

# Best Interests of the Child

## Ending Immigration Detention of Children in Thailand



Submission to the United Nations  
Special Representative to the Secretary-General  
on Violence Against Children

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International Law Practicum

 **THE FLETCHER  
SCHOOL**  
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*Best Interests of the Child:  
Ending Immigration Detention of Children in Thailand*  
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**Cover photo description:** “Detainees flash hand gestures at an immigration detention center in Bangkok, Thailand, Monday, Jan. 21, 2019” – the day Thailand announced its commitment to releasing children held in its immigration detention centers. (Cover photo © AP Photo/Sakchai Lalit).

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## I. INTRODUCTION<sup>†</sup>

While in recent decades many countries have increased and arguably normalized the use of immigration detention for children,<sup>1</sup> Thailand—with a large migrant and refugee population and record of detaining thousands of such children annually—is moving towards ending the practice and expanding alternatives.<sup>2</sup> Thailand, a non-signatory to the 1951 UN Refugee Convention, has explicitly grounded its approach in Thai and international law’s best interests of the child principle—that is, that in all actions concerning children, the best interests of the child are to be a primary consideration.<sup>3</sup> Indeed, after years of advocacy and engagement on the part of Thai non-governmental organizations (NGOs), international NGOs (INGOS), and United Nations organizations, Thai Prime Minister Prayut Chan-o-cha pledged at the 2016 Leaders’ Summit on Refugees in New York that Thailand would end immigration detention of children<sup>4</sup> and, more broadly, institute a new National Screening Mechanism (NSM) to distinguish undocumented migrants in need of international protection from economic migrants, allowing such persons to remain in the country on at least a temporary basis.<sup>5</sup>

In addition to not being a signatory to the major international refugee conventions, at the time of the Leaders’ Summit, Thailand had no domestic legal framework for refugee and asylum-seekers, leaving United Nations High Commissioner for Refugees (UNHCR) largely responsible for the screening and determination of refugee status for select populations in Thailand, while leaving others excluded.<sup>6</sup> Meanwhile, Thailand’s policies regarding economic migrants have also been regarded as largely incoherent, with major barriers to regularization.<sup>7</sup> Consequently, the Government’s migrant, refugee and asylum policies had been criticized for years as being “ad hoc and inadequate,”<sup>8</sup> leaving potentially millions of people, including children, without legal status vulnerable to arrest, detention, and deportation.<sup>9</sup> Given this legal context and its record of arbitrary and often indefinite immigration detention practices, the Government’s shift in policy has been especially significant. Since its 2016 UN pledge, the Government has issued a number of relevant legal instruments and policies, including the Memorandum of Understanding on the Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centres (MOU-ATD), its accompanying Standard Operating Procedures (SOP-ATD),<sup>10</sup> and Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562, which created a National Screening Mechanism (NSM). At the regional level, Thailand also has taken the lead in developing the Association for Southeast Asian Nations (ASEAN) Declaration on the Rights of Children in the Context of Migration,<sup>11</sup> as well as the Regional Plan of Action approved in October 2021 with the goal of increasing the number of countries that end immigration detention of children and implement alternatives by 2030.<sup>12</sup>

While these developments have been welcomed by civil society and UN organizations, fundamental shortcomings with the MOU-ATD and its implementation persist.<sup>13</sup> A key criticism is that Thai Immigration Law continues to allow for the arrest and detention of



migrant and refugee children; and the MOU-ATD, a policy not a law, itself does not outright prohibit the immigration detention of children in all circumstances—a requirement of international law, as proclaimed by the UN Committee on the Rights of the Child, and more specifically, that detention is never in the best interest of the child.<sup>14</sup> The MOU-ATD instead allows for the exceptional use of detention as a “measure of last resort” and “for the shortest duration of time.”<sup>15</sup> The MOU-ATD also fails to provide much guidance in ensuring against family separation. Indeed, ongoing issues, including continued immigration raids on migrant settlements, family separation, excessive and inconsistently applied bail requirements, and closed government facilities, continue to frustrate the implementation of the MOU-ATD. Furthermore, the question remains as to how Thailand’s new NSM framework will benefit “persons of concern,” and the extent to which it will result in increased protections, or how the MOU-ATD will influence the protection of children and families from detention if they were screened out from the NSM.<sup>16</sup>

