

Paper for Seminar on Irregular Migrants, Refugees or Victims of Human-Trafficking?: Analysis, Advocacy and Assistance between Categorizations and (Self) Identifications (June 2017)

Current immigration detention practices and alternatives for child asylum seekers and refugees in Malaysia, Thailand and Indonesia

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This short paper comprises a summary of the findings of recent research conducted by Save the Children and the Asia Pacific Refugee Rights Network (APRRN) in relation to the immigration detention of child refugees and asylum seekers in Malaysia, Indonesia and Thailand, together with an analysis of categorizations under international and domestic law which underpin their prolonged and sometimes indefinite detention. It proposes a recategorization that is necessary to underpin the development of solutions which would end this practice and ensure that the rights of child migrants are respected and upheld.

I. Introduction

In September 2016, global leaders condemned the detention of children for immigration purposes and pledged, through the UN General Assembly's adoption of the New York Declaration, to work towards ending this harmful practice.¹

Human rights experts have reached a consensus that detention of children for immigration purposes violates the rights of children under international law and is never in the best interests of the child.² It is a practice that offends the sacred and shared duty of all people and institutions to nurture and protect children.

However the immigration detention of undocumented migrant children (including asylum seekers and refugees) is still common in many countries around the world.³ The Asia and Pacific region is no exception with key transit, host and destination countries for asylum seekers and refugees such as Indonesia, Thailand, Malaysia, Australia and Nauru having each engaged in the practice of detaining children for immigration-related purposes in recent years.

Recent research published by Save the Children and APRRN⁴ has presented current qualitative and quantitative data in relation to the scale and nature of immigration detention of child asylum seekers and

¹ See Article 33, New York Declaration UN General Assembly, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1,

(<http://www.unrefworldun.org/docid/57ceb74a4.html> ga/search/view_doc.asp?symbol=A/71/L.1)

² UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, p 2; see also the observations of a number of UN Special Rapporteurs in Defense for Children International, *Children Deprived of Liberty: A Global Perspective* (Brief Report: Side Event to the 28th Session of the Human Rights Council), 10 March 2015, p 6; Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion – The rights of all children in the context of international migration*, p32; Inter-Agency Working Group to End Child Immigration Detention (IAWG), *Summary of standards relating to child immigration detention*, June 2016; IAWG, *Ending Child Immigration Detention*, p 9

³ See International Detention Coalition, *There are Alternatives (Revised Edition)*, 2015

⁴ See Save the Children, Asia Pacific Refugee Rights Network, *Unlocking Childhood: Current immigration detention practices and alternatives for child asylum seekers and refugees in Asia and the Pacific*, May 2017 (available at <http://resourcecentre.savethechildren.net/>)

refugees in these five countries. The research draws on desk research, extensive consultations with stakeholders in South East Asia (including some affected children and their communities) and field visits.

2. Labels and classifications

The South East Asian-based research is focused on children who are ‘persons of interest’ registered with the United Nations High Commissioner for Refugees (UNHCR). The rationale for focusing on this group, rather than undocumented child migrants more broadly, is underpinned by the understanding that the classification of a child as an asylum seeker or refugee has distinct consequences as a matter of international law and as a matter of domestic immigration practices. This is the case notwithstanding that in three of the five countries investigated (namely Malaysia, Thailand and Indonesia) the relevant states have not ratified the Refugee Convention nor recognised asylum seekers or refugees as rights-holders or as having distinct legal status under domestic law.

