalities are subjected to requirements established by the Ministry of National Education. These requirements may hamper the

<sup>126</sup> CESASS, Unpublished Indonesia Report, 2013, p.103-110.

<sup>127</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.40.

<sup>128</sup> *Commercial Sexual Exploitation of Children – The Situation in Thailand 2009*, Presentation by the Anti- Human Trafficking Division of the Royal Thai Police given at the 8<sup>th</sup> Conference of Investigators on the Commercial Sexual Exploitation of Children in South East Asia, Tokyo, 25-26 November 2009.

<sup>129</sup> *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, *op. cit.*, p.49.

<sup>130</sup> *General Comment No.6*, *op. cit.*, para.89.

<sup>131</sup> *Ibid.*, para.46-48.

<sup>132</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.32.

enjoyment of the right to education for cross-border UASC as they usually lack the necessary documentation needed to attend school.<sup>133</sup> Not surprisingly, the lack of access to formal and informal education was raised as a major issue by the UASC interviewed.<sup>134</sup> In Malaysia, the Child Act makes it compulsory for every child of a Malaysian citizen to be enrolled in primary education, but has failed to address the education needs of children of non-citizens.<sup>135</sup> This is confirmed by a 2009 study conducted by the Ministry of Education which revealed that the majority of the almost 44,000 school-age children, who never attended school, were refugee and asylum seeking children, children of irregular migrants and foreign workers.<sup>136</sup>

A number of barriers have been identified which impede UASC's access to health care and social services. In Thailand, many migrant children do not receive basic health services because they lack identification papers.<sup>137</sup> In the refugee camps along the Thai-Myanmar border, aid is limited for mere subsistence and access to social services and health care is modest.<sup>138</sup> Reports also indicate that there are no specialised services for UASC who have been victims of child sex trafficking in Thailand.<sup>139</sup>

The situation in Malaysia and Indonesia is no different. In Malaysia, although recognised refugees receive a 50% discount on foreigner fees at government hospitals, the cost of healthcare can still be prohibitively expensive. Furthermore, the fear of arrest, detention and harassment by the authorities deters UASC from accessing healthcare.<sup>140</sup> In Indonesia, all asylum seekers and refugees, including those held in IDCs, have access to health care through an agreement with the government. Besides government institutions, IOM and some NGOs are also providing health services to UASC in Indonesia.<sup>141</sup> However, legislation should be enacted to extend rights to health and social services to all categories of UASC.<sup>142</sup>

Within the three countries, UASC are unable to access lawful employment. While legislation has generally been enacted to prohibit dangerous and exploitative child labour, because foreign UASC are not legally allowed to work they face difficulty enjoying this right. In Malaysia, there are no legal provisions giving refugees the right to employment, although the authorities have taken a relaxed attitude to those with UNHCR cards.<sup>143</sup>

In Thailand, the Alien Employment Act of 2008 allows migrants over the age of 15 to obtain work permits for up to two years. However, this statute includes several provisions potentially discouraging UASC from seeking employment including a controversial reward scheme for informants who notify authorities about undocumented workers. Moreover, most employers are reluctant to register child migrants, as it is a complicated process.<sup>144</sup>

In Indonesia, children between 16-18 years of age have the right to be employed in light work; however, these rights are only given to Indonesian nationals.<sup>145</sup> The lack of opportunities for legal employment reported in all three countries has led to UASC becoming particularly vulnerable to involvement in hazardous labour or commercial sexual

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133 CESASS, Unpublished Indonesia Report, 2013, p.78.

134 Ibid.

135 REPUSM, Unpublished Malaysia Report, 2013, p.30.

136 Ibid., p.20.

137 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.33.

138 Ibid., p.30.

139 Ibid., p.33.

140 REPUSM, Unpublished Malaysia Report, 2013, p.20-21.

141 CESASS, Unpublished Indonesia Report, 2013, p.144.

142 Ibid., p.205.

143 REPUSM, Unpublished Malaysia Report, 2013, p.31.

144 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.92 & 105.

145 CESASS, Unpublished Indonesia Report, 2013, p.82-83.

exploitation.<sup>146</sup> Attempts to seek compensation from exploitative employers are rare due to the fact that most UASC are working “illegally.” Those working in non-traditional roles, for example as domestic workers, often remain particularly invisible.

### **Durable solutions**

When the immediate needs, rights and liberties of UASC have been met, attention should be given to long-term durable solutions to maintain the level of necessary care and protection afforded to these children. Durable solutions can include family reunification, safe repatriation, resettlement in a third country and inter-country adoption.

None of the three countries examined were found to have met international standards in the implementation of durable solutions. In Thailand, there are no legal provisions giving effect to family tracing and reunification or to ensure the safe repatriation of UASC.

For some child victims of trafficking and children living in refugee camps, family tracing and repatriation has been facilitated. This is usually done in an *ad hoc* and informal manner and often in partnership with NGOs, particularly those with networks and partners in the country of origin.<sup>147</sup>

Thai domestic legislation also lacks mechanisms and procedures for reintegrating UASC in Thailand. In terms of resettlement to a third country, UNHCR refers UASC for resettlement based on the best interests of the child. Thailand has, in fact, implemented legal provisions which allow for inter-country adoption of all children, including UASC who are foreign or stateless.<sup>148</sup> It is also worth noting that eight welfare protection and occupational development centres have been established by the Bureau of Anti-Trafficking in Women and Children in Thailand to house Thai and foreign victims of trafficking (four shelters for children and women, three shelters specifically for children – one for girls and two for boys, and four newly opened shelters for male victims). Services provided to victims include family tracing and assessment, return and reintegration, follow-up and evaluation.<sup>149</sup>

In Indonesia, as the Child Protection Law applies only to Indonesian children, UASC are not entitled, under domestic law, to family reunification or family tracing. While UNHCR and IOM unofficially assist with voluntary repatriation, for those who are undocumented and placed in Indonesian IDCs, local integration is rarely an option. UASC are forced to stay in the IDCs or allowed outside only at the discretion of the immigration official. There are no provisions related to resettlement in a third country under the Indonesian legal framework.<sup>150</sup> UNHCR is currently working with States to facilitate resettlement of unaccompanied children in Indonesia and specific quotas have been made available for such cases by the Australian and US governments. Adoption was also found to be difficult, as UASC with refugee or asylum seeker status are required to obtain written permission from the government of their country of origin for the adoption to be authorized.<sup>151</sup>

In Malaysia, it was not possible to identify legal provisions or policies related to the implementation of durable solutions for UASC children. In practice, IOM and UNHCR are the main agencies working on the resettlement of refugees and helping the victims of trafficking.<sup>152</sup> IOM is responsible for making travel arrangements for those selected

146 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.30; REPUSM, Unpublished Malaysia Report, 2013, p.31.

147 Bureau of Anti-Trafficking in Women and Children, Ministry of Social Development and Human Security, *Protect [victims of] Human Trafficking, Eliminate Human Traders* leaflet, distributed in events organised by the Ministry of Social Development and Human Security to promote the Anti-Trafficking Act 2008, in 2010.

148 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.98.

149 Ibid.

150 CESASS, Unpublished Indonesia Report, 2013, p.88.

151 Ibid., p.93.

152 REPUSM, Unpublished Malaysia Report, 2013, p.62.



for resettlement by third countries as well as organising pre-departure orientation and health checks.

UNHCR provides assistance to refugees by conducting family tracing and reunification, as well as processing resettlement applications and submissions to resettlement countries.<sup>153</sup> In this regard, UNHCR asserts that “the UASC are prioritized and expedited at each stage of processing taking account their age, gender, and diversity. In order to be transparent and manage expectations of the refugee population, UNHCR provides information on challenges and limitations in terms of processing through an Information hub.”<sup>154</sup> However, the research shows that in practice, UASC do not receive special treatment and will wait long periods of time to be resettled.<sup>155</sup>

With regard to adoption, current provisions are rather vague. Although the *Adoption Act* is meant to be applied only to children of Malaysian nationals, it remains unclear whether children with refugee, asylum seeker and stateless person status, including those born or living in Malaysia for a long period of time, could be classified as a “resident” of Malaysia.<sup>156</sup>

The study of the legal frameworks both at international and domestic levels, in a way, is the reflection of the situation faced by UASC in the three countries under review. Because the concept and terminology is new for these countries, the adoption of any specific measures as well as legal norms to ensure the protection of the rights of UASC remains a challenge. The examination of the roles of different stakeholders reveals that some stakeholders have been interpreting and implementing the laws correctly while others are lagging behind.

## Stakeholders

### Government agencies

Government agencies generally involved in the response to UASC include the Ministries of Interior, Foreign Affairs, Justice and Social Welfare and Development, Immigration, law enforcement and local government departments. Since UASC are often regarded as “illegal” immigrants, departments within the Ministry of Interior coordinate initial responses. Immigration staff and the police are generally frontline officers, conducting pre-emptive, preventive, and law enforcement for human smuggling cases and irregular migration.

In Thailand and Indonesia, the navy and armed forces patrol borders and sea territory to prevent human smuggling and trafficking. The Ministry of Foreign Affairs coordinates with international governments and organisations to respond to human smuggling, refugee and asylum seekers situations.<sup>157</sup> The Ministry for Political, Legal and Security Affairs’ Desk on People Smuggling, Refugee and Asylum Seekers (P2MP2S) was established in Indonesia in 2012 to specifically assist in monitoring, synchronising, and coordinating the implementation of provisions on prevention and enforcement on the issues of human smuggling, refugee and asylum seekers.<sup>158</sup>

Thailand established Provincial Admission Boards (PABs), consisting of representatives from provincial administration, military, defence, intelligence, police and UNHCR staff.<sup>159</sup> PABs ceased operation in 2001 and all refugees, including UASC, were forced to wait

<sup>153</sup> Ibid., p.50.

<sup>154</sup> Information provided by UNHCR Regional Office (Southeast Asia), 29 December 2013.

<sup>155</sup> REPUSM, Unpublished Malaysia Report, 2013, p.76.

<sup>156</sup> Ibid., p.30-31.

<sup>157</sup> CESASS, Unpublished Indonesia Report, 2013, p.154; IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.107.

<sup>158</sup> CESASS, Unpublished Indonesia Report, 2013, p.156.

<sup>159</sup> Lutheran Immigration and Refugee Service (LIRS), *No Small Matter: Ensuring Protection & Durable Solutions for Unaccompanied & Separated Refugee Children*, 2007, accessed on 4 June 2013 from: <http://www.crin.org/docs/NoSmallMatter.pdf>

until they were re-established in 2005 to receive refugee status.<sup>160</sup> In Thailand, suspected trafficking cases are handled by the Department of Special Investigations (under the Ministry of Justice) and the Ministry of Social Development and Human Security, which also run regional shelters for trafficking victims.<sup>161</sup>

In Malaysia, the Immigration Department is charged with investigating suspected cases of UASC. Other government agencies, such as the Welfare Department run shelters and safe houses for children, although initially, the children may have spent up to six months in an immigration detention depot waiting for verification of their status.

The Council for Anti-Trafficking of Persons and Anti-Smuggling of Migrants (MAPO), chaired by the Chief Secretary of the Home Office also oversees the management of these issues. The MAPO council includes representation from the Royal Malaysian Police, the Immigration Department, the Customs Department, the Malaysian Maritime Enforcement Agency and the Department of Labour under the Ministry of Human Resources.<sup>162</sup>

### **UN agencies and International Organisations**

Care arrangements for UASC are generally assisted by UN agencies. Within the framework of UNHCR's mandate, its operational activities in a country may vary. Thailand does not officially recognise the large number of asylum seekers living in Thai-Myanmar border camps and are referred to as "displaced persons fleeing fighting" by the Thai government.<sup>163</sup> Over the years, UNHCR in Thailand has made it a priority to work to effectively identify, register, monitor and protect UASC. In Bangkok, the UNHCR provides expedited refugee status determination for some UASC. Protection and Community Services staff undertakes best interest determinations in accordance with applicable guidelines and standard operating procedures. In an age appropriate and child friendly manner, they also allow children extra time when conducting the interview.<sup>164</sup> However, UNHCR's mandate is, at times, constrained by Thai policies regarding displaced persons from Myanmar. These policies can create challenges in the agency's ability to provide assistance within the camps, which are often overcrowded and lacking in resources.

In Malaysia, UNHCR is the primary organisation that deals with issues relating to UASC. It is responsible for registering, interviewing and documenting prospective refugees and asylum seekers. UNHCR also provides, *inter alia*, legal advice, financial and medical assistance, best interest determination assessments, counselling, registration, family tracing, family reunifications and resettlement opportunities.<sup>165</sup> In Malaysia, some view the presence of UNHCR as a potential attraction for refugees in the region. UNHCR is also viewed by respondents as only providing documentation and limited supports to refugees, in order to survive in the country or to be quickly resettled in third countries.<sup>166</sup>

UNHCR's presence in Indonesia is a result of the Memorandum of Understanding (MoU) between the Government of Indonesia, represented by the Ministry of Foreign Affairs and UNCHR. Although UNHCR's mandate is to protect the rights of refugee and asylum seekers, its role in Indonesia focuses on refugee status determination, while care arrangements are handled by IOM. CWS is also responsible for managing two shelters for unaccompanied children under an agreement with UNHCR, as well as for providing informal education programmes, including computer and English language classes.<sup>167</sup>

<sup>160</sup> Ibid.

<sup>161</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.103.

<sup>162</sup> REPUSM, Unpublished Malaysia Report, 2013, p.40-47.