Notwithstanding these issues, Thailand’s undertaking is an important and meaningful step towards aligning national policies and practices more with international law—and could be a significant example from which to derive lessons and “better” practices both for countries within the region and globally.<sup>17</sup> This Report is therefore meant to examine in depth Thailand’s trajectory in recent years, including what led to the Government’s change in its position and what further steps it needs to take to fully actualize its commitment. More specifically, this Report will discuss the initiatives that contributed to the Government’s public commitment to “end migrant child detention,” mapping the advocacy efforts surrounding the commitments, followed by a review of the development of the MOU-ATD itself, its key provisions, and its implementation in the country thus far. The Report will also examine the shortcomings of the MOU-ATD in terms of the law, policy, and implementation gaps, as well as proposals from advocates as to next steps towards better effectuation of the MOU-ATD’s principles and Thailand’s international legal obligations.

## **A. Organization of the Report**

The organization of the Report is as follows. Part II will provide: a factual background surrounding the plight of migrants and refugees in Thailand and more specifically, the Government’s immigration detention practices in the period prior to the 2019 MOU-ATD; next it will give an overview of Thailand’s relevant domestic, international, and regional laws and policies pre-2019. Part III will outline the initiatives and campaigns of NGOs, INGOs, and UN organizations that contributed to the development of the MOU-ATD, and examine Governmental actions as well as collaboration with various stakeholders. Part IV will examine the MOU-ATD’s provisions and achievements, followed by a discussion in Part V of the key legal, policy, and implementation gaps. Part VI will conclude with recommendations from stakeholders as to how to address these gaps so as to end child immigration detention in Thailand in conformity with international law.



## **B. Methodology**

The research team for this report consisted of U.S.-based graduate students with an interdisciplinary international affairs and law background supervised by a law faculty member with expertise in international human rights law who also supplemented the research. The Report relies on interviews, primary source documents, and a literature review of publicly available material. Desk research included extensive review of the relevant laws and policies, and reports and studies from Thai NGOs, INGOs, intergovernmental organizations (IGOs), academics, as well as Royal Thai Government (the Government) reports and submissions to UN treaty bodies. Considering the unexpected and profound nature of the Government's shift in policy and the relatively recent signing of the MOU-ATD, the development of this case in Thailand is not, as of yet, extensively documented. Consequently, interviews were heavily relied on for purposes of substantiating the events that led to the Government's proclamation, the efforts surrounding the development of the MOU-ATD, and what has unfolded since the MOU-ATD's signing. Local NGOs, INGOs, IGOs, lawyers, academics, and advocates involved with the campaign to enforce the MOU-ATD were interviewed and were indispensable to the underlying research and a number of them provided invaluable feedback on several drafts of the report.<sup>18</sup>

## **C. Limitations**

Desk research was limited to English-language sources, due to the absence of a Thai-speaking member of the research team. Due to the lack of officially translated documents by the Government on this issue, the team relied heavily on information and sources provided by academics, NGOs, and IGOs. While no in-person field research was undertaken, a number of the informants who were interviewed by the team were directly involved: in the efforts to promote alternatives to detention (ATD) and in the development of the MOU-ATD in Thailand; and/or are service providers to the migrant, refugee and asylum seeking communities in Thailand. The team has not been able to interview any Government official. The team also did not interview children and/or individuals whom themselves have been impacted by or are at risk of immigration detention due to the many potential risks to their wellbeing and security concerns. The team recognizes, however, that the affected individuals' insights into their personal experiences of immigration detention would provide valuable perspectives, and should be sought in the future provided that sufficient protective mechanisms are in place to ensure anonymity and respond to their potential service and security needs.