The current governments of these three South East Asian countries profess respect for the international customary law norm of *non-refoulement*,⁵ and uphold the principle in practice (to greater or lesser extents) by not routinely deporting individuals who are ‘persons of concern’ to the UNHCR.⁶ However, undocumented asylum seekers and refugees in these countries are regularly detained as ‘illegal’ or ‘unauthorised’ migrants. The combination of the *non-refoulement* obligation and the practice of detaining irregular migrants owing to their immigration status (or lack thereof) results in asylum seeker and refugees being detained, sometimes for prolonged or indefinite periods⁷ pending a temporary or permanent solution to the predicament created by their lack of legal migration status in the state. By contrast, undocumented migrants (including children) who do not are not classified as ‘asylum seekers or refugees’ are typically released from detention within much shorter timeframes (namely when they are deported to their countries of origin).⁸

This group is also treated in a way which is distinct from those who are classified as ‘victims of trafficking’ – a category which has been recognized in the domestic laws of Thailand, Malaysia and Indonesia.⁹ While technically the categories of ‘asylum seeker or refugee’ overlap with the category ‘victims of trafficking’, those who are classified only as an ‘asylum seeker or refugee’ cannot access the legal rights and protections that are available (at least according to law, if not practice) to victims of trafficking. Conversely, those who are classified as victims of trafficking but not registered with the UNHCR as an ‘asylum seeker’ or ‘refugee’ may not in practice be able to avail themselves of the protection afforded by the *non-refoulement* obligation.

In addition, and underpinning all of the above, is the consideration that in Malaysia, Indonesia and Thailand, the mandate (albeit informal) and mechanisms for bestowing the ‘asylum seeker or refugee’ classification currently reside exclusively with a non-state actor, namely the UNHCR. Individuals who are not registered with UNHCR as ‘asylum seekers or refugees’ do not, in practice, have access to the protection that comes from the obligation of *non-refoulement*.

⁵ This is the principle that a country may not return a person to another country where they may face persecution, torture or other forms of serious harm. This principle is enshrined in customary international law as well as in treaty law including under article 33 of the Refugee Convention and article 3 of the Convention Against Torture.

⁶ See above n 4, p 28-29, 32, 34-35, 41

⁷ In the five countries this report examines there are other administrative practices linked with immigration control which also impose serious limits upon the freedom of movement of asylum seekers, refugees and other migrants including: interception sites, police holding cells, guarded hotels; refugee camps which do not permit residents to leave, or place serious restrictions on exit and re-entry; government shelters which do not permit residents to leave, or place serious restrictions on exit and re-entry; and camps or residential facilities in highly isolated or remote locations including islands.

⁸ ‘Those from countries bordering Thailand tend to spend a few days or weeks in detention before they are taken to the border to be deported or otherwise released. Nationals from countries that do not border Thailand, however, can spend years in indefinite detention, being essentially held until they can pay for their own removal.’ Human Rights Watch, *Two Years with No Moon*, September 2014, p 8

⁹ See Law 21/2007 on the Eradication of the Criminal Act of Trafficking in Persons (Indonesia); Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 67) (Malaysia); Anti-Trafficking Persons Act B.E 2551 (2008) (Thailand)

3. The scale of child immigration detention in Malaysia, Thailand and Indonesia

During 2016 more than 2,290 asylum seeker and refugee children were detained in officially-designated 'immigration detention' facilities in Indonesia, Thailand and Malaysia. These statics do not include those held in other forms of detention or detention-like conditions or have faced serious restrictions on their freedom of movement due to their migration status, including those confined to closed refugee camps, closed shelters, police holding cells and isolated or remote locations.

Number of child asylum seekers and refugee children in immigration detention facilities¹⁰

	31 Dec 2014	Full Year 2014	31 Dec 2015	Full year 2015	31 Dec 2016	Full year 2016
Indonesia	1,349	1,795	1,056	1,904	975	1,602
Malaysia	425	1,334	418	1,433	87	647
Thailand	DNA	DNA	49 ¹¹	DNA but 49 in December	43 ¹²	DNA but 43 in December
Total	More than 1,774	More than 3,129	1,523	At least 3,386	1,105	At least 2,292