<sup>163</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.35.

<sup>164</sup> Ibid., p.39 & 140.

<sup>165</sup> REPUSM, Unpublished Malaysia Report, 2013, p.49-50.

<sup>166</sup> Ibid., p.82.

<sup>167</sup> CESASS, Unpublished Indonesia Report, 2013, p.157.

In Indonesia, UNHCR provides protection and assistance and facilitates access to durable solutions in the form of resettlement. UNHCR also provides specific steps for UASC registration and UNCHR staff regularly visit IDCs to register UASC. UNCHR also conducts best interest assessments and determinations to identify and address the protection needs of each unaccompanied and separated child.<sup>168</sup>

IOM has a role in the care and assistance of UASC in each of the three countries. Although Indonesia is not yet a member of IOM, it is an observer country and has plans to become a member country. IOM has been assisting the Indonesian government with migration issues, including issues relating to refugees and asylum seekers.

IOM Indonesia works closely with the Directorate General of Immigration (under the Ministry of Law and Human Rights) by providing the logistical support for migrants in IDCs, a temporary detention shelter in Jakarta and in some other sites. IOM has also introduced community housing in Medan, Makassar, Bogor, and Yogyakarta and is developing shelters in other cities. Community housing accommodates those who have already been granted refugee status, families and vulnerable populations within the refugee and asylum seekers group (after being released from IDCs). IOM also provides informal education through English language, Bahasa Indonesia language and mathematics classes and also facilitates recreation activities. In some cases IOM will assist in arranging formal education. IOM also facilitates voluntary repatriation for UASC who wish to return to their country of origin.<sup>169</sup>

In Thailand and Malaysia, IOM assists with the voluntary repatriation of rejected asylum seekers, refugees and victims of trafficking. In both countries, IOM assists in capacity building of government and NGO-run shelters to provide recovery and care for trafficking victims prior to repatriation. IOM also conducts training and awareness raising activities for police and immigration officials on laws and procedures related to the treatment of trafficked victims.<sup>170</sup>

The International Committee of the Red Cross (ICRC) focuses its efforts on improving the conditions and treatment in IDCs. ICRC advocates for separate accommodation for UASC and time limitations for detention. ICRC also supports family tracing, reunification and repatriation.<sup>171</sup>

The large number of irregular migrants and trafficked victims in Thailand has resulted in other UN agencies having a significant profile in the country. Since 2000, the ILO has been involved in directing the implementation of the Mekong Project to Combat Trafficking in Children and Women (TICW Project) as part of its International Programme on the Elimination of Child Labour (ILO-IPEC). The Regional Project to Combat Trafficking in Children for Labour and Sexual Exploitation (TICSA) also operates as part of this Programme and works with the Ministry of Labour and the Ministry of Social Development and Human Security.<sup>172</sup> The United Nations Inter-Agency Project on Human Trafficking (UNIAP) operates within the Mekong sub-region. UNIAP Thailand coordinates a clearing house for information on human trafficking and a centre for knowledge building. The project involves working in collaboration with partners in Thailand to share information, identify gaps and key priorities and develop interventions.

<sup>168</sup> Ibid., p.116-119.

<sup>169</sup> CESASS, Unpublished Indonesia Report, 2013, p.164-165.

<sup>170</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.137; REPUSM, Malaysia Report, 2013, p.62-63.

<sup>171</sup> IHRP and ECPAT International, Ibid., p.42; REPUSM, Ibid., p.52.

<sup>172</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.136.

In Thailand, the United Nations Children's Fund's (UNICEF) works on strengthening child protection systems and building the capacity of families, local communities and government for children who are vulnerable to violence, abuse, exploitation and neglect.<sup>173</sup> In Malaysia, UNICEF is involved with programmes and activities focused on reducing child vulnerability through, *inter alia*, poverty reduction strategies, social safety net programmes, and education initiatives.<sup>174</sup>

### Civil society

Many international and local civil society organisations are concerned with refugee and migration issues, children and other humanitarian concerns, although there are no organisations with the specialised priority of or focus on unaccompanied and separated children. Nevertheless, these civil society groups tend to give special attention to the rights and needs of children.

Thailand and Indonesia have many of the same groups focusing on child protection including, Save the Children, Plan International, World Vision International and the ECPAT International network as well as a range of smaller local NGOs.<sup>175</sup> In Malaysia there are various NGOs working with children, some on the basis of their ethnicity. Other groups specifically work with child refugees, orphans, children living in poverty or on the streets and those without access to health care and education. As such, these programmes often include UASC as part of their target groups or beneficiaries. Malaysia also has refugee community-based organisations and informal learning centres that can also serve as support groups for UASC. These organisations often have limited resources and many were reluctant to share information with the researchers due to confidentiality concerns and the sensitive nature of the issue in Malaysia.<sup>176</sup>

All three countries have religious based organisations that support refugee communities. In Malaysia, the activities of faith-based groups focus on vulnerable groups in a broader sense and report that UASC are not a specialised focus.<sup>177</sup>

Religious organisations in Indonesia providing programmes for refugee and asylum seeker children include the Jesuit Refugee Service (JRS), Bethel Church, Thsui Foundation, World Relief and Church World Service.<sup>178</sup> In Thailand, the Catholic Office of Emergency Relief and Refugees (COERR) is UNHCR's implementing partner for providing support to UASC living in border camps. COERR manages the Extremely Vulnerable Individuals (EVI) Program across all the camps and also has offices in Bangkok, Mae Sot, Mae Hong Son, Mae Sariang and Ratchaburi. From the findings, COERR, has been, the only NGO that deals with UASC directly. However, COERR reports budget limitations will impact their capacity to recruit social workers with child welfare and protection backgrounds and necessary local language skills.<sup>179</sup>

### Challenges in coordination, cooperation and other limitations

Observations and field interviews and the review of secondary data confirmed that there are challenges when it comes to the coordination and cooperation between ministries, other government institutions and non-government organisations (both internationally and nationally).

173 Ibid., p.135.

174 REPUSM, Unpublished Malaysia Report, 2013, p.123.

175 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.108-112; CESASS, Unpublished Indonesia Report, 2013, p.166.

176 REPUSM, Unpublished Malaysia Report, 2013, p.48 & 54.

177 Ibid., p.61-62.

178 CESASS, Unpublished Indonesia Report, 2013, p.166.

179 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.119.

Work being done on refugee issues is generally found to have the greatest level of coordination. The Committee for Coordination of Services to Displaced Persons in Thailand (CCSDPT) is made up of representatives from UNHCR, the World Health Organization (WHO), as well as a broad range of NGOs, like the Thai Burma Border Consortium (TBBC), the International Rescue Committee (IRC), JRS, Médecins Sans Frontières (MSF) and Aide Médicale Internationale (AMI).<sup>180</sup> Malaysia also has a number of community-based coalitions and alliances created to support refugees. However, since they are mostly funded by the refugee community, their resources and activities are often very limited.<sup>181</sup>

In Indonesia, both vertical and horizontal coordination must be improved. While the P2MP2S Desk<sup>182</sup> has been established to solve coordination problems, guidelines to organise the tasks and duties of each institution have not yet been authorized as part of the Presidential Regulation. Furthermore, the Desk mainly focuses on security concerns and the coordination in regard to care arrangements for UASC by government institutions remains unclear.

Additionally, the coordination between ministries and other government institutions with IOs, the UN and local or international NGOs regarding the issue of UASC has not been maximized at the national or local level. For example, the Ministry of Education has not established coordination with IOM in order to provide education for children of refugee and asylum seekers, including UASC. Similarly, UNHCR Indonesia and IOM have not successfully collaborated with the Ministry of Social Affairs to provide shelter for refugees and vulnerable asylum seekers who are released from IDCs. Many children, women, and those who have already obtained refugee status still remain in IDCs due to the limitation of shelter capacity provided by IOM and UNHCR Indonesia. The coordination among international and national NGOs in Indonesia, particularly regarding UASC issues, is also reported to be very limited.<sup>183</sup>

There is no overarching coordinating body responsible for UASC in Thailand. However, there are *ad hoc* instances of inter-sectoral cooperation at national and local levels and multi-disciplinary child protection committees set up under the Child Protection Act to respond to specific child protection reports.<sup>184</sup> This cooperation will be elaborated on in the next section.

Within Malaysia, the lack of cooperation among stakeholders can lead to data not being shared with appropriate parties. Overlapping jurisdictions have also appeared to have fed into a cycle of mistrust and occasionally confrontational stances by different stakeholders. Even where procedures are clear as to what needs to be done when processing a potential UASC, there are still gaps especially in determining which agency is responsible for what; and MAPO's<sup>185</sup> mandate does not extend to the full range of categories of UASC.<sup>186</sup>

<sup>180</sup> IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.138.

<sup>181</sup> REPUSM, Unpublished Malaysia Report, 2013, p.54-61.

<sup>182</sup> The Ministry for Political, Legal and Security Affairs' Desk on People Smuggling, Refugee and Asylum Seekers ('P2MP2S') in Indonesia was established in 2012 to specifically assist in monitoring, synchronising, and coordinating the implementation of provisions on prevention and enforcement on the issue of people smuggling, refugee and asylum seekers.

<sup>183</sup> CESASS, Unpublished Indonesia Report, 2013, p.167-169.

<sup>184</sup> ECPAT International, *Global Monitoring Report on the Status of Action against Commercial Sexual Exploitation of Children: Thailand*, 2011, accessed on 7 January 2014 from: [http://resources.ecpat.net/EI/Pdf/A4A\\_II/A4A\\_V2\\_EAP\\_THAILAND.pdf](http://resources.ecpat.net/EI/Pdf/A4A_II/A4A_V2_EAP_THAILAND.pdf)

<sup>185</sup> The Council for Anti-Trafficking of Persons and Anti-Smuggling of Migrants (MAPO) is a body or council which oversees the management/investigation of UASC cases. It is chaired by the Chief Secretary of the Home Office. Current membership of MAPO includes the Royal Malaysian Police, the Immigration Department, the Customs Department, the Malaysian Maritime Enforcement Agency and the Department of Labour under the Ministry of Human Resources.

<sup>186</sup> REPUSM, Unpublished Malaysia Report, 2013, p.81.

The research teams also identified certain constraints and challenges within the government departments responsible for assisting this group of children. In Thailand, corruption has been widely documented as being widespread amongst Thai law enforcement personnel. This is particularly the case in relation to victims of sex trafficking and forced labour where police officers are suspected of protecting commercial sex venues, factories and sweatshops from police inspections or alternatively, taking bribes from employers to conduct raids to round up irregular migrants just prior to the end of the month when wages should be paid.<sup>187</sup>

Indonesia's decentralisation system allows local government to decide on the programmes to be implemented in their region, which can create a significant challenge for ministries to enforce national regulations at the local level.<sup>188</sup> In Malaysia, civil society tends to view government agencies as being uncaring, corrupt and prone to abuses of power when dealing with refugee and UASC issues.<sup>189</sup>

### Good Practice Examples

A number of good practices in responding to different issues that arise with the various categories of UASC were identified in each of the three countries. Predominantly, the most documented examples were found in dealing with refugee/asylum seeking children or trafficked children – particularly around interim care arrangements. A few examples, where the three countries demonstrated similar progress and practices (verified during field research interviews) are given below:

*Coordination in identifying child victims of trafficking:* In northern Thailand, the “multi-disciplinary team approach” is used to identify victims of child trafficking. The team is comprised of civil society members such as FOCUS/TRAFCORD, which is made up of social workers, lawyers and a strong community network from the nine Northern provinces. Representatives from state agencies are also involved, including law enforcement officers, immigration officers, social workers from State shelters and doctors from public hospitals. The team works according to the Anti-trafficking in Persons Act B.E.2551, and its operation follows the “Memorandum of Understanding on Prevention, Suppression, and Solution for Human Trafficking Problem in 17 Northern Provinces B.E.2550”. This multi-disciplinary team approach is now utilised nationwide.<sup>190</sup>

Indonesia has a national Anti-Trafficking Task Force, which receives reports from Sub Task Forces at the district and provincial level. The task force was established to support the National Law No. 21/2007 to Combat Trafficking in Persons.<sup>191</sup> The Malaysian Government has also created MAPO, which facilitates discussion among the relevant agencies responsible for migration and human trafficking issues.<sup>192</sup>

*Family tracing and contact:* In Thailand, family tracing has been assisted with a bilateral MoU and Standard Operating Procedure (SoP) on Victim Protection, developed in partnership with Laos, Myanmar and Vietnam. Trainings were also supported by IOM, Save the Children, WorldVision International (WVI) and UNIAP.<sup>193</sup> In Indonesia, ICRC has been doing family

187 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.104-105.

188 CESASS, Unpublished Indonesia Report, 2013, p.168.

189 REPUSM, Unpublished Malaysia Report, 2013, p.84.

190 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.50.