Most interviews were conducted in 2019 and 2020, with some follow up interviews and correspondence in late 2021 and early to mid-2022; consequently, it should be noted that the impacts of COVID-19 which emerged in Thailand more profoundly in early 2021 are largely not captured in the Report.<sup>19</sup>

## II. BACKGROUND & LEGAL FRAMEWORK

The focus in Part II is on the factual and legal background from before the MOU-ATD was executed in January 2019. Consequently, the factual context concerning the detention of migrant children is largely drawn from reports documenting the situation prior to 2019. This is not to say that the particular situation facing migrants and refugees, nor the governing laws necessarily changed beginning with the signing of the MOU-ATD in 2019.

### A. Factual Background Prior to MOU-ATD

Thailand's treatment of migrant and refugee<sup>20</sup> children in detention prior to the declaration and signing of the MOU-ATD in 2019 has been the subject of criticism among human rights, refugee and migrant rights and children's rights advocacy groups.<sup>21</sup> This section provides an overview of the general context and background related to migration in Thailand and, more specifically, the issue of child immigration detention in Thailand prior to 2019.

#### 1. *Situation of Migrant and Refugee Populations in Thailand*

Situated in the center of mainland Southeast Asia, Thailand has “a long history as both a regional hub for migration and as host to refugees.”<sup>22</sup> Due in part to the strength of its economy prior to 2019,<sup>23</sup> Thailand has been an increasingly important destination for migrants, hosting an estimated 4.9 million non-Thai residents in 2018 (the year prior to the MOU-ATD), up from 3.7 million in 2014.<sup>24</sup>

Estimates as to the number of migrants in Thailand are imprecise as the number of migrants without legal status is unclear. While some sources estimate there to have been over 800,000 migrant workers in the country under irregular status in 2018, others estimate that a majority of migrants in Thailand were without legal status.<sup>25</sup> The vast majority of migrants come from neighboring countries, such as Myanmar, Cambodia, Laos, and Vietnam, with most migrants seeking low-skilled labor opportunities through various work permits. In terms of children, the International Organization for Migration (IOM) estimated that as of 2018 there were approximately 300,000 to 400,000 child migrants in Thailand.<sup>26</sup> The figure as to how many child migrants are in Thailand without legal status is unknown.<sup>27</sup> Under Thai law, “all migrants with irregular immigration status, even children, can be arrested and detained,” and arrests can occur while crossing the border or at any time while being within the country.<sup>28</sup>

Following the military coup in 2014, the newly installed Thai government shifted its policy towards migrant labor, announcing upon coming to power a crackdown on irregular migrant workers.<sup>29</sup> The threat alone resulted in 220,000 Cambodians fleeing the country over the course of two weeks and led to “chaos on both sides of the border.”<sup>30</sup> To in part mitigate the impacts of the exodus, in 2015 and 2016, the Government broadened the intergovernmental Memorandums of Understandings (MOUs) with particular migrant countries of origin—Cambodia, Lao PDR, and Myanmar—and entered into a new MOU with Vietnam. In addition, in 2017, the Government attempted to develop a more comprehensive legal framework to

manage migrant labor and incentivize migrants to pursue regularization—issuing a Royal Decree on migrant labor which would levy heavy fines on employers of up to 800,000 Thai Baht (approximately \$24,000 USD) for each unauthorized worker—and foreign workers would likewise receive harsh penalties, including up to five years in prison and up to 100,000 Thai Baht (\$3,000 USD) in fines.<sup>31</sup> Many migrants thereafter returned home, some in an effort to obtain the appropriate documentation.<sup>32</sup>