DNA = Data Not Available for relevant period

4. The human impact and economic cost of immigration detention

In Malaysia, Indonesia and Thailand, asylum seeker and refugee children are detained for indefinite and sometimes lengthy periods without judicial oversight. They are held 24 hours a day, seven days a week with overcrowding, inadequate hygiene and lack of access to adequate and timely medical treatment leading to a number of reports of children in detention dying from treatable illnesses in recent years.¹³ Children are detained in cells housing dozens of unrelated adults, frequently separated from their family members along age and gender lines, with cramped and substandard sleeping facilities, no privacy from unrelated adults, little or no educational opportunities, little or no recreational space or activities, extremely limited access to healthcare and are at risk of sexual and other forms of violence and exploitation.

The adverse impact of immigration detention on the physical and mental wellbeing of children is well documented – mental illness, poor physical health and susceptibility to illness, developmental impairment, self-harm, exposure to violence and even death are all sadly predictable outcomes. In addition, immigration

¹⁰ The data in this table is compiled from that set out in part 3.2 and comes from a number of different sources. In some cases, the collection methods may vary between years and between jurisdictions, These numbers are provided to give a general indication of the scale of child detention rather than to provide a precise quantification of every instance of detention.

¹¹ With 38 children on bail

¹² With 113 children on bail

¹³ See Mamatjan Juma, 'Death of Boy in Thailand Highlights Plight of Hundreds of Uyghur Detainees', *Radio Free Asia*, 29 April 2015 (<http://www.rfa.org/english/news/uyghur/death-04292015161150.html>) (accessed 7 April 2017); *Equal Rights Trust and Institute of Human Rights and Peace Studies, Mahidol University, Equal Only in Name: The Human Rights of Stateless Rohingya in Thailand* (October 2014), p45. During our consultations we heard of children who had died in Malaysian detention centres, in circumstances consistent with that described in relation in this recent news article: A Ananthalakshmi, 'Exclusive: More than 100 die in Malaysian immigration detention camps in two years', *Reuters*, 30 March 2017 (<http://www.reuters.com/article/us-malaysia-detention-deaths-idUSKBN1710GR>) (accessed 7 April 2017) Families are generally reluctant to report the deaths of children to the media for fear of reprisals against their communities.

detention can prolong the separation of children from their family members and often prevents them from accessing basic services including education, adequate healthcare and recreation.

The practice of detention affects not just those who are detained, but also the larger community of undocumented asylum seekers and refugees who fear arrest and detention, many of whom live in a form of self-regulated house arrest, afraid to leave their homes or travel beyond their immediate neighbourhoods lest they encounter authorities and find themselves arrested and detained. This culture of fear can seriously limit the access of children to vital services and opportunities such as education, healthcare and recreation. It can also prevent them from reporting instances of abuse or other crimes against them to authorities.

In addition to the human cost of this practice, immigration detention is also very costly to governments when compared with more humane and child-appropriate alternatives. The International Detention Coalition estimates that such alternatives may cost up to 80 percent less to run than detention facilities¹⁴ and have numerous other benefits which are salient to national policy agendas.

Positive developments and ongoing challenges

Encouragingly, our findings suggest that authorities in each of the five countries are responding to calls to end the practice of child immigration detention to greater and lesser degrees. Our research indicates:

- A **reduction in the number of children being detained** in immigration detention facilities in each country from 2015 to 2016, with reductions in Malaysia being the most numerically significant overall.¹⁵ Access to resettlement opportunities for those in South East Asia (mostly to the United States)¹⁶ and changes in underlying population demographics may account for some of this reduction, but the availability of alternatives to detention (where relevant) is also playing a significant role.
- The ongoing **emergence of alternative policies and practices** which aim to release or divert children away from immigration detention including community-based residence (with accompanying case management) and foster care for unaccompanied or separated children
- **Developing initiatives and announcements** in each jurisdiction which indicate a general desire of relevant governments to work towards ending this practice

Of particular interest, we note the development of small scale initiatives in Malaysia and Indonesia by which local NGOs are supporting unaccompanied and separated child asylum seekers and refugees to live in community settings, rather than in detention or institutional care, with comprehensive case management and other support services. With sufficient support from government and international organisations these initiatives could be expanded and adopted elsewhere (including in Thailand) to support a greater number of child asylum seekers and refugees, including those accompanied by family members.