191 CESASS, Unpublished Indonesia Report, 2013, p.57.

192 REPUSM, Unpublished Malaysia Report, 2013, p.81.

193 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.54.

tracing for UASC in East Timor as a response to the previous conflict. However, they have expressed a willingness to support UNHCR or IOM to do family tracing if there is special request submitted by the respective organisations.<sup>194</sup> In Malaysia, ICRC also conducts family tracing, assisted by NGOs and refugee-led community organisations.<sup>195</sup>

*Interim care arrangements:* The Thai Government reportedly refers cases of UASC to nine regional children's shelters run by the Ministry of Social Development and Human Security (MSDHS).<sup>196</sup> The Rumah Perlindungan Sosial Anak Center in Indonesia is child-friendly and spacious, with good facilities and sufficient private space for the children. It works very closely with a network of organisations that provide referral, recovery, reintegration and legal protection services. This comprehensive approach is in line with nationally defined priorities to strengthen child welfare and protection.<sup>197</sup> NurSalam, an NGO working with children in Malaysia, offers direct assistance to stateless children, including education and health services, food and clothing, counselling and job placement assistance and a peer mentoring programme.<sup>198</sup>

*Legal representation and assistance:* With respect to asylum seeking/refugee UASC in Thailand, each Karen refugee camp has established a Sexual and Gender Based Violence Committee to respond to cases of sexual abuse and work to prevent its occurrence. These Committees also try to ensure that child victims can access legal services.<sup>199</sup> UNHCR Indonesia allows Jakarta Legal Aid institution (LBH Jakarta) to assist asylum seekers in the Refugee Status Determination (RSD) interview.<sup>200</sup> Malaysia's High Court made a landmark decision regarding child refugees by allowing an officer from UNHCR to be present in court during the proceedings pursuant to s. 12(3)(b) of the *Child Act 2001*. The officer was classified as a person "directly concerned" in the case within the meaning of s. 12(3)(b) of the *2001 Act* and could thus advocate on behalf of the child. This overturned the decision made by the Magistrates Court in *ISKANDAR ABDUL HAMID v. PP* [2005] 6 CLJ 505.<sup>201</sup>

The findings are clear and in the words of one research report:

"Unaccompanied migrant children have become part of global and mixed migration flows across the world. Travelling on false documents or having no documents at all, the young migrants are often apprehended and possibly detained in transit or after entering the host country. The reasons for which children emigrate from their country of origin vary and - whether the decision was an individual one or family based - the root causes for emigration are the same as those for adults; some flee war and persecution in their home countries, while a large proportion migrate in search of economic and educational opportunities."<sup>202</sup>

194 CESASS, Unpublished Indonesia Report, 2013, p.122.

195 REPUSM, Unpublished Malaysia Report, 2013, p.50, 54-55.

196 IHRP and ECPAT International, Unpublished Thailand Report, 2013, p.43.

197 ILO, *Project Overview: Thailand - Regional Project to Combat Trafficking in Children for Labour and Sexual Exploitation (TICSA)*, 2006, accessed on 4 June 2013 from: <http://www.ilo.org/public/english/region/asro/bangkok/library/download/ticsa7.pdf>

198 UNHCR, *Good Practices Addressing Statelessness in South East Asia: Report of the Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia*, Bangkok, 28-29 October 2010, accessed on 4 June 2013 from: <http://www.unhcr.org/4d7de47f9.html>.

199 The Thailand Border Consortium (TBBC), *Camp Locations*, 2012, accessed on 4 June 2013 from: <http://www.tbbsc.org/camps/camps.htm>

200 CESASS, Unpublished Indonesia Report, 2013, p.189.

201 REPUSM, Unpublished Malaysia Report, 2013, p.35.

202 Ana Fonseca, Anna Hardy, and Christine Adam, *Unaccompanied migrant children and legal guardianship in the context of returns: the missing links between host countries and countries of origin*, in IOM, *Children on the Move*, Geneva, 2013, p.47.

The following stories and testimonials summarise the research findings.

“The situation in Maungdaw was not safe. Many houses in my village were burnt down and the young men have been arrested and killed. Even small children are also threatened and some even killed. I am afraid to stay there and my parents asked me to come to Malaysia. I came to Malaysia through an agent in Myanmar, by boat from Maungdaw to the coast of Thailand. There were 490 people on the boat. There were 300 Rohingya and 190 Bangladeshi. In Thailand, I don’t know where we landed, but there was a van that immediately took me to Padang Besar. After half an hour we reached Padang Besar and we were asked to walk into Malaysia, crossing the border. I walked past the gate at the border to a waiting car. The car took us to Sungai Petani, Kedah. Then I took a bus to Kuala Lumpur. A Malaysian agent took care of the car trip across the border but only up to Sungai Petani. I paid the agent RM 6,500 by selling house and land owned by my family. I’ve been in Malaysia for 23 days. I’m staying with somebody from my home village in Maungdaw. In terms of a place to stay and food I rely only on this friend.

Now I’m looking for a job and when I have work I will pay back my friend. I feel safe here in Malaysia compared to Maungdaw. I’ve not been harassed by the police nor the local people. I haven’t been to UNHCR to register for a refugee card.”<sup>203</sup>

Researchers in Thailand encountered a similar story from Rohingya UASC living at Ban Sri Surat (Suratthani). The 12-year-old boy in the following story was not yet registered by UNHCR. The boy arrived in Southern Thailand with adults in a boat loaded with about 70-100 people. He wanted to go to Malaysia to join his sister who was already there. He was rescued alongside other Rohingyas and was sent along with 52 women and children to the shelter home run by the Ministry of Social Development and Human Security. He had one brother back home in Maungdaw. His parents and younger sister were killed in the recent violence.

These touching stories about 17 and 12 year old UASC describe the reasons why people, including children, make the dangerous trip across the sea and by land to an unknown place. The above stories illustrate that these children believe a new country can provide them with peace and security and a chance to start over.

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203 Excerpts from an interview with a Rohingya UASC, Ampang, Kuala Lumpur, 1 December 2012.



## CHAPTER 4

# EXISTING REGIONAL FRAMEWORK ON MIGRATION AND CHILDREN

The previous chapter looked at migration and child migrants in particular, to provide a clearer picture of children on the move in Southeast Asia. This chapter aims to examine existing national and regional frameworks for the protection of children. It will demonstrate that although there is no framework specifically established to protect UASC, child protection frameworks do exist in the region. The chapter will first look at the existing framework within the CRC. The second part deals with ASEAN and other related regional frameworks. The chapter will end with some thoughts on the possible application of the existing frameworks.

### *The Convention on the Rights of the Child in Southeast Asia* <sup>204</sup>

All Southeast Asian countries are parties to the UN Convention on the Rights of the Child (CRC). (See **Annex 3**) The CRC has laid down the foundation for State Parties to protect and promote the rights of children. The four principle pillars enshrined in the CRC: (1) non-discrimination; (2) the best interests of the child; (3) child survival and child development; and (4) child participation, form a very important basic framework for state (and non-state actors). Although these countries have committed themselves to abide by the CRC, four countries still maintain declarations and/or reservations to certain articles prescribed by the CRC. (See **Annex 4**) As of May 2013, in spite of the fact that reservations to some articles have been withdrawn, certain countries - Brunei Darussalam and Malaysia in particular - still retain reservations to a number of articles. Singapore has made a blanket reservation which states that “The Constitution and the laws of the Republic of Singapore provide adequate protection and fundamental rights and liberties in the best interests of the child. The accession to the Convention by the Republic of Singapore does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore or the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.” Thailand still maintains a reservation to Article 22 of the CRC.

Apart from the CRC, some countries in Southeast Asia have also ratified and/or acceded to the three optional protocols to the CRC - namely the Optional Protocol on the involvement of children in armed conflict (OP1-OP-CRC-AC), the Optional Protocol on the sale of children, child prostitution and child pornography (OP2-OP-CRC-SC), and the Optional Protocol on a Communications Procedure. The research on “Towards an ASEAN Commission on the Promotion and Protection of the Rights of Women

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204 The writing of this section is based on the study (with updates) conducted by the Office of Human Rights Studies and Social Development (OHRSD), Mahidol University, *Towards an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children*, Ateneo Human Rights Centre, Manila, 2008.

and Children” (the Study) conducted in 2008 by the (former) Office of Human Rights Studies and Social Development (OHRSD), Mahidol University, Thailand<sup>205</sup> revealed that, in general, the national constitution provides for the protection and promotion of the rights of children, though in many cases it does not contain child-specific provisions. The Study, through the review of the various state reports that individual governments in ASEAN had already submitted to the Committee, concluded that ASEAN is well equipped with laws and policies on child protection/child development and child survival.

The Study further demonstrated that, to different extents, most if not all countries were making efforts to comply with the obligations stipulated in the CRC. For example, upon ratification of the CRC, most countries promulgated at least one piece of child-specific legislation. Brunei Darussalam issued a Children’s Order Act as well as a Women and Girls Child Act, while Indonesia passed a Child Protection Act. Singapore has the oldest Children and Young Persons Act in the region, dating back to 1949, with the latest amendment in 2001. Cambodia is the only country in ASEAN without a child-specific law. However, Cambodia seems to be the only country in ASEAN where the national constitution directly refers to the CRC. Art.48 of the Royal Cambodian Constitution stipulates that “the State shall guarantee and protect the rights of children as set forth in the Convention on the Rights of the Child, in particular the right to life...”<sup>206</sup>

Cambodia has a law prohibiting child labour and setting a minimum age for employment. However, the Philippines has the most comprehensive laws relating to children, including: the Special Protection of Children Against Child Abuse, Exploitation and Discrimination; an Act Prohibiting the Employment of Children Below 15 Years of Age in Public and Private Undertakings; a Memorandum of Agreement on the Handling and Treatment of Children Involved in Armed Conflict; an Anti-Trafficking in Persons Act; and an Anti-Violence against Women and Their Children Act.<sup>207</sup>

The Study also noted that certain plans and policies reflect some specific problems of the children in a particular country. In Vietnam, as a legacy of the war and due to the problem of poverty, the country has adopted a number of programmes to deal with street children and children in difficult circumstances. These include the Programme of Protection of Children in Especially Difficult Circumstances 1999-2002, and the Prevention and Resolution of the Problems of Street Children, Sex-Abused Children and Children who are being Overworked and Working in Hazardous and Dangerous Conditions. Guidelines and plans to fight against child labour are also found in Indonesia, the Philippines, Thailand and Vietnam.

According to state reports to the UN Committee on the Rights of the Child, in addition to the line ministries/departments concerned, each and every country in ASEAN has made national machineries available to promote and protect the rights of the child. Brunei has established a National Children’s Council and a Working Group on CRC Report/Monitoring to ensure the implementation of the CRC. The same kind of mechanisms have been set up in Cambodia (Cambodian National Council for Children), Lao PDR (National Commission for Mother and Child), Malaysia (National Advisory and Consultative Council for Children), Myanmar (National Committee on the Rights of the Child (NCRIC)), the Philippines (Council for the Welfare of Children (CWC) and the CRC National Monitoring System), Singapore (Inter-Ministry Committee on the Convention on the Rights of the Child), Thailand (National Committee for Child Protection and the National Council for Child and Youth Development), and Vietnam (National Committee on Population,

205 Office of Human Rights Studies and Social Development (OHRSD), Mahidol University, *Towards an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children*, Ateneo Human Rights Centre, Manila, 2008.

206 Committee on the Rights of the Child, Initial reports of States parties due in 1994: Cambodia, CRC/C/11/Add.16, 24 June 1998, para.33.

207 Office of Human Rights Studies and Social Development (OHRSD), Mahidol University, *op. cit.*

Family and Children).<sup>208</sup> It is important to add that in countries where a National Human Rights Commission exists, such as in Indonesia, Malaysia, Myanmar, Philippines, Thailand, and Timor Leste, this national human rights institution is usually mandated to investigate complaints with the power to recommend.

The promulgation of child specific legislation, the formulation of national plans, policies and strategies and the establishment of different government and/or independent machineries on children by the states parties in Southeast Asia (SEA) indicate the willingness and attention paid to the protection and promotion of the rights of children. However, all states parties recognize that they still face many challenges relating to the implementation of child rights as specified in the CRC. The Government of Vietnam, for instance, admitted that “there still remain some problems relating to the functions and tasks of the government agencies responsible for the protection, care and education of children as well as their management capability, monitoring and supervision of the implementation of the National Law and the Convention. There are also a lot of difficulties in updating data relating to children as well as with the precision of these data.”<sup>209</sup> Unfortunately, Vietnam is not alone in facing these problems.<sup>210</sup>

It should be noted that although most countries in Southeast Asia have laws, policies and mechanisms dealing with the protection of the rights of children, none has any specific reference to UASC. However, if particular aspects enshrined in the CRC are examined, it is possible to determine how it may impact the rights of UASC.

### **Non-Discrimination**

The principle of non-discrimination is enshrined in all international human rights instruments. It is also recognised that discrimination is a human rights violation and it is prohibited by most national laws. The principle of non-discrimination as prescribed in Art.2 of the CRC states that “States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” The principle affirms that all rights apply to all children without exception. The State Parties have obligations to protect children from any form of discrimination.

In order to protect children from discrimination, State Parties are obliged to review their legislation and also come up with measures to eliminate discriminatory provisions and practices. In Southeast Asian countries, national constitutions guard against any form of discrimination, although they do not specifically single out discrimination against children. Only Thailand and Vietnam refer to children and discrimination based on age. In Vietnam, the 1992 Constitution Art.64 states that “the State and society shall recognize no discrimination among children.” In Thailand, the 2007 Constitution states in Art.30 that “all people are equal before the law and are equally protected by law.” It further states that “discrimination based on birthplace, race, language, sex, age, disabilities and physical condition or health, personal status, economic or social position, creed, education and political ideology not contradictory to the provisions in the Constitution is prohibited.”

In addition to the Constitution, in many cases, child-specific laws also prohibit discrimination against children. For example, the Child Law of Myanmar prescribes in Section 14 that “every child shall, irrespective of race, religion, status, culture, birth or sex: a) be equal

<sup>208</sup> Ibid.