After receiving much criticism from business, Civil Society Organizations (CSOs), IGOs, and the European Union,<sup>33</sup> the Government backpedaled, and following a broader consultation process in March 2018, the Cabinet approved a revised version of the Royal Ordinance Concerning Management of Foreign Workers Employment.<sup>34</sup> The revisions included reducing the severe fines along with the harsh prison sentences for migrants, further aligning Thai laws with international standards and good practices for labor migration governance.<sup>35</sup> A year following the initial promulgation of the decree in 2017, approximately 1.2 million migrants were noted to have regularized their status.<sup>36</sup> Nevertheless, sources indicate that “a remarkably high number of workers are still using informal means of entering and working in Thailand”; and “only a small population of jobseekers and migrant workers [from Cambodia, Myanmar, and Lao PDR] use the formal, intergovernmental MOU process due to the costly, complicated, and lengthy procedures involved.”<sup>37</sup>

In addition to migrant workers and their families, there has been a significant refugee population in Thailand, estimated at approximately 104,000 in 2018,<sup>38</sup> as well as 480,000 *registered* stateless persons in Thailand.<sup>39</sup> Indeed, over the past several decades, Thailand has hosted well over three million refugees.<sup>40</sup> The refugee population in Thailand is largely categorized into two groups: “camp-based refugees” and “urban refugees.”<sup>41</sup> Most of the near 98,000 camp-based refugees in Thailand are from Myanmar and live in nine refugee camps (what the Government refers to as “temporary shelters”) along the border.<sup>42</sup> In 2018, there were approximately 6,000 urban refugees and asylum-seekers coming from over 40 countries and largely living in Bangkok and other urban and semi-urban areas.<sup>43</sup> These figures are largely the same today.<sup>44</sup>

The conditions and treatment facing refugee populations in Thailand has varied greatly depending on where they are situated in the country, with a clear distinction drawn between those residing along Thailand’s western border and the urban refugees.<sup>45</sup> Those residing along the border are situated in crowded and remote camps, which have poor physical and institutional infrastructure—some having been settled decades ago.<sup>46</sup> Refugee populations—including Vietnamese and Cambodians who arrived in the 1970s and the Burmese or Myanmar refugees who have come since the late 1970s and 1980s—do not have legal status in the country, but are allowed to remain in Thailand on a *de facto* basis, so long as they live in these closed camps near the borders.<sup>47</sup> Their freedom of movement is highly restricted,<sup>48</sup> and leaving the camps makes them vulnerable to arrest and detention. Refugees residing in the camps are dependent on humanitarian assistance for even their basic needs.<sup>49</sup>

Notwithstanding the official figures of refugees in Thailand, there is a large population of Burmese—estimated at 1.8 to 3 million—living in Thailand, only 140,000 of whom live in border camps. Among those living outside camps, some may qualify as refugees. The Government claims, however, that they are economic migrants.<sup>50</sup>

Despite Thailand being host to such a large number of refugees and asylum-seekers—including the Government’s involvement with operating the refugee camps, i.e., “temporary shelters,” with UNHCR—Thailand has yet to ratify the Refugee Convention, nor developed a domestic legal framework.<sup>51</sup> Consequently, refugees and asylum seekers do not have legal status and have been (and continue to be) particularly vulnerable to arbitrary arrest, detention, and deportation.<sup>52</sup>