Notwithstanding these positive developments, without national level legislative or policy reform in each country, efforts to eliminate the practice of child immigration detention may not succeed. In particular:

- The dynamics of the global refugee crisis show **refugee numbers climbing while resettlement opportunities are stagnating** or, in the case of the United States, dramatically shrinking.¹⁷ Bearing in mind that over half the world's 21 million refugees are children,¹⁸ this dynamic may result in the number of

¹⁴ International Detention Coalition, *There are Alternatives (Revised Edition)*, 2015, p 1, 11-12

¹⁵ This conclusion is based on the data relating to the number of children detained at 31 December 2016, compared with 31 December 2015. It is also supported by the full year detention data for each country other than Thailand, for which full year data was not available (see above n 4, p 1)

¹⁶ See UNHCR, *Projected Global Resettlement Needs 2017*, p 35

¹⁷ Stephanie Anderson & Henry Belot. 'Donald Trump slams 'dumb' refugee deal with Australia after 'worst' phone call', ABC News, 2 February 2017 (<http://www.abc.net.au/news/2017-02-02/trump-slams-dumb-refugee-deal/8235820>) (accessed 7 April 2017); Ray Sanchez & Madison Park 'What to know about Trump's visa and refugee restrictions', CNN Politics, 30 January 2017 (<http://edition.cnn.com/2017/01/28/politics/trump-immigration-refugees-visa-policy/>) (accessed 7 April 2017)

¹⁸ See UNHCR, *Children* (<http://www.unhcr.org/en-au/children-49c3646c1e8.html>) (accessed 7 April 2017)

children detained beginning to climb again in South East Asia, a region that has had significant access to resettlement opportunities in the United States in recent years¹⁹

- **A sudden influx of asylum seekers in any of the countries included in this research could see the numbers increase** as they did in 2015 in Malaysia²⁰
- Current **initiatives aimed at diverting or removing children from immigration detention are limited in scale, often ad hoc and discretionary** and will not necessarily continue to reduce the instances of child immigration detention
- Many current government-initiated **alternative programs are not underpinned by a conceptual framework** that supports the rights and wellbeing of children more generally and, while often well-meaning, can offer a ‘hit and miss’ response to the needs of children

5. Overview of country findings

The following is an overview of some of the key developments in each of the three South East Asian states which are having a positive impact on reducing the detention of child asylum seekers and refugees, or which have the potential to have a positive impact in the future. It also identifies ongoing concerns and challenges which need to be overcome in order to achieve an end to this practice in a manner consistent with the rights of children.

Positive Developments	Ongoing Concerns
<p>Thailand’s Cabinet of Ministers approved a State Council proposal to implement a new screening process to identify undocumented migrants with protection needs</p> <p>The Thai government implicitly reinforced that it does not intend to detain ‘children, women and sick people’ in its response to the Human Rights Council in 2016, though the mechanism it cited (bail) is currently largely suspended. In early 2017 the government also reassured the Human Rights Committee that Thailand has a ‘no child detention policy’</p> <p>A recent Thai court decision has seen a refugee child being brought within Thailand’s child protection system and avoiding immigration detention</p> <p>Rollout of enhanced UNHCR refugee card (with photograph) and digital verification application, but without all of the features of the UNHCR Malaysia card which enable authorities to self-verify the validity of the card and the details of the person it pertains to</p> <p>Reduced waiting times for RSD decision after commencement of a UNHCR initiative to clear a large backlog of claims</p>	<p>Child asylum seekers and refugees continue to be detained in sub-standard and dangerous conditions</p> <p>Currently lacking a national legal or policy framework for asylum seekers and refugees</p> <p>Lack of legal status renders individuals vulnerable to arrest and detention and inclined to live in a way that decreases their visibility in their host community</p> <p>Waiting times for RSD decisions are still likely to be significant. Even if refugee status is conferred, this provides limited additional protection</p> <p>Currently lacking of formal mechanisms to secure the release of children from immigration detention (even where they are registered with the UNHCR), with informal methods requiring the separation of children from their parents (who must remain in detention)</p> <p>Bail program currently suspended with only very few individuals being able to access bail since its suspension following concerted and individualised advocacy by UNHCR and NGOs</p> <p>Lack of legal framework for legal guardianship and foster care of UASC</p>