<sup>209</sup> Committee on the Rights of the Child, Periodic reports of States parties due in 1997: Vietnam, CRC/C/65/Add.20, 5 July 2002, para.32.

<sup>210</sup> See also State parties’ reports on CRC of other countries in ASEAN.

before the law; and b) be given equal opportunities.”<sup>211</sup> The Philippines goes as far as making discrimination punishable. A number of child specific laws such as the Child and Youth Welfare Code (PD 603) as well as the Special Protection Act ensure that there is no discrimination against the child in any form. The Act specifically protects the children of indigenous cultural groups against discrimination and prescribes penalties for violations.”<sup>212</sup> It is noteworthy that the Philippines is the only country in ASEAN with specific legislation prohibiting discrimination against children. However, not all countries in ASEAN provide a legal guarantee to the principle of non-discrimination. Brunei Darussalam states in its report to the Committee that “there is no legislation [prohibiting discrimination]”<sup>213</sup> and currently it is felt that it is not necessary to legislate on this matter.”<sup>214</sup>

Although in general, legislative measures guaranteeing the non-discrimination principle are available in most countries, implementation of these measures remains problematic. In most, if not all, of the Concluding observations to the reports submitted by states parties, the Committee has expressed its concerns on the existence of various patterns of discrimination against children of non-nationals, migrant workers, ethnic minorities, children with disabilities, and children with HIV/AIDS, in most if not all member countries of the region. In spite of the availability of laws prohibiting discrimination, the term and concept of discrimination has not been well-defined. Moreover, there is also existing legislation that contains discriminative provisions.

### **The Best Interests of the Child**

Article 3 of the CRC stipulates that “the best interest of the child must be the primary consideration in all decisions concerning the child, and that the state must provide appropriate assistance if parents, or others legally responsible, fail in their duties.”<sup>215</sup> This means that laws and policies/plans/programmes affecting children should put the child’s best interest first and should most benefit the children.

At least as reflected in the CRC reports and other studies, it seems that the principle of the best interests of the child might not be well understood by a number of State Parties, let alone be incorporated in legislative measures or policies/plans. In most cases, the best interest principle is not explicitly specified in constitutions or in child-specific legislation, except for a few cases such as the Philippines, Indonesia and Thailand.

The Government of Indonesia states in its report to the Committee on the Rights of the Child that:

“The principle of the best interest of the child has yet to be integrated into the Constitution or into national legislation. However, the Law on Child Protection 2002 already recognizes this principle in Art.2. In everyday life, however, it can be assumed that this principle, to a certain degree, is put into practice. Nevertheless, it must be recognized that over time this principle appears to be eroding.”<sup>216</sup>

211 Committee on the Rights of the Child, Second periodic reports of States parties due in 1998: Myanmar, CRC/C/70/Add.21, 5 November 2003, para.37.

212 Committee on the Rights of the Child, Second periodic reports of States parties due in 1997: Philippines, CRC/C/65/Add.31, 5 November 2004, para.104.

213 Added by the author for clarity.

214 Committee on the Rights of the Child, Initial reports of States parties due in 1998: Brunei Darussalam, CRC/C/61/Add.5, 13 March 2003, para.43.

215 Eugeen Verhellen, *Convention on the Rights of the Child*, Leuven, E.Verhellen and Garant Publishers, Third Edition, 2000, p.78.

216 Second periodic reports of States parties: Indonesia, *op. cit.*, para.61.

Thailand's report follows a similar line, stating that "...most pieces of legislation do not explicitly mention that they were developed with the principle of 'the best interests of the child' in mind."<sup>217</sup> The principle, nevertheless, was later prescribed in the Child Protection Act. The most explicit provision on the best interests of the child is found in the Child and Youth Welfare Code and the Special Protection of Children Act of the Philippines. The principle is applied in institutions such as courts of law and other social services.<sup>218</sup>

Singapore made a declaration to Art.3 of the CRC involving the best interests of the child.<sup>219</sup> Although the Government of Singapore "...agrees that in all our actions concerning children, the best interests of the child should be the primary consideration, Singapore is of the opinion that it is in the best interests of the child that the rights conferred on the child by the CRC should also be exercised with respect for the authority of parents and schools and in accordance with the customs, values and religions of the people."<sup>220</sup> The report affirms, however, that "while entering such declaration, Singapore's laws and practices take into account and place emphasis on the best interests of the child."<sup>221</sup>

The examination of the Concluding observations made by the Committee on the Rights of the Child done by the Study showed that the principle of the best interests of the child is one of the concerns expressed to all states parties in ASEAN (except the Philippines), as it is not always a primary consideration in all actions taken by the government and other actors, including in matters related to family law, adoption, welfare, etc. The Committee generally recommends that each State Party "...review its legislation and administrative measures to ensure that article 3 of the Convention is duly reflected therein and that this principle is taken into account when administrative, policy, judicial or other decisions are made."<sup>222</sup> The same recommendation is applied to all countries. In brief, it seems that the principle of the best interests of the child has not been systematically referred to in all government actions or legislation. Most countries probably believe that the governments/parents know what is best for the children.<sup>223</sup>

### **Child Survival, Protection and Development**

A child has the inherent right to life and the meaning of this "right to life" should be interpreted broadly. In the context of the right to life of the child, the State has an obligation to protect and help ensure the full development and survival of the child. Child survival includes health care, nutrition, sanitation and hygiene, and prevention against the transmission of HIV/AIDS. Child development primarily covers education and training. Child protection concerns violence against children, child trafficking and exploitation, child labour, children deprived of a family environment, and children in conflict with the law.

In examining state reports of all countries in the region it is noted that the areas of child survival, child protection and child development are the most developed among the four principles. As noted earlier, it's clear that laws, policies/plans and national machineries on child protection, survival and development do exist. Most countries in the region have adopted various legislative and policy measures to ensure the protection, survival and

217 Committee on the Rights of the Child, Second periodic report of States parties due in 1999: Thailand, CRC/C/83/Add.15, 31 May 2005, para.149.

218 See the details in Second periodic reports of States parties: Philippines, *op. cit.*, para.112-117.

219 It was stated that "the Republic of Singapore considers that a child's rights as defined in the CRC, in particular rights defined in articles 12 to 17, shall in accordance with articles 3 and 5 be exercised with respect for the authority of parents, schools and other persons who are entrusted with the care of the child and in the best interests of the child and in accordance with the customs, values and religions of Singapore's multiracial and multi-religious society regarding the place of the child within and outside the family."

220 Committee on the Rights of the Child, Initial reports of States parties due in 1997: Singapore, CRC/C/51/Add.8, 17 March 2003, para.115.

221 *Ibid.*

222 Committee on the Rights of the Child, Concluding observations: Singapore, CRC/C/15/Add.220, 27 October 2003, para.27.

223 Office of Human Rights Studies and Social Development (OHRSD), Mahidol University, *op. cit.*

development of children and some are specifically aimed at this principle. However, to a certain extent, child survival and development are related to the level of economic and social development of the country. Brunei Darussalam and Singapore are the two most developed countries with the highest standard of living in ASEAN. The implementation of the principles of child survival and child development requires not only laws and policies, but also resources. It is, therefore, not surprising that in spite of existing legislative and policy measures put in place, countries like Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, Timor Leste and Vietnam are facing many challenges in this area.

It is to be noted that the Philippines is the only country in Southeast Asia that has ratified the UN Convention on the Protection of the Rights of Migrant Workers and their Families, while Cambodia and Indonesia have signed the Convention. All Southeast Asian countries except Myanmar have ratified the two ILO Conventions pertaining to child labour - namely the ILO Convention on Minimum Age (No. 138) and the ILO Convention on the Worst Forms of Child Labour (No. 182).<sup>224</sup> (See **Annex 5**) It is observed that the minimum age of child labour is set at the age of 15 in the ILO Convention. Two countries in Southeast Asia, namely Cambodia and Lao PDR, have fixed the minimum age of labour at 14 years old. Moreover, the gap between law and practice is clearly reflected in this area, and to a certain extent, in the area of trafficking as well. Although national laws prohibiting child labour, child exploitation and trafficking in women and children exist in most if not all countries, the use of child labour and child trafficking is widespread in Southeast Asia. According to a UNICEF report "...it is estimated that around one-third of global trafficking in women and children occurs within or from Southeast Asia."<sup>225</sup> More recent studies confirm that poverty is a contributing factor to the problem.

### **Respect for the View of the Child or Child Participation**

Art. 12 of the CRC recognizes a child's right to express his/her views and to have his/her views taken into consideration in any decisions that affect them. This right to participation includes the right to information, to freedom of thought and expression, to the right to join and form associations, and the right to identity and privacy.

As pointed out earlier, legislative and policy measures as well as national machineries on child survival, protection and development can be considered very developed in Southeast Asian countries, but much less is noted in the area of child participation. With regards to the principle of child participation, only the Philippines provides for it by law. The Committee on the Rights of the Child notes in its Concluding observations that "despite these positive steps, the Committee is of the view that children's right to participation and free expression of their views is still limited in the State Party, partly due to traditional attitudes in society."<sup>226</sup> The traditional attitudes *vis-à-vis* the respect of the views of the child were, in fact, brought up in all its Concluding observations to all other countries without exception.<sup>227</sup> The traditional attitudes that the Committee refers to so frequently are those that view children as "irresponsible, irrational, emotional and incapable." Therefore, their views are not to be listened to. These traditional attitudes cannot easily be changed by legal or policy measures.

In conclusion, the Study revealed that legal and policy commitments are not entirely lacking in the Southeast Asian region and in individual countries. Most, if not all countries have tailored, or at least made efforts to tailor, their national legislation to the principles set

224 Timor Leste acceded to the ILO Convention No. 182 only.

225 UNICEF, *Situation Review of Children in ASEAN*, UNICEF East Asia and Pacific Regional Office, Bangkok, December 2007, p.23.

226 Committee on the Rights of the Child, Concluding observations: Philippines, CRC/C/15/Add.259, 21 September 2005, para.29.

227 See, for example, Committee on the Rights of the Child, Concluding observations: Brunei Darussalam, CRC/C/15/Add.219, 27 October 2003, para.31; Concluding observations: Indonesia, CRC/C/15/Add.223, 26 February 2004, para.35; Concluding observations: Singapore, CRC/C/15/Add.220, 27 October 2003, para.28; and Concluding observations: Vietnam, CRC/C/15/Add.200, 18 March 2003, para.29.

forth in the CRC. All countries have also established bureaucratic as well as specialized institutions to ensure the implementation of child protection and welfare. Programmes and policies have specially been designed to deal with different issues of the rights of children. The Study made some observations, namely:

- **Definition of the child.** Not all countries define a child as “every human being below the age of 18 years.” Myanmar defines a child in Section 2 of their Child Law as “a person who has not attained the age of 16 years”; and “Youth” means “a person who has attained the age of 16 years but has not attained the age of 18 years.”<sup>228</sup>

No legal provision giving a general definition of the child and of the age of majority has been adopted in Cambodia.<sup>229</sup> Moreover, even within the same country, different laws offer different definitions of a child for different purposes; this is the case in all countries without exception.<sup>230</sup>

- **Provisions** meaning laws, policies, and mechanisms that provide goods and services (such as food, health care, education, social security, etc.) are well established in all countries. The implementation differs, however, according to the level of economic and social development in a given country.
- **Protection** covers the right to be protected from certain actions; for instance, maltreatment and neglect, the right to be protected from all forms of exploitation, and rights in the justice system. As demonstrated above, to different degrees, there are a number of laws, policies and mechanisms in existence in most if not all countries in the region. What is problematic is legislation relating to criminal justice and procedures that are not well aligned with international standards and the CRC.
- **Participation** deals with the right of children to share in decision-making that affects them. Although this principle is referenced in the legislation of some SEA countries, such as the Philippines, there remains much to be accomplished in this area.

### **Commitment to the Rights of the Child in ASEAN and Southeast Asia**

Although children and youth have been mentioned in various official policy documents of ASEAN and have been included as part of Functional Cooperation programmes, the focus has largely been on youth development and youth employment. On the ASEAN website there is an entry on Youth and Children, but the information provided is mainly about youth.

While youth matters are given priority over children’s issues in ASEAN, the commitment of ASEAN to the development and welfare of children is not negligible. The Resolution on the ASEAN Plan of Action for Children adopted in Manila, Philippines, on 2 December 1993 is the first document in ASEAN dealing directly with children’s issues. Through its resolution, six ASEAN members adopted an ASEAN Plan of Action for Children with the objective of providing “...a framework for promoting regional cooperation for the survival, protection and development of the ASEAN Child. The Plan shall be an integral part of the member countries’ efforts in improving the lives of the peoples of the region.”<sup>231</sup> The Plan followed closely the 1990 World Declaration on the Survival,

228 Second periodic reports of States parties: Myanmar, *op. cit.*, para.34.

229 Initial reports of State parties: Cambodia, *op. cit.*, para.22.

230 See for example Initial reports of State parties: Singapore, *op. cit.*, para.81-104; Committee on the Rights of the Child, Initial reports of States parties due in 1998: Brunei Darussalam, CRC/C/61/Add.5, 13 March 2003, para.30-42.

231 Resolution on *The ASEAN Plan of Action For Children*, Manila, Philippines, 2 December 1993, accessed on 4 June 2013 from: [www.aseansec.org](http://www.aseansec.org), quoted in *op. cit.*, Office of Human Rights Studies and Social Development (OHRSD), Mahidol University.