In addition to distinctions between refugees residing in camps and urban refugees, there is also a distinction within the urban refugee population in treatment based on country of origin, and/or particular ethnic or religious group within a country of origin.<sup>53</sup> “Urban refugees” typically refers to those refugees who have fled largely from Cambodia, Vietnam, and Pakistan, as well as the hundreds from Syria, Palestine, and Somalia, and generally does not refer to refugees from North Korea, Chinese Uyghur, and Myanmar including Rohingya and those Burmese refugees who fled from Myanmar due to the military coup and recent political conflict in 2021, due to separate Government arrangements for these groups, who are also not able to be registered with UNHCR.<sup>54</sup> UNHCR is only allowed to engage in refugee status determination (RSD) for certain populations—Burmese (including the Rohingya), Lao Hmong, Chinese Uyghur, and North Koreans are specifically excluded.<sup>55</sup> This means that, for example, Rohingya from Myanmar arriving in Thailand are considered by the Government as illegal immigrants, subject to detention, with UNHCR not allowed to conduct RSDs for them.<sup>56</sup> Since early 2013 the Government has been offering what it refers to as “temporary protection” to Rohingya who are rescued from brokers and exploitation on land and considered to be “victims of trafficking.” UNHCR and the Government reached an informal agreement allowing UNHCR to register Rohingya asylum seekers in immigration detention centers (IDCs) and social welfare shelters with the objective of identifying solutions to their situation. However, those Rohingya arriving by boat are subject to a “push-on” policy, whereby boats intending to enter the territorial waters of Thailand are prevented from docking.<sup>57</sup> (It should be noted that since 2020, however, brokers have changed the route and many Rohingya entered Thailand illegally by land through Mae Sot district. As a result, they have been subject to arrest and detention.<sup>58</sup>)

Despite UNHCR’s arrangement with the Government allowing it to recognize some groups as refugees, UNHCR has no authority to grant asylum. Indeed, even UNHCR documentation does little to protect against arrest and detention. Since Thailand positioned itself as a transit country and local legal integration is not presented as a “durable solution” in Thailand,<sup>59</sup> urban refugees are reportedly aware of this upon arrival and their goal is to resettle in third countries in Europe, North America, and Oceania.<sup>60</sup> Urban refugees typically wait several years before their claims for refugee status are heard by UNHCR,<sup>61</sup> and the vast majority are unlikely to be resettled.<sup>62</sup>

## *2. Arrest and detention of migrant and refugee children and their families*

Given their precarious legal status, irregular migrants and urban refugees suffer under conditions of exploitation, discrimination, and the threat of arrest and detention in one of Thailand's notorious IDCs.<sup>63</sup> Migrant worker camps, homes, and places of employment have been subject to raids by the Thai police or immigration authorities, and migrants are also vulnerable to being stopped and arrested on the street.<sup>64</sup> Chances of arrest for refugees or asylum-seekers increase due to, among other things, the long processing time for individuals to go through the status determination process and then obtain UNHCR cards, and even with a UNHCR card, asylum seekers may still be subject to arrest.<sup>65</sup> Other reasons for arrest may involve overstaying a visa or having been found to have fraudulent passports, or illegal entry.<sup>66</sup> Criteria for arrest has been documented as being arbitrary and varying significantly from case to case.<sup>67</sup> The lack of a legal framework in Thailand to recognize individuals as refugees, to provide them with Government documents, or even to allow them to gain regular status, as well as barriers to regularization for migrant workers, results in potentially millions of people, including children, being at risk of arrest and detention.<sup>68</sup> Sources indicate that this results in a persistent and high level of fear among, for example, refugees in Bangkok. So as to provide more security and support, many urban refugees choose to live in the same buildings or areas, which can result in them being more susceptible to being raided by the authorities. Consequently, many will regularly move, which makes for a precarious existence, especially for children.<sup>69</sup>

Based on reports from the period prior to 2019, the risk of arrest and detention for migrant children was high as they were often arrested together with other adults or family members.<sup>70</sup> According to a Human Rights Watch (HRW) report released in 2014, there were thousands of children detained in Thailand on an annual basis.<sup>71</sup> With regard to child refugees and asylum seekers, figures from a 2016 report by UNHCR's Thailand office indicated that out of 281 asylum seekers and refugees in immigration detention, 43 were children, roughly 15 percent.<sup>72</sup> It should be noted that according to reports from before the MOU-ATD, UNHCR's ability to protect refugees, including children, from arrest or detention was limited.<sup>73</sup>