¹⁹ See UNHCR, *UNHCR Projected Global Resettlement Needs 2017* (13-15 June 2016), p 14

²⁰ During our consultations, stakeholders typically attributed the 2015 increase to the Andaman Sea Crisis, which resulted in more than 1,000 migrants being detained in Malaysia (See Save the Children, *The Journey of Refugee and Asylum-Seeking Children Across the Andaman Sea*, 2016, p 2 (available at <https://resourcecentre.savethechildren.net/library/journey-refugee-and-asylum-seeking-children-across-andaman-sea>))

<p>Some good practices developing in relation to victims of trafficking, which may be expanded upon (including temporary residence cards carrying work rights and the operation of at least one family shelter)</p>	<p>Lack of consistent use of reliable age-assessment practices by immigration authorities which may result in children being inadvertently detained as adults</p> <p>Child asylum seekers and refugees (including those in immigration detention) are generally excluded from national child protection laws and services</p>
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Malaysia

Positive Developments	Ongoing Concerns
<p>New UNHCR refugee ID card and related digital platforms are commanding greater respect and offering greater protection from arrest and detention</p> <p>Current UNHCR processes prioritise the registration of the most vulnerable, including children</p> <p>As a matter of current practice (rather than policy) the Malaysian government prioritises the referral to UNHCR of detained asylum seeking children, which facilitates their registration with UNHCR and subsequent release from detention</p> <p>Alternatives to detention for UASC are being developed by NGOs (albeit on a relatively small scale at present), with a strong emphasis on case management principles and a move away from institutional care</p> <p>Government and UNHCR cooperating in pilot project which will give 300 Rohingya access to work rights</p> <p>Establishment of new government/UNHCR taskforce with working groups tasked to focus on addressing the issue of detention and alternatives to detention for children</p> <p>Relatively high levels of public sympathy towards Rohingya refugees reflected by favourable government statements such as the Prime Minister's announcement that all Rohingya refugees will be able to access training and work rights</p> <p>Civil society is undertaking legal analysis in relation to the application of Malaysia's Child Act to undocumented child migrants</p> <p>Related to the above, the instigation of recent strategic litigation pursued by the legal community to challenge the detention of a 16-year-old Rohingya refugee which seeks to apply provisions of the Malaysian Child Act as well as the CRC. The case has yet to be finally decided but has received sympathetic media coverage and the boy was released on bail pending a final decision</p>	<p>Child asylum seekers and refugees continue to be detained in sub-standard and dangerous conditions</p> <p>Currently lacking a national legal or policy framework for asylum seekers and refugees</p> <p>Lack of legal status renders individuals vulnerable to arrest and detention and inclined to live in a way that decreases their visibility in their host community, particularly for those who do not hold a UNHCR card</p> <p>Not all refugees and asylum seekers are registered with UNHCR</p> <p>Lengthy waiting time for initial UNHCR registration for some groups, and lengthy waiting time for RSD decision and the additional protection that registration and refugee status can provide</p> <p>Lack of alternatives to detention for family groups</p> <p>Lack of legal framework for guardianship and foster care of UASC</p> <p>Risk that non-Rohingya refugees may be excluded from emerging initiatives in relation to training and work rights</p> <p>Lack of consistent use of reliable age-assessment practices by immigration authorities which may result in children being inadvertently detained as adults</p> <p>Child asylum seekers and refugees (including those in immigration detention) are generally excluded from national child protection laws and services</p>