Protection and Development of Children and Plan of Action for Child Survival, Protection and Development by prescribing three areas of concern - child survival, child protection, and child development. Although the details of the Plan substantially reflect the content of CRC, the term “rights of the child” is not used in any part of the document.

For the effective implementation of the Plan, the Resolution designated a Children’s Desk Officer both within ASEAN and at national levels to coordinate regional programmes on children with relevant bodies and committees of ASEAN involved in children’s issues.

The Senior Officer position was to assist in coordinating the implementation of the programmes for children in the absence of an institutionalized sub-committee on children.<sup>232</sup> ASEAN put forth a time frame to “achieve the objectives of the ASEAN Plan of Action for Children by the year 2000.”<sup>233</sup> By the time the Study was conducted, the child protection unit was put in place in a number of countries in ASEAN. However, there was no ASEAN Children Desk’s Officer appointed. There was established, however, the ASEAN Commission on the Protection of the Rights of Women and Children.

Apart from the Hanoi Plan of Action of 1998 and the ASEAN Declaration Against Trafficking in Persons, particularly Women and Children, adopted in Vientiane in 2004, another important document which reflects the commitment of ASEAN to children is the Declaration on the Commitments for Children in ASEAN adopted by 10 ASEAN countries in Singapore in August 2001. This time the document was guided by the CRC, the outcomes of the World Summit on Children, the World Summit for Social Development and other international instruments concerning children.<sup>234</sup> This document is seen as “a human rights-based” document as it fully incorporates the very essence and spirit of the CRC and relevant documents relating to rights of the child. The first four points are remarkable in that they declare to:

- (1) Promote regional cooperation for the survival, development, protection and participation of ASEAN children, as an integral part of ASEAN’s efforts to improve the lives of peoples in the region.
- (2) Intensify ASEAN economic and social development cooperation so as to eradicate the scourges of poverty, hunger and homelessness, which have a far-reaching impact on children, in order to promote their welfare and well-being.
- (3) Protect, respect and recognise the rights of all children, including those of indigenous people, consistent with the customs and traditions of their respective communities.
- (4) Recognise and encourage respect for children’s rights through mutual sharing of information on the rights of the child by ASEAN members, taking into account the different religious, cultural and social values of different countries.<sup>235</sup>

In fact, the 18 points of agreement prescribed in the Declaration on the Commitments for Children in ASEAN 2001 follow precisely the provisions enshrined in the CRC. While the implementation of the Declaration is hard to trace, by looking at the list of projects one may see the initiatives (and/or efforts) made by ASEAN. In 2002, a number of projects pertaining to children were identified and formulated at the ASEAN level. These included projects on juvenile justice, ASEAN computer-based information networks for families and child development, the development of a homepage on ASEAN children, hosting a symposium on children in especially difficult circumstances, studies on child abuse and neglect, a feasibility study and workshop on the establishment of an ASEAN Regional Centre for Family and Child Development, and projects on early child care and

232 Ibid.

233 Ibid.

234 Declaration on the Commitments for Children in ASEAN, Singapore, 2 August 2001, accessed on 4 June 2013 from: [www.aseansec.org](http://www.aseansec.org), quoted in *op. cit.*, Office of Human Rights Studies and Social Development (OHRSD), Mahidol University.

235 Ibid.



development. However, the implementation of the commitments made at the ASEAN level was seen more at the national level.

The ASEAN Declaration Against Trafficking in Persons, particularly Women and Children was adopted in 2004. The member states of ASEAN pledged to adopt measures to prevent fraudulent use of passports and official travel and identity documents; exchange information on migration flows, trends and patterns; improve victim identification and protection procedures; take coercive measures against human trafficking and strengthen regional and international cooperation to prevent and combat trafficking through the establishment of a regional focal network. Although the Declaration shows the seriousness of the issue as well as the commitment of ASEAN to deal with it (and that ASEAN recognizes the regional nature of the problem), the Declaration only requires member states to take measures “to the extent permitted by their respective domestic laws.”<sup>236</sup> In terms of implementation, ASEAN has not made much progress in addressing the problem. Even though the ASEAN ad-Hoc Interagency was established in 2006, the efforts of ASEAN seem to be limited to the areas of information exchange, training of responsible officials and law enforcement agencies, and workshops. In addition, although the issue of human trafficking was included in the political and security blueprint adopted by ASEAN in 2009 under the Section B.4 Non-Traditional Security Issues,<sup>237</sup> “ASEAN States continue to treat the problem of human trafficking as an ordinary crime not as a security problem that poses existential threat that requires extraordinary measures.”<sup>238</sup> It should also be noted that the issue of trafficking in persons has not been put in the context of wider migration.

It is important to note that the regional framework against trafficking has been complemented by both sub-regional and bilateral arrangements. Bilateral cooperation on the issue of human trafficking has also come about through MoU agreements. On 31 May 2003, Cambodia and Thailand signed a MoU on Bilateral Cooperation to Eliminate Trafficking in Children and Women. Thailand signed a MoU on Cooperation to Combat Trafficking in Persons, Especially Women and Children with Lao PDR in July 2005 and an agreement with Vietnam on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking in March 2008. Similar arrangements were reached between other Greater Mekong Sub-Region (GMS) countries: Cambodia and Vietnam signed an agreement on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking in October 2005, Myanmar and China concluded a MoU on Strengthening Cooperation on Combating Human Trafficking in November 2009, while Vietnam and Lao PDR concluded a MoU on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking in November 2010.<sup>239</sup> Vietnam and China concluded more or less the same kind of MoU in 2010. Bilateral arrangements on anti-trafficking in persons as well as protection of victims were put in place between Malaysia and the Philippines as well as between Indonesia and Malaysia.

Basically, all memoranda share the same structure and include salient features of anti-trafficking measures such as prevention of human trafficking, prosecution of criminals and protection of victims. However, each memorandum reflects bilateral relationships unique to the respective two countries at that time. The memoranda that were concluded more

236 The ASEAN Declaration Against Trafficking in Persons, particularly Women and Children.

237 Iv. Further strengthen criminal justice responses to trafficking in persons, bearing in mind the need to protect victims of trafficking in accordance with the ASEAN Declaration Against Trafficking in Persons, particularly Women and Children, and where applicable, other relevant international conventions and protocols on trafficking in persons.

238 Rizal Sukma, *Different Treatment: Women Trafficking in the Securitization of Trans-national Crimes*, Paper presented at the 2<sup>nd</sup> NTS Convention, Beijing, 9-11 November 2008.

239 Mekong Migration Network and Asian Migrant Centre, *Migration in the Greater Mekong Sub-region: Resource Book*, Wanida Press, Chiang Mai, January 2013, p.77.

recently tend to contain more detailed provisions than earlier ones. Since international agreements are agreed upon by states parties to be consistent with their respective domestic laws, bilateral memoranda on human trafficking inevitably reflect the provisions of respective domestic laws on human trafficking.<sup>240</sup>

In addition to the regional and bilateral frameworks concluded in the Southeast Asian region, there are also sub-regional arrangements dealing with the issue of human trafficking. The best known at the sub-regional level is the Coordinated Mekong Ministerial Initiative Against Trafficking (COMMIT). The MoU, which was concluded in 2004 by the six countries of GMS,<sup>241</sup> adopted the Sub-Regional Plan of Action (SPA) which was first introduced in 2005; the second and third SPAs were formulated and adopted in 2008 and 2011 respectively. The SPA III, which will end in 2013, confirms its adherence to “a policy of zero tolerance for any public sector complicity or involvement in the crime of trafficking in persons.”<sup>242</sup> The SPA outlines different measures and projects that aim to combat trafficking in persons in the region. It could be said that the Declaration and SPA are human rights-based documents in the sense that they place trafficked persons at the centre of all anti-trafficking interventions and promote respecting the human rights of trafficked persons in all anti-trafficking interventions.<sup>243</sup> They also emphasize inter-sectoral and interdisciplinary responses to human trafficking. The involvement of all actors – namely government agencies, regional-international organisations, as well as NGOs – is encouraged. Efforts are being coordinated by the UN Agency Project on Human Trafficking (UNIAP) with focal points/task forces at both national and sub-regional levels.

The issue of labour migration has also been a concern in Southeast Asia. In 2007, with the push of the Philippines, ASEAN adopted the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. The Declaration, in a way, articulated a rights-based approach to migration. However, this rights-based approach was immediately countered by the member states recognizing “the sovereignty of states in determining their own migration policy relating to migrant workers, including determining entry into their territory and under which conditions migrant workers may remain.”<sup>244</sup> This particular preamble weakens the Declaration as it curtails any possibility for any regional approach to migration and migrant workers since each state still has full authority to deal with migrant workers according to their national policies, in spite of the recognition for the need to address the cases of abuse and violations against migrant workers whenever such cases occur.<sup>245</sup> The preamble was further weakened by the general principles which essentially say that the treatment of migrant workers will be in accordance with the laws, regulations, and policies of respective ASEAN Member countries. The Declaration is not to be interpreted as “implying the regularization of the situation of migrant workers who are undocumented.”<sup>246</sup> The Declaration does not address the issue of irregular migrant workers in ASEAN.

In order to follow up on the implementation of the Declaration, ASEAN set up, in 2007, the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). Tasked to conduct the annual ASEAN Forum on migrant workers, develop an ASEAN instrument on migrant workers’ rights, prepare pre-departure information for ASEAN migrant workers and collaborate with relevant international organisations on “Safe Migration” campaigns and pre-departure literature to migrants as well as strengthen the dialogue between

240 Miwa Yamada, IDE Discussion Paper No.349: Comparative Analysis of Bilateral Memoranda on Anti-human Trafficking Cooperation between Thailand and Three Neighboring Countries: What Do the Origin and the Destination States Agree Upon?, March 2012, p.4.

241 Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam.

242 The Second Joint Declaration of Coordinated Mekong Ministerial Initiative Against Trafficking (COMMIT), Point 9, Hanoi, 16 February 2012.

243 Ibid.

244 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.

245 Ibid.

246 Ibid.

the ACMW and those working on human smuggling and trafficking,<sup>247</sup> the ACMW has been making very slow progress in fulfilling its mandates due to the sensitivity of the issue and the lack of consensus among members.

Another policy platform in ASEAN regarding migrant workers is the Socio-Cultural Blueprint. The document under “social justice and rights” includes strategies and activities relating to, among other things:

- Implementation of programmes on child survival, development and protection consistent with the CRC;
- Development and implementation of programmes to assist children living under disadvantaged and vulnerable conditions;
- Protection and promotion of the rights of migrant workers including facilitating access to resources and remedies through information, training and education, access to justice and social welfare services.<sup>248</sup>

As noted earlier, the issue of migrant workers is considered sensitive by most countries in the region. This sensitivity is felt in most if not all documents, including the Blueprint. The section begins with strategic objectives to “ensure fair and comprehensive migration policies and adequate protection for all migrant workers in accordance with the laws, regulations and policies of respective ASEAN Member States as well as implement the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers reflected.”<sup>249</sup> It is reiterated in point (vii) of the same section that the access to resources, justice as well as social services will be provided “as appropriate and in accordance with the legislation and of the receiving state, provided they fulfil the requirements under applicable laws, regulations, and policies of the said state, bilateral agreements and multilateral treaties.”<sup>250</sup>

The overall policies and work plans on workers (and migrant workers) are overseen by the ASEAN Labour Ministers and the Senior Labour Officials Meetings (SLOM). The ASEAN Labour Ministers’ Work Programme 2010-2015 identifies a number of thematic areas and actions including a few on child labour – namely to “study the development of regional guidelines with respect to eliminating the worst forms of child labour.” The Work Plan requires SLOM to “coordinate, as the need arises, with the AICHR and other ASEAN bodies in protecting labour rights, including migrant workers’ rights.”<sup>251</sup>

Apart from the regional framework on the protection and the promotion of the rights of migrant workers, bilateral arrangements in different forms have been used to manage migration flows between countries. Stella P. Go<sup>252</sup> noted that “in the Asian region, the Philippines has been the most successful among the labour-sending countries in its attempts to negotiate these agreements over the last thirty years.” In spite of this success, the Philippines has been able to enter into agreements with only 13 countries, only one of which was a labour sending country (Indonesia). Negotiations with receiving countries such as Singapore, Japan, and Saudi Arabia have not been successful.<sup>253</sup> However, the bilateral agreement with Indonesia is geared towards the promotion of the welfare of migrant workers and protection of their rights as it includes priorities for joint initiatives and cooperation such as:

247 ASEAN, ASEAN Labour Ministers’ Work Programme 2010-2015, ASEAN Secretariat, Jakarta, 2010.

248 ASEAN, Roadmap for an ASEAN Community 2009-2015, ASEAN Secretariat, Jakarta, 2009, p.78-79.

249 Ibid., p.79.

250 Ibid.

251 ASEAN, ASEAN Labour Ministers’ Work Programme 2010-2015, *op. cit.*

252 Stella P. Go, *Asian Labor Migration: The Roles of Bilateral and Similar Agreements*, paper re-presented at the Mekong Symposium on Migration: Migrants from the Mekong Neighborhood Living Together; Seeking Effective Responses to Enable Integration and Social Cohesion, organised by Mekong Migration Network, 26-28 February 2013, Bangkok, Thailand.

253 Ibid., p.3.

- a. Promotion and protection of the welfare and rights of migrant workers of both countries;
- b. Training and certification of migrant workers;
- c. Provision of legal aid for the protection of the rights of migrant workers.