Prior to the MOU-ATD, procedures for the arrest and detention of migrant children closely resembled those used for adults, with children often held in the same facilities as adults and deprived of many of their basic needs.<sup>74</sup> Reports noted that police and immigration authorities often "demanded money or valuables from detained migrants or their relatives in exchange for their release, either from detention or at the time of arrest."<sup>75</sup> Reports indicate that there was no systematic screening process to identify children in the IDCs.<sup>76</sup> After being arrested, migrants and refugees, including children, were generally detained without access to judicial review, bail, a lawyer, or other methods of challenging their detention.<sup>77</sup> The authorities often did not provide information about the duration of their detention to members of their family.<sup>78</sup> Some may have been given a court hearing, and sentenced either to pay fines or to serve jail time. After the penalty was served, the person would be deported on the basis of illegal entry or overstay. All persons who entered into Thailand illegally or stay beyond their visa are

subjected to deportation. Generally, undocumented migrants from Myanmar, Laos and Cambodia were deported within days or week to their home countries. However, in the cases where refugees were unable to return, they may be detained based on their country of origin, or designation by the authorities.<sup>79</sup> (COVID-19 has delayed this process and number of people from these three countries were increased and they will be detained for a longer period (1-3 months). Children and their families have been prioritized in this deportation. Note: Because of COVID-19, borders are closed and would open from time to time (it is inconsistency, sometime once a month, sometime once a week depending on these countries' capacity to quarantine people upon their return.)<sup>80</sup>

In its 2014 report, HRW found that among the thousands of migrant children arbitrarily detained annually in IDCs and police lock ups, approximately 100 migrant children—including children of refugees and asylum seekers, as well as unaccompanied migrant children—could have been detained in Thailand's IDCs for months or years without bail, judicial review, or prospects of release.<sup>81</sup> Whereas children of migrant workers generally remained in detention for a few days or weeks (but less than a month) during the processing of their case,<sup>82</sup> children of asylum seekers and refugees were reported to remain in detention for longer. This distinction is critical, especially for understanding the MOU-ATD. Children considered to be Myanmar, Laos, or Cambodia nationals, were sent to an IDC immediately and await deportation, whereas if refugees from other nationalities, they were arrested and charged in court.<sup>83</sup> According to estimates from 2008–2012, on average refugee and asylum seekers were reported to be detained for 298 days, and as much as a few years.<sup>84</sup> The variations in lengths of stay in detention may have depended on whether or not the children and their families were from countries close to Thailand, i.e., where they may be easily deported, or countries further away where deportation was more difficult and costly.<sup>85</sup> HRW further found in its 2014 report that the Government placed the burden of paying for repatriation on many of the migrants themselves, which could result in further prolonging their stay in detention if they were unable to raise sufficient funds.<sup>86</sup> Most children who were subject to longer-term detention were detained in Bangkok's IDCs, whereas those who were subject to rapid deportation were detained in IDCs outside Bangkok.<sup>87</sup> The main Bangkok IDC where migrant and refugee children were detained indefinitely is located in central Bangkok in a highly touristy area, where one informant noted that people walking by the IDC would never know that inside the building there were hundreds of people being indefinitely detained,<sup>88</sup> among the 1,000-2,000 people detained inside.<sup>89</sup>

Migrant and refugee children were largely detained with their family members. Migrants and refugees in Suan Plu detention were separated based on their gender, though children stayed with the mother, unless a male child was above or looked older than the age of eight.<sup>90</sup> It often depends on their physical appearances, with one informant suggesting that those from South Asia, MENA or Africa could look bigger in age than children from Southeast Asia countries.<sup>91</sup> The Government claimed that detaining children together with a family member “is a form of protection” and that parents do not wish to be separated from their children for purposes of personal security.<sup>92</sup>