Indonesia

Positive Developments	Ongoing concerns

<p>As a matter of current practice the Indonesian government cooperates with UNHCR, IOM and other NGOs to facilitate the release from immigration detention of asylum seekers and refugees (including children), though this process usually takes several months</p> <p>Expansion of alternatives to detention for children and families through increased NGO capacity and co-operation between immigration, social services, UNHCR, IOM and NGOs</p> <p>Recent Presidential Regulation provides a new framework for a nationally coordinated response to asylum seekers and refugees and contemplates the availability of alternatives to detention for children and other vulnerable groups and could potentially be implemented to end the practice of detaining children</p> <p>Planned rollout of new UNHCR ID card in 2017 with same security features and digital verification application as that employed by UNHCR in Malaysia, which may see fewer child asylum seekers and refugees arrested and/or a reduction in duration of their detention</p> <p>New child protection law and regulation waiting presidential signature, which would establish a system of court-appointed guardianship and could potentially apply to undocumented migrant children</p>	<p>Child asylum seekers and refugees continue to be detained in sub-standard and dangerous conditions</p> <p>Currently lacking detailed regulations to implement the new national legal framework for asylum seekers and refugees established by the recent Presidential Regulation. The Indonesian government has indicated that it may take up to two years for these to be developed</p> <p>Lack of legal status renders individuals vulnerable to arrest and detention and inclined to live in a way that decreases their visibility in their host community, particularly for those who do not hold a UNHCR card.</p> <p>Lengthy waiting time for initial UNHCR registration and RSD decisions, with delays in accessing the additional protection that registration and refugee status may carry</p> <p>Access to alternatives for asylum seekers and refugees generally requires first passing through immigration detention for a significant period, though there are some ATD mechanisms that are enabling UASC to bypass immigration detention</p> <p>For this reason, as well as the general lack of livelihood support, many asylum seekers and refugees self-report to detention to access food, shelter and alternative programs</p> <p>Presidential Regulation appears to permit detention of minors, at least as a short-term measure</p> <p>Currently lacking a legal framework for guardianship and foster care of UASC</p> <p>Lack of consistent use of reliable age-assessment practices by immigration authorities which may result in children being inadvertently detained as adults</p> <p>Child asylum seekers and refugees (including those in immigration detention) are generally excluded from national child protection laws and services</p> <p>Risk that in the current political climate segments of Indonesian society may become intolerant of asylum seekers and refugees who are not Sunni Muslims</p>
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6. The way forward – a recategorization?

Our recently published report contains a number of recommendations which aim to bring an end to the practice of immigration detention of children in the region, along with the creation of sustainable and appropriate alternatives to detention which uphold the rights of children under international law.

Of all these recommendations, perhaps the most important comes down to an issue of categorisation. At the heart of the practice of immigration detention of migrant children is the exclusion of these children from national laws and policies in relation to the treatment 'children'. The report advocates for states to treat

asylum seeker and refugee children as ‘children’ first and foremost (rather than as ‘illegal’ or ‘irregular’ migrants, or ‘migrant children’ or ‘asylum seekers’). This approach was recently emphasized in the work of UNICEF²¹ and is consistent with the Convention on the Rights of the Child which does not distinguish between children based on their citizenship or migration status. If relevant governments endorse the principle that each child within their territory or jurisdiction is a child first and foremost, then national laws, policies and practices can be aligned with this principle. This would ensure that migrant children, whatever their motives for migration, are no longer detained and are treated humanely, treated with dignity and treated in accordance with their rights.

²¹ UNICEF, *A child is a child: Protecting children on the move from violence, abuse and exploitation* (May 2017)