According to Stella P. Go, Malaysia has also signed MoUs with several sending countries to facilitate recruitment and selection of migrant workers. Within SEA, Malaysia has concluded agreements with Indonesia, Thailand, and Vietnam. Among the concerns raised regarding the MoUs is that there are no minimum standards for conditions of works specified; workers have no right to join trade unions; and employers can keep worker passports. The 2004 MoU with Indonesia does not include domestic workers, which are one of the most vulnerable groups.

Thailand, as a receiving, transit and sending country, has concluded MoUs with its neighbouring countries – namely Cambodia, Laos PDR and Myanmar – for the hiring of foreign workers. The MoUs are designed to:

- a. Institute proper procedures for employment of workers;
- b. Ensure the repatriation of workers, who have completed their employment or are deported by the authorities,
- c. Protect the rights and welfare of workers;
- d. Prevent and take action against illegal border crossings, trafficking of illegal workers and illegal employment of workers.<sup>254</sup>

The most significant action (but also problematic) taken under bilateral MoUs between Thailand and the three neighbouring countries deals with nationality verification. The nationality verification was not explicitly specified in the MoUs but was widely exercised as a means to regularize the workers entering into Thailand on an irregular basis. While the process might benefit some of the workers, it faces challenges in that not all irregular migrant workers (from Myanmar in particular) were included in the process, especially stateless persons.

The establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009 and the ASEAN Intergovernmental Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) in April 2010 presented a step towards the protection and promotion of the rights of women and children. Due to the fact that each country has one representative on children sitting on the ACWC, it is hoped that the rights of children will be better promoted and protected.

The AICHR is a charter-based body in the ASEAN region with the mandate to promote and protect the human rights of all ASEAN peoples. As an overarching body in ASEAN, AICHR not only deals with all categories of human rights, but also has obligations to promote and protect the human rights of all groups of the population of ASEAN, including children. There have been criticisms of the AICHR in the sense that the body does not have an explicit mandate to perform a protection duty. Although the criticisms are valid in some respects, AICHR could, if the Representatives so desired, interpret their mandates and functions expansively and creatively. For example, the AICHR could influence ASEAN Member States to consider acceding to and ratifying international human rights instruments (4.5 mandates and functions). AICHR could also seek to obtain information

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254 Ibid., p.8-9.

from ASEAN Member States (AMS) on the protection and promotion of human rights (4.10) which could include the rights of children, UASC in particular. AICHR could also conduct thematic studies relating to human rights in ASEAN (4.12).

So far, AICHR has identified a number of issues for thematic studies including issues of migration led by the Indonesian Representative, the right to education, women and children in armed conflicts and natural disasters, and children in conflict with the law. These thematic studies could potentially cover the issue of UASC. In addition, the issue of statelessness has already found its way into the AICHR agenda, although reluctantly. Even though the activities organised so far have focused mainly on awareness raising, in the long run, this may lead to sensitization and more concrete actions to be taken by the AICHR.

The adoption of the ASEAN Human Rights Declaration (AHRD) is another milestone in ASEAN. Although some provisions of the AHRD do not meet international standards and it does not contain any specific provisions on the rights of children, the general principles make it clear that:

Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status; every person has the right of recognition everywhere as a person before the law; every person is equal before the law; every person is entitled without discrimination to equal protection of the law, and the rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.

The reference to every person in most of the provisions and children in a few could be positively interpreted to contribute to the promotion and protection of the rights of UASC.

The establishment of the ACWC was strengthened by the adoption of the Hanoi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children adopted by ASEAN leaders in October 2010. By affirming different ASEAN Declarations on children adopted by ASEAN, this declaration aims to strengthen ASEAN's commitment to ensure that women and children benefit fully from the process of ASEAN integration and community building. The Declaration, although focusing on welfare and well-being of children, does have a few provisions that promote "closer cooperation in promoting and protecting the rights of women and children especially those living under disadvantaged and vulnerable conditions including those in disaster and conflict affected areas." The Declaration further states (in point 16) that it aims "to achieve goals for children in the ASEAN region as regards the child's rights to survival, protection, development and participation in a comprehensive and systematic way." In point 18, ASEAN is committed to "improve the quality of and gender equality in education and school enrolment to children, including children of ethnic and/or indigenous groups..." It still remains to be seen how much ASEAN has done as a region to promote and protect the rights of children. The Declaration, if interpreted broadly, may also include those children who are on the move.

As for the ACWC, although its Terms of Reference (TORs) could be seen as a bit more advanced than those of the AICHR, the protection mandates are still hindered by more or less the same principle of non-interference in internal affairs of AMS and delayed by the principles of consultation and consensus. Nevertheless, the ACWC is the specialised body dealing specifically with the rights of women and children. The Work Plan of the

ACWC (2012-2016) contains specific thematic areas and activities which include the promotion and the protection of children, namely:

- Elimination of violence against women and children which includes the review of legislation and mechanisms relating to violence against women (VAW) and violence against children (VAC), the compilation of ASEAN best practices in eliminating VAW and VAC, and the development of guidelines for a non-violent approach to child rearing and caring in different settings;
- The rights of children to participate in all affairs that affect them;
- Review existing practices on treatment of victims of trafficking (i.e., rescue, recovery, repatriation, rehabilitation, reintegration, referral system and assistance to victims of trafficking in women and children among origin, transit and receiving countries);
- The Work Plan also includes the area of child protection systems which covers comprehensive and integrative approaches for children in need of special protection. This expands to cover victims of abuse and neglect; trafficked children; child labourers; children affected by statelessness; undocumented migrant children; children affected by HIV/AIDS, natural disaster and conflicts; and children in the juvenile justice system/children in conflict with the law.<sup>255</sup> Two activities were identified to implement these child protection systems, namely: “setting performance standard in integrative child protection system led by Indonesia and develop standard for quality early childhood and quality education with Malaysia as the lead country.”

It is to be observed that the activities identified by the ACWC seem not to be commensurate with the demands of the protection and promotion of the rights of children or with the exigencies of the situation that children in need of special protection face. In addition, although the Work Plan attempts to deal with children in need of special protection, some particular groups of children, in this case UASC, were not included.

Apart from ASEAN sub-regional based standards and mechanisms already available at the ASEAN level, it is important to add that at the wider Asia-Pacific level, there is a framework which could possibly be used to address the issue of UASC: the Bali Process.

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime commemorated the 10<sup>th</sup> anniversary of its establishment in 2012. It was in February 2002 that the First Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime was held in Bali. As of June 2013, 45 states and territories in the Asia-Pacific region are members of the Bali Process including all ASEAN Member States, with 18 countries outside the region becoming “Other Participating Countries (and Agencies).” UNHCR, IOM and the United Nations Office on Drugs and Crime (UNODC) are considered member agencies. The Bali Process was initiated due to the common concerns of irregular migration in the region, especially people smugglings and trafficking in human persons, and the need for increased regional cooperation on the issues.

The core objectives of the Bali Process are:<sup>256</sup>

- the development of more effective information and intelligence sharing;

<sup>255</sup> ASEAN, ACWC Work Plan 2012-2016 and Rules of Procedures, ASEAN Secretariat, Jakarta, 2012.

<sup>256</sup> The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, *About the Bali Process*, accessed on 4 June 2013 from: <http://www.baliprocess.net/about-the-bali-process>

- improved cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks;
- enhanced cooperation on border and visa systems to detect and prevent illegal movements;
- increased public awareness in order to discourage these activities and warn those susceptible;
- enhanced effectiveness of return as a strategy to deter people smuggling and trafficking through conclusion of appropriate arrangements;
- cooperation in verifying the identity and nationality of illegal migrants and trafficking victims;
- the enactment of national legislation to criminalise people smuggling and trafficking in persons;
- provision of appropriate protection and assistance to the victims of trafficking, particularly women and children;
- enhanced focus on tackling the root causes of illegal migration, including by increasing opportunities for legal migration between states;
- assisting countries to adopt best practices in asylum management, in accordance with the principles of the Refugees Convention; and
- advancing the implementation of an inclusive non-binding regional cooperation framework under which interested parties can cooperate more effectively to reduce irregular movement through the region.

The Bali Process is purely a State-led mechanism based on voluntary pledges and is non-binding. As a structure, it has the Steering Group co-chaired by Australia and Indonesia with four other countries and agencies, namely New Zealand, Thailand, IOM, and UNHCR. The Ad Hoc Group (AHG) was set up in 2009 to address situations on a case-by case basis upon the request of the most affected countries, and to report the developments to the wider membership of the Bali Process as appropriate.<sup>257</sup>

Until 2009, the Bali Process focused mainly on transnational crime (including people smuggling and trafficking in persons). In 2009, concrete progress was made by the Bali Process due to the wave of refugees from Afghanistan and Sri Lanka, as well as members of the Rohingya population, which became a “mini-crisis” in the region. The persistent efforts of UNHCR bore some fruit as, since 2009, the protection of refugees has been included in the agenda of the Bali Process.<sup>258</sup>

The “mini crisis” in Southeast Asia led the Bali Process to find “regional responses to current situations concerning the irregular movement of people in the Asia-Pacific region.”<sup>259</sup> The AHG in its second meeting held in June 2010 agreed to “a proposal for the UNHCR to host a workshop on regional cooperation on refugees and irregular movement.”<sup>260</sup> It is during the workshop organised in Manila in November 2010 that UNHCR presented a proposal called “Regional Cooperation Framework” containing “a set of common understandings” for dealing with irregular movement and asylum seekers in a protection sensitive manner.”<sup>261</sup> These developments had a positive effect in

257 The Bali Process, *Ad Hoc Group*, accessed on 4 June 2013 from: <http://www.baliprocess.net/ad-hoc-group>

258 Savitri Taylor, *Regional Cooperation and the Malaysian Solution*, Inside Story, accessed on 4 June 2013 from: <http://inside.org.au>

259 Ibid.

260 Ibid.

261 Ibid.

the region in the sense that country members of the Bali Process recognized that the issues of irregular migration require regional and comprehensive solutions and that the issues of refugee protection present a common concern of the region.

The Regional Cooperation Framework (RCF) recommended by AHG senior officials was finally endorsed by the Bali Process Ministers in their 4<sup>th</sup> Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime held in Bali in March 2011.

It is important to note that although the RCF was adopted with an expanded agenda and activities, the arrangements as agreed upon by the Ministers emphasize the control of borders and migration managements. Although human life and dignity are to be observed, there is no guarantee that members will enshrine these concepts, especially when it comes to irregular migrants and asylum seekers as most of the members and participants of the Bali Process have not ratified the 1951 UN Convention Relating to the Status of Refugees or its Protocol. Moreover, future activities do not seem to be concrete and most are subjected to further negotiations and depend on agreements to be made either bilaterally or multilaterally. It is also important to note that the RCF is not a binding document. Its implementation depends on the political will of members. However, the establishment of the Regional Coordination Office based in Bangkok and co-managed by Australia and Indonesia is a step towards a more concrete implementation of the RCF. The research project on “Mapping and Analysing the Protection Situation of Unaccompanied and Separated Children” is one of the research projects associated with the work plan.

Even with the number of international, regional and national frameworks in place, one cannot deny that within the international community, emigration is regarded as a right but immigration is seen as a matter of national sovereignty/security.

There is an imbalance in power when individual security is locked into an unbreakable paradigm in which it is partly dependent on and partly threatened by the state. This imbalance allows for manipulation by the state. Asylum seekers and refugees who move irregularly are not only cast out of their own state, but are vulnerable to state whims because they are perceived as secondary to citizen and national interests.



## CHAPTER 5

# CONCLUSIONS-EMERGING ISSUES, CHALLENGES AND RECOMMENDATIONS

Any attempt to address the situation of UASC in the region should start with the premise that the international definition of UASC has not been adopted by the three countries studied. In examining the living conditions of different groups of children who fall under this category (child migrants, refugees, asylum seekers, trafficked children, etc.), the research recognises that the lack of a legal definition significantly hampers UASC's protection, leaving them vulnerable to a number of violations of their rights. Across the different contexts analysed, the country reports exposed similar findings and identified comparable shortcomings which require urgent action:

- Although there is a lack of estimations and data on the different groups of UASC, UNHCR has reported an increase in the number of refugees and asylum seekers, including those who are unregistered. Coupled with the significant migration flows in the region (with Indonesia being purely a net out-migration country and Thailand and Malaysia being both recipient and source nations for migrant workers), this scenario suggests that there is a growing presence of UASC children in need of protection.
- Not all international legal instruments that afford protection to UASC have been ratified. It is of particular concern that none of the three countries are Parties to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol. This implies that the legal status for refugees, including that of asylum seeking and refugee UASC, remains undefined and unclear.
- In the absence of an agreed upon definition of refugees and UASC, these children are generally treated as “illegal migrants” and placed within detention centres, usually not segregated from adults and in appalling living conditions. There is no recognition that children are particularly vulnerable and therefore need special protection.
- All three countries examined fall short of international standards for the protection of UASC. There are no institutionalized mechanisms for prompt and child-sensitive identification and registration of UASC, including child trafficking victims, nor is there an efficient guardianship system available for them (with the exception of Thailand where the right to have a guardian exists, at least on paper). Besides being accommodated in facilities that are not suitable to meet their needs, UASC children have very limited access to quality and specialized medical care and do not enjoy equal access to appropriate education and vocational training. They are not allowed to be employed as other children are and are often victims of discrimination with little or no opportunity for redress. The implementation of durable solutions in accordance with international requirements is also constrained by a number of challenges and, as a result, children are left languishing in detention centres for long periods of time.