The Government held unaccompanied children in IDCs, often not separated from adults.<sup>93</sup> Because there is a lack of individualized screening following the arrest and prior to detention and because unaccompanied minors (UAMs) were undocumented, an UAM could be detained as an adult and held in the adult cell.<sup>94</sup> Some unaccompanied children were documented to have been held in indefinite detention for years.<sup>95</sup> Unaccompanied or separated children are considered to be “the most vulnerable and at-risk children.”<sup>96</sup> For those children who are unaccompanied, there is a known risk that they have been trafficked.<sup>97</sup> Numbers of unaccompanied children in 2018 were estimated to be low in Bangkok, with one source noting there to be 30 unaccompanied or separated children,<sup>98</sup> but other sources indicate the figure to be much higher.<sup>99</sup> Another source indicated that though there are few in Suan Plu as of 2017-2018, other detentions are possible, including North Koreans in Nakhon Phanom immigration detention who usually travel alone, or Rohingya in the Southern provinces.<sup>100</sup>

Hundreds of HRW’s interviewees, including children who had been detained in the IDCs in the years prior to 2014, described abysmal living conditions, including “severe overcrowding, putrid sanitation, and an atmosphere of violence.”<sup>101</sup> The cells were referred to as “24/7 cells” because individuals being detained spend all their time there.<sup>102</sup> Overcrowding was noted to be so severe that sometimes children must sleep sitting up.<sup>103</sup> Similarly, other NGOs reported squalid conditions in the IDCs, with migrant children often detained for indefinite periods of time, due in part to the long-waiting periods of processing resettlement cases.<sup>104</sup> Among the well-documented abusive detention conditions amounting to further human rights violations include: degrading treatment in initial holding cells; failure to separate children from non-relative adults; children in overcrowded, squalid cells; and children exposed to violence.<sup>105</sup>

Detention, even for a short period of time, has severe impacts for children. The medical community has widely found that the potential mental and physical impacts of detention are especially detrimental as children face long-term harm and trauma as a result.<sup>106</sup> Various groups repeatedly documented how immigration detention in Thailand led to severe repercussions for children.<sup>107</sup> Given this record, Thailand’s treatment of migrant and refugee children in detention prior to the declaration and signing of the MOU-ATD in 2019 has been (and continues to be) the subject of criticism among human rights, children’s rights, and refugee rights advocacy groups.<sup>108</sup>

## **B. Legal Framework Prior to MOU-ATD**

### **1. Domestic Law Framework**

The following provides an overview of the relevant domestic laws, governing the issue of migrant child detention prior to the 2019 MOU-ATD. Although the focus here is on the domestic legal landscape prior to 2019, the laws discussed herein continue to govern and/or be relevant to migrant child arrest and detention today.



Under Thai law, all migrants with irregular immigration status may be arrested and detained—arrests can occur while crossing the border or at any time while being within the country.<sup>109</sup> Refugees and asylum seekers and their families are considered to be irregular migrants subject to detention; the lack of a legal framework makes their status unclear and vulnerable to arrest and detention unless they have a valid visa issued pursuant to the Immigration Act of Thailand, B.E. 2522 (1979) (Immigration Act).<sup>110</sup> Based on a longstanding policy framework, refugees from Myanmar who stay in one of the refugee camps along the border are largely protected from arrest and summary deportation yet lack freedom of movement and access to work. Should they leave the camps, they typically become at risk of arrest and deportation.<sup>111</sup>