- There is insufficient coordination and cooperation between the various actors dealing with UASC and their roles and responsibilities remain unclear. The limited coordination may be the result not only of shortcomings or contradictions in the regulatory and institutional frameworks (e.g. absence of protocols), but also of competing and contradicting agendas, work ethics and frames of reference.
- The protection of cross border UASC has not been prioritized in the political agenda of countries in the region and there is very limited awareness of the rights to which UASC are entitled, especially among government officials. A consistent lack of specialized training for care staff, police, immigration officers, judges and other actors who come into contact with UASC has also been reported in all three countries.

### **UASC Regional Recommendations:**

#### **General Principles and Approaches:**

- Countries in the region should foster a genuine collaborative approach that actively seeks and sustains the involvement of civil society groups, victim support agencies, international organisations and vulnerable communities, in the design, implementation and monitoring of policies and programmes concerning UASC.
- Efforts must be made to strengthen the capacity of relevant stakeholders across the region to implement coordinated actions and ensure they and their work continues to enjoy strong support from the highest levels of government. Proposed capacity building activities under the auspices of the Bali Process Regional Support Office could be implemented by either AICHR and/or ACWC in partnership with UNHCR and IOM and should include a component on child protection and, in particular, identifying and addressing the needs of UASC.
- Cooperation and collaboration among all organisations concerned is critical for the care and protection of UASC. It is important that all actions be coordinated with the relevant government authorities. Dialogue and coordination mechanisms need to start as soon as an UASC is detected and identified, and be maintained throughout the process of determining the steps that should be taken to provide necessary protection in accordance with the best interests of the child. For this reason, it is recommended that a government agency be assigned responsibility for the protection of UASC and facilitation of coordination/cooperation with other agencies.
- Regional level cooperation between governmental and non-governmental sectors should be based on a clear delineation of roles and responsibilities.
- All relevant ministries and government bodies (including judicial, police, migration, asylum, and social service authorities, Ministry of Social Affairs, Ministry of Home Affairs and Ministry of Foreign Affairs) involved in the protection of UASC should adopt policies and procedures that promote information-sharing and networking between agencies, states and individuals working with UASC.
- Cross-border cooperation of law enforcement officials should be strengthened to increase the flow of information across borders. Clear guidelines should be established for investigations of child trafficking cases and to ensure that child victims are treated as children and victims in need of protection, and not as criminals.
- States should strive to regularise the status of their migrant populations and improve working conditions and protection mechanisms through international or bilateral negotiations and agreements.

- National governments should focus on designing and implementing co-development strategies between countries within particular migration routes. Policies and legal frameworks should focus primarily on reducing social, economic, educational, and health inequalities between countries while maximizing migration's developmental potential for both receiving and sending countries.
- The underlying factors causing UASC to cross borders to flee persecution and seek asylum in neighbouring countries and the consequences of this migration should be recognised and addressed by countries within the region. Particular care should be taken to address the situation of Rohingya refugees who have no access to citizenship in Myanmar and whose refugee status is not recognised by the authorities in Thailand, Malaysia or Indonesia.

### Identifying/Registering/Documenting UASC

- There should be coordination on a (ASEAN) regional level between Immigration, other government agencies, UN agencies, and international and national NGOs in order to create standardized regional guidelines and mechanisms for identification, registration and documentation of UASC. ACWC would be the best partner for the Bali Process for such a regional implementing agency.
- There should be agreed upon baseline, minimum standards regionally on how to perform initial assessments of UASC's situations. These assessments should be conducted jointly by two or more agencies, as inter-agency cooperation at the beginning of the initial assessment paves the way for a strong coordinated response later on. In cases where joint assessments are not possible, findings should be shared between concerned agencies.
- There should also be agreed upon similar minimum standards regionally on the steps to be taken after the identification of UASC, such as the adoption of a comprehensive and systematic approach to the registration and documentation of UASC, as well as referrals to relevant agencies.
- Emphasis should be placed on cross-border collaboration to train border officials to properly identify and interview UASC, especially UASC asylum seeking and trafficking victims. Cross-border cooperation of law enforcement officials should be strengthened, for example by establishing coordinating units with a mandate to issue clear guidelines for child centred investigations of child trafficking cases. The systematic disincentives which make UASC who are victims of trafficking hesitant to communicate with authorities, such as law enforcement corruption and fear of legal consequences from authorities or traffickers, should be recognised and addressed.

### Family Tracing:

- In situations where tracing activities take place among a number of countries, there should be close coordination, cooperation and joint planning and centralisation of information between the governments, ICRC, UNHCR, UNICEF and other implementing agencies in all countries concerned.
- All those engaged in tracing should use the same systematic approach, with standardised forms and mutually compatible systems that, at a minimum, should promote and utilise the principles of the right to privacy and confidentiality and the best interests of the child. This will facilitate cooperation and information-sharing (particularly across borders) and prevent duplication of activities.

### Guardianship, Care and Accommodation:

- A region-wide harmonised approach should be in place on basic minimum standards of support for UASC in response to their specific needs and protection concerns. This includes: community-based shelter (not in a detention centre), food, health (access to free and equal health care), legal advice (guaranteed for those UASC in legal proceedings or those facing deportation), education (free access) and care and protection through guardianship arrangements.
- A region-wide harmonised approach should be in place to ensure that UASC will not be placed in detention centres.
- Provisions should be enacted to guarantee that a suitably qualified guardian or adviser is appointed to UASC as soon as they are identified as such. All necessary regulatory means should be taken to introduce a review mechanism to monitor the quality of the exercise of guardianship responsibilities to ensure the best interests of the child are being represented and to prevent abuse.

### Repatriation and Reintegration:

- Bilateral/Multilateral agreements and/or Memoranda of Understanding should be established to facilitate a comprehensive and uniform system of repatriation and reintegration of child trafficking victims, if it is in the best interests of the child. There should be regional cooperation ensuring that repatriated UASC receive the support needed for full long-term recovery and social reintegration.
- All relevant stakeholders should collaborate to develop consistent/uniform Best Interest Assessments (BiA) and Best Interest Determination (BID) procedures. These BiA and BID assessments should be based on the individual circumstances of each child. The following should be considered when conducting a BiA: living and care arrangements; access to health and medical care, food, water, sanitation, and education; the child's safety, psychosocial wellbeing and protection. Under a BID, the following should be considered: the child's family situation; the situation in his or her country of origin; particular vulnerabilities; safety and the risks he or she is exposed to and his or her protection needs; level of integration in the host country; and the child's mental and physical health, education and socio-economic conditions. It is important to obtain the views of the child on his or her care arrangements and long-term or durable solutions. Training should be given to those responsible for conducting the BID assessments.

### General National Level Recommendations:

- National governments should make it a priority to ratify all relevant international human rights instruments<sup>262</sup> and ensure incorporation into their domestic legislation accordingly. Governments should also lift any reservations they have to relevant international human rights instruments, especially the Convention on the Rights of the Child.

262 (such as the *Protocol Relating to the Status of Refugees*, 1967; *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2000; *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*, 1990; ILO Conventions No. 138 *Concerning Minimum Age for Admission to Employment*, 1973; No. 59 *Concerning Minimum Age for Admission to Employment in Industry*, 1937; and No. 189 *Concerning Decent Work for Domestic Workers*; 2011 *Convention on the Reduction of Statelessness*, 1975).

- In order to ensure comprehensive protection for UASC in each country, governments should identify one stakeholder that is responsible for overseeing, coordinating and prioritising all UASC programming; ensuring a full range of UASC services in border camps including identification, documentation, tracing, BID assessments, monitoring, etc.; coordinating programming with government, NGOs, and community-based organisations; organising and facilitating training for relevant stakeholders; identifying and coordinating responses to gaps in UASC programming and capacity; developing an effective strategy for programme monitoring and evaluation.
- The education of child migrant workers on their rights, their employers' obligations to them and the legal recourses available to child victims of trafficking should be promoted.
- Governments should take significant and concrete steps to improve communication and coordination between government and NGOs/civil society organisations to implement programmes specifically addressing protection for UASC. At the national level, an Interdisciplinary Steering Committee or Working Group could be set up and this could be replicated at the regional level as well.
- National legislation ought to be strengthened to comply with the international minimum standards and good practice principles on guardianship to better protect the rights of UASC.
- In accordance with international standards and in order to ensure the safety and protection of UASC, the practice of placing UASC in detention centres should be eliminated. When detention is used as a last resort, monitoring and evaluation measures/provisions should be implemented to ensure that UASC are separated from adult detainees and are afforded special treatment according to their vulnerabilities. Alternatives to detention should be identified and promoted.
- Legal representation should be guaranteed and provided to UASC, especially those facing legal proceedings or deportation.
- Legal provisions, policies and programmes should be enacted giving effect to the international minimum standards for UASC family tracing, repatriation and reunification.
- Every UASC should be provided with the necessary economic and psycho-social support for full and long-lasting recovery and social reintegration (in line with UNHCR Guidelines on Formal Determination of the Best Interests of the Child).

# ANNEX I: LIST OF PARTICIPANTS FOR THE REGIONAL CONSULTATION ON UASC

## Regional Consultation on Mapping and Analysing the Protection Situation of Unaccompanied and Separated Children in Southeast Asia 14-15 February 2013 at the Sukosol Hotel, Bangkok

No	Name	Position/Organisation
1	Ms. Anisa Farida	Staff of the Directorate of Human Rights and Humanitarian Affairs, Ministry of Foreign Affairs, Indonesia
2	Ms. Ratih Kusuma Astuti	Staff Member of Children with Specialist Needs, Ministry of Social Affairs, Indonesia
3	Ms. Sutarti Soedewo	Consultant / Member of Task Force Team on the Child Conflicting with the Law, Ministry of Women Empowerment and Child Protection, Indonesia
4	Mr. Temmnengnga	Directorate of Human Rights, Ministry of Law and Human Rights, Indonesia
5	Ms. Apong Herlina	Commissioner, Indonesian Commission on Child Protection, Indonesia
6	Ms. Realisa Daratheo Masardi	Centre for Southeast Asian Social Studies (CESASS) Gadjah Mada University, Indonesia
7	Ms. Sazkia Noor Anggraini	University in Yogyakarta, Indonesia
8	Ms. Esti Nuringdyah	Indonesia team
9	Ms. Rarik Oktiviana	Indonesia team
10	Ms. Vivien Chew	Project Consultant / Researcher, Malaysia Child Resources Institute
11	Mr. Hamzah Ishak	Principal Assistant Secretary Division of Research and the National Crisis Management-National Security Council (MKN), Prime Minister's Office, Malaysia
12	Dato' Hj. Suhaimi Mohd. Salleh	Director, Sabah Federal Task Force, National Security Council, Malaysia
13	Prof. Dr. Azizah Kassim	Institute Malaysia and International Studies (IKMAS), Universiti Kebangsaan Malaysia (UKM)
14	Mr. Muhammad Sha'ani bin Abdullah	Commissioner, Head of the Complaint, Inquiry & Monitoring Group, Human Rights Commission of Malaysia (SUHAKAM)
15	Ms. Rosmaini Ahmad	Senior Assistant Director, Children's Welfare, Department of Social Welfare, Malaysia
16	Ms. Jennifer Jayeswari	Clement, Communication and Research Coordinator-Voice of Children, Malaysia
17	Dr. Kamarulzaman Askandar	Research and Education for Peace, Universiti Sains Malaysia (REPUSM)
18	Ms. Ayesah Uy Abubakar	Research and Education for Peace, Universiti Sains Malaysia (REPUSM)
19	Ms. Eleonora Emkic (Leila)	Research and Education for Peace, Universiti Sains Malaysia (REPUSM)

No	Name	Position/Organisation
20	Mr. Che Mohd. Aziz Yaacob	Research and Education for Peace, Universiti Sains Malaysia (REPUSM)
21	Mr. Abdul Fareed Bin Abdul Gafoor	Research and Education for Peace, Universiti Sains Malaysia (REPUSM); VM Mohan, Fareed and Company: Advocates and Solicitors, Accredited Mediators, and Syariah Counsel
22	Ms. Siwaporn Pusuwan	Director, Bansongkhawe Protection and Occupation Development Center, Phitsanulok province, Thailand
23	Ms. Napassawan Dee-Am	Officer, Bansongkhawe Protection and Occupation Development Center, Phitsanulok province, Thailand
24	Ms. Preeda Issachot	Department of Labour Protection and Welfare, Ministry of Labour, Thailand
25	Mr. Thotsapon Jantrapirom (on behalf of Ms. Ramrung Subunsenee, Chief of Prachabodee Operation Center)	Bureau of Anti-Trafficking in Women and Children, (BATWC), Department of Social Development and Welfare, Ministry of Social Development and Human Security, Thailand
26	Ms. Supawadee Muhummud (on behalf of Ms. Ramrung Subunsenee, Chief of Prachabodee Operation Center)	Bureau of Anti-Trafficking in Women and Children, (BATWC), Department of Social Development and Welfare, Ministry of Social Development and Human Security, Thailand
27	Mr. Inpun Ropchana (social development officer)	Bureau of Child Promotion and Protection, Office of Welfare Promotion, Protection and Empowerment of Vulnerable Groups, Ministry of Social Development and Human Security, Thailand
28	Pol. Lt. Col. Watcharaphol Kaniakuntorn	Investigation Division, Immigration Bureau, Royal Thai Police
29	Mrs. Jane Calder	Child Protection Advisor Asia Region, Save the Children
30	Ms. Thachamach Krairit	Health Project Assistant, Save the Children
31	Ms. Vuthaya Charoenpol	Country Program Director, Friends International, Thailand
32	Mr. Tim Tempany	Technical Adviser of Peuan Peuan Program, Thailand
33	Ms. Pusa Srivilas	Regional Officer of East Asia & Pacific, ECPAT International
34	Dr. Sriprapha Petchamesree	Core Researcher and Research Project Director, IHRP-Mahidol University
35	Mr. Mark Capaldi	Co-researcher, ECPAT International
36	Ms. Nussara Meesen	Field researcher-Chaingmai, Thailand
37	Ms. Pinkaew Unkaew	Field researcher-Mae Sot, Thailand
38	Mr. Chatchai Amornlerdwattana	Field researcher-Ranong/Phuket, Thailand
39	Mr. Chollapat Vichean (on behalf of Mr. Sompong Srakaew)	Field researcher-Samut Sakorn, Thailand
40	Ms. Thongpol Buasri	Field researcher-Bangkok
41	Ms. Chanladda Strassle	ECPAT International team