Refugee and irregular migrants' rights are governed by the Immigration Act,<sup>112</sup> as well as the Alien Employment Act, B.E. 2511 (2008),<sup>113</sup> the Royal Decree on Management of Foreign Workers' Employment, B.E. 2560 (2017), the Royal Decree on Rules on Bringing Migrant Workers to Work with Employers in the Country (No. 2), B.E. 2561 (2018),<sup>114</sup> and a series of other official orders and Cabinet Resolutions.<sup>115</sup> Sections 19 and 20 of the Immigration Act enable any "competent official to detain aliens [any non-Thai person] at any place," thereby providing Thai immigration officials or attendant authorities the broad discretionary powers to arrest and detain any person who (1) is not a Thai citizen, or (2) does not have state-sanctioned travel documents, i.e., temporary visa permit; but the officer should also have a reason for detention as provided under Section 12, regardless of whether the person is an adult or child.<sup>116</sup> Under Section 19, the officer is also allowed to release the person on bail during conduct inspection and considering whether an alien is prohibited from entering the country in accordance with Section 12. Upon the order to repatriate such an "alien person," the competent official shall have the power to (1) allow the "alien person" to stay in the Kingdom on the condition such that he or she shall report to the official on the date, time, and place as prescribed, or (2) detain such person for a necessary period of time.<sup>117</sup> Notably, the Immigration Act does not set a maximum period of time that such migrants can be detained for purposes of deportation.<sup>118</sup> Under Section 20 the police are allowed to detain an alien not more than 48 hours but if necessary it can be extended to seven days only on request of a court for extension. Under Thai criminal law, the police can hold a suspect only for 24 hours; if police would like to extend the detention, the police need to request court to put person in jail during inspection period but not more than 7 or 12 days per time [depending 'on the punishment rate']. This can be extended multiple time but not more than 48 or 84 days [depending 'on the punishment rate'].<sup>119</sup> In contrast, under Thai criminal law, police can hold a suspect only for seven days.<sup>120</sup>

Under the Immigration Act, there are two provisions—Section 17 and 54—allowing individuals to stay in Thailand. Article 17 provides that the Cabinet may allow some groups to stay in Thailand on a temporary basis. For example, the Cabinet used Section 17 to allow migrant workers to live and work in Thailand, and the Cabinet has also allowed refugees from Myanmar who fled from the conflict during a particular period of time to live in the nine refugee camps in Thailand. Section 54 provides that an Immigration Officer may grant permission to stay in Thailand under certain conditions.<sup>121</sup> Whereas Section 54 includes a number of conditions, such as bail, guarantor and reporting requirements, Section 17 has more flexibility.<sup>122</sup>

According to Immigration order No.53/2559 (and followed more recently by Immigration order No. 85/2565), the criteria for persons who can request bail include: a person who needs to get bail in order to process their travel document, e.g., passport; a UNHCR Person of Concern (POC); a person with a serious medical problem; and a person with a force majeure circumstance who cannot be deported, e.g., the person has a court ruling that the individual cannot be deported to their home country because of war/disaster.<sup>123</sup> Even though bail may be requested, it is considered to be at the Immigration Supervisor's discretion whether to grant bail.<sup>124</sup>

Under the 2008 Alien Employment Act, as well as the more recent Royal Ordinance 2560 of 2017, a migrant could be subject to repatriation, a period of imprisonment of up to five years, and/or charged a potentially severe fine.<sup>125</sup> The 2018 Royal Ordinance 2561, amending the 2017 Royal Ordinance 2560, removed the prison penalty for foreign workers and reduced somewhat the potential for fines.<sup>126</sup> Thai Law does not define separate standards for the arrest and treatment of migrant children and adults.<sup>127</sup>

Despite the Immigration Act, Thailand's refugee policies are fragmented, irregular, and ad hoc, leaving refugees and asylum seekers vulnerable to arbitrary and abusive treatment.<sup>128</sup> There are no special protections afforded to refugees under Thai Immigration law. Consequently, irregular migrants including urban refugees, such as the Chinese Uyghurs and Rohingya, are being managed through the National Security Council.<sup>129</sup> Since Thailand does not have a single legal framework governing refugee policy, practices have been instituted through a series of Government directives. As an example of Government directives that have had significant impact on migrant detention, in 2010, the Office of the Prime Minister established a "special cooperation" on immigration enforcement regarding the arrest and prosecution of migrants working underground between the Ministries of Labor, the Ministry