No	Name	Position/Organisation
42	Ms. Sunsanee Sutthisunsanee	Project coordinator
43	Ms. Saksinee Amasiri	IHRP, Mahidol University
44	Mr. Greg Kelly	RSO Co-Manager, Bali Process Regional Support Office
45	Ms. Areti Sianni	Senior Regional Asylum and Migration Policy Officer, UNHCR
46	Mr. Alvin Gonzaga	Senior Protection Officer UNHCR Malaysia
47	Ms. Thulasi Munisamy	Protection Associate UNHCR Malaysia
48	Ma. Victoria Juat	Chief Child Protection, Child Protection Section- United Nations Children's Fund (UNICEF-Thailand)
49	Mr. Steve Hamilton	Deputy Chief of Mission - Indonesia, International Organization for Migration (IOM)-Indonesia
50	Ms. Michiko Ito	Resettlement officer, IOM Thailand
51	Ms. Carolina Tinangon	First Secretary, Indonesia Embassy
52	Ms. Elphie Galland	Rapporteur, ECPAT International
53	Ms. Sarale Hoider	Rapporteur, ECPAT International
54	Ms. Laura Healy	Rapporteur, ECPAT International
55	Ms. Rebecca Rittenhouse	Legal Researcher, ECPAT International
56	Ms. Lina Giellale	Legal Researcher, ECPAT International
57	Dr. Yanuar Sumarlan	Interpreter, IHRP, Mahidol University
58	Ms. Kritsana Pimonsaengsuriya	Interpreter, Independent Consultant
59	Ms. Warunyakorn Fakthong	Interpreter, People's Empowerment Foundation



# ANNEX 2: LIST OF PARTICIPANTS FOR THE ROUNDTABLE CONSULTATION ON UASC

**Roundtable Consultation on the Draft Regional Guidelines on Unaccompanied and Separated Children in Southeast Asia  
20 May 2013 at the Ibis Bangkok Siam Hotel, Bangkok**

No	Name	Position/Organisation
1	Mr. Temmnengnga	Directorate of Human Rights, Ministry of Law and Human Rights, Indonesia
2	Ms. Vivienne Chew	Project Consultant/Researcher, International Detention Coalition, Malaysia
3	Ms. Siwaporn Pusuwan	Director, Bansongkhawe Protection and Occupation Development Center, Phitsanulok province, Thailand
4	Ms. Napassawan Dee-Am	Officer, Bansongkhawe Protection and Occupation Development Center, Phitsanulok province, Thailand
5	Ms. Jananan Wuttithanee	Social Worker, Office of Welfare Promotion, Protection and Empowerment of Vulnerable Groups, Bureau of Child Promotion and Protection, Ministry of Social Development and Human Security
6	Ms. Puricha Inthawong	Director of Protection Unit, Department of Social Development and Welfare, Bureau of Anti-Trafficking in Women and Children (BATWC), Ministry of Social Development and Human Security
7	Ms. Phatriya Jiraporn	Social Worker of Protection Unit, Department of Social Development and Welfare, Bureau of Anti-Trafficking in Women and Children (BATWC), Ministry of Social Development and Human Security
8	Pol. Capt. Dr. Monthida Veeraphan	Investigation Division, Immigration Bureau, Royal Thai Police
9	Mr. Ben Mendoza	Program Director, Catholic Office for Emergency Relief and Refugees (COERR)
10	Mr. Thomas Vargas	Senior Regional Protection Adviser, UNHCR Regional Coordinator's Office
11	Ms. Areti Sianni	Senior Regional Asylum and Migration Policy Officer, UNHCR
12	Ms. Maria Corinna Miguel-Quicho	Senior Protection Officer, UNHCR Thailand
13	Mr. Madhav Raj Belbase	Associate Community Services Officer, UNHCR Indonesia
14	Ms. Thulasi Munisamy	Protection Associate, Children-at-Risk Team, UNHCR Malaysia
15	Mr. Santi Siritheerajesd	Child Protection Officer, Child Protection Section-United Nations Children's Fund (UNICEF Thailand)
16	Ms. Michiko Ito	Resettlement Officer, International Organization for Migration (IOM Thailand)
17	Ms. Sebastian Moretti	Regional RFL and Migration Advisor, International Committee of the Red Cross (ICRC)

No	Name	Position/Organisation
18	Mr. Bebeb AKN Djundjuran	Minister/Deputy Chief of Mission of Embassy of the Republic of Indonesia/RSO Co-Manager (Indonesia), Regional Support Office-the Bali Process (RSO)
19	Ms. Carmen Madrinan	Consultant and child protection/child trafficking expert
20	Ms. Edelweiss Silan	Consultant and child protection/child trafficking expert
21	Ms. Warangkana Mutumol	Thailand Children on the Move and Child Rights Governance Coordinator, Save the Children
22	Ms. Pusa Srivilas	Regional Officer of East Asia & Pacific, ECPAT International
23	Dr. Sriprapha Petcharamesree	Core Researcher and Research Project Director, IHRP-Mahidol University
24	Mr. Mark Capaldi	Co-researcher, ECPAT International
25	Ms. Realisa Darathea Masardi	Indonesia Researcher Team – Centre for Southeast Asian Social Studies (CESASS) Gajah Mada University, Indonesia
26	Ms. Chanladda Strassle	Research Associate, ECPAT International
27	Ms. Rebecca Rittenhouse	Legal Researcher, ECPAT International
28	Ms. Sunsanee Sutthisunsanee	Project Coordinator
29	Ms. Penny Herasati	Counsellor, Embassy of the Republic of Indonesia
30	Ms. Elizabeth Diana Dewi	Third Secretary, Embassy of the Republic of Indonesia
31	Ms. Masako Ueda	Associate Expert/Trafficking in Persons Focus Officer, International Organization for Migration (IOM)
32	Ms. Michelle Kim	Intern, UNHCR
33	Ms. Kritsana Pimonsaengsuriya	Interpreter, Independent Consultant
34	Ms. Warunyakorn Fakhong	Interpreter, People's Empowerment Foundation

## ANNEX 3: ASEAN RATIFICATIONS OF CRC

Country	Ratification/Accession	Reservations
Brunei Darussalam	CRC : 27/12/1995 CRC-OP-SC : 21/11/2006	Art.14,20,21
Cambodia	CRC : 15/10/1992 CRC-OP-SC : 30/5/2002 CRC-OP-AC : 16/7/2004	With Declarations
Indonesia	CRC : 05/09/1990 CRC-OP-SC : 24/9/2012 CRC-OP-AC : 24/9/2012	With Declarations
Lao PDR	CRC : 08/05/1991 CRC-OP-SC : 20/9/2006 CRC-OP-AC : 20/9/2006	Art.5(2)  With Declarations
Malaysia	CRC : 17/02/1995 CRC-OP-SC : 12/4/2012	Art.1,2,7,13,14,15,28,37 Art.2,3 (Declarations)
Myanmar	CRC : 17/02/1995 CRC-OP-SC : 16/1/2012	
Philippines	CRC : 21/08/1990 CRC-OP-SC : 28/5/2012 CRC-OP-AC : 26/8/2003	With Declarations
Singapore	CRC : 05/10/1995  CRC-OP-AC : 11/12/2008	Art.7,9,10,12,22,28 and 32 With Declarations Art.12-17,19,39 (Declarations)
Thailand	CRC : 27/03/1992 CRC-OP-SC : 17/1/2006 CRC-OP-AC : 27/2/2006 CRC-OP-CP : 25/9/2012	Art.22  With Declarations
Timor Leste	CRC : 16/04/2003 CRC-OP-SC : 16/4/2003 CRC-OP-AC : 2/7/2004	With Declarations
Vietnam	CRC : 08/02/1990 CRC-OP-SC : 20/12/2001 CRC-OP-AC : 20/12/2001	Reservations withdrawn on 26/3/2009 With Declarations

**Source:** United Nations Treaty Collection:

[http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-11&chapter=4&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en) Accessed on 12 May 2013

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en#EndDec) Accessed on 10 June 2013

## ANNEX 4: SOUTHEAST ASIAN COUNTRY RESERVATIONS TO CRC

**1. Brunei Darussalam** <sup>21,22,23</sup> *Reservation:* “[The Government of Brunei Darussalam] expresses its reservations on the provisions of the said Convention which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State, religion, and without prejudice to the generality of the said reservations, in particular expresses its reservation on articles 14, 20 and 21 of the Convention.”

**2. Malaysia** <sup>37,38</sup> *Reservation:* “The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1 (a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.”

*Declaration :* “With respect to article 28 paragraph 1 (a) of the Convention, the Government of Malaysia wishes to declare that with the amendment to the Education Act 1996 in the year 2002, primary education in Malaysia is made compulsory. In addition, the Government of Malaysia provides monetary aids and other forms of assistance to those who are eligible.”

**3. Singapore** <sup>23, 50</sup> *Declarations* “(1) The Republic of Singapore considers that a child’s rights as defined in the Convention, in particular the rights defined in article 12 to 17, shall in accordance with articles 3 and 5 be exercised with respect for the authority of parents, schools and other persons who are entrusted with the care of the child and in the best interests of the child and in accordance with the customs, values and religions of Singapore’s multi-racial and multi-religious society regarding the place of the child within and outside the family. (2) The Republic of Singapore considers that articles 19 and 37 of the Convention do not prohibit - (a) the application of any prevailing measures prescribed by law for maintaining law and order in the Republic of Singapore; (b) measures and restrictions which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedoms of others; or (c) the judicious application of corporal punishment in the best interest of the child.

*Reservations:* (3) The Constitution and the laws of the Republic of Singapore provide adequate protection and fundamental rights and liberties in the best interests of the child. The accession to the Convention by the Republic of Singapore does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution. (4) Singapore is geographically one of the smallest independent countries in the world and one of the most densely populated. The Republic of Singapore accordingly reserves the right to apply such legislation and conditions concerning the entry into, stay in and departure from the Republic of Singapore of those who do not or who no longer have the right under the laws of the Republic of Singapore, to enter and remain in the Republic of Singapore, and to the acquisition and possession of citizenship, as it may deem necessary from time to time and in accordance with the laws of the Republic of Singapore. (5) The employment legislation of the Republic of Singapore prohibits the employment of children below 12 years old and gives special protection to working children between the ages of 12 years and below the age of 16 years. The Republic of

Singapore reserves the right to apply article 32 subject to such employment legislation. (6) With respect to article 28.1 (a), the Republic of Singapore-(a) does not consider itself bound by the requirement to make primary education compulsory because such a measure is unnecessary in our social context where in practice virtually all children attend primary school; and (b) reserves the right to provide primary education free only to children who are citizens of Singapore.”

4. **Thailand** <sup>18</sup> *Reservation*: “The application of articles 22 of the Convention on the Rights of the Child shall be subject to the national laws, regulations and prevailing practices in Thailand.”

# ANNEX 5: SOUTHEAST ASIAN COUNTRY RATIFICATIONS OF ILO CONVENTIONS

**Table: Ratifications of ILO Conventions**

SEA Countries	C138 - Minimum Age Convention, 1973	C182 - Worst Forms of Child Labour Convention, 1999
1. Brunei	17 Jun 2011 <i>Minimum age specified: 16 years</i>	09 Jun 2008
2. Cambodia	23 Aug 1999 <i>Minimum age specified: 14 years</i>	14 Mar 2006
3. Indonesia	07 Jun 1999 <i>Minimum age specified: 15 years</i>	28 Mar 2000
4. Lao PDR	13 Jun 2005 <i>Minimum age specified: 14 years</i>	13 Jun 2005
5. Malaysia	09 Sep 1997 <i>Minimum age specified: 15 years</i>	10 Nov 2000
6. Myanmar**	--	--
7. Philippines	04 Jun 1998 <i>Minimum age specified: 15 years</i>	28 Nov 2000
8. Singapore	07 Nov 2005 <i>Minimum age specified: 15 years</i>	14 June 2001
9. Thailand	11 May 2004 <i>Minimum age specified: 15 years. Pursuant to Article 5, the provisions of the Convention shall be applicable to the following branches of economic activity: mining and quarrying; manufacturing; construction; electricity; gas and water; sanitary services; transport; storage service and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, with the exception of family and small-scale holdings producing for local consumption and not regularly employing hired workers.</i>	16 Feb 2001
10. Timor Leste	--	16 June 2009
11. Vietnam	24 Jun 2003 <i>Minimum age specified: 15 years</i>	19 Dec 2000

Source: ILO Convention Ratifications by country <http://www.ilo.org/dyn/normlex/en/f?p=1000:11001:0::NO>: Accessed on 12 May 2013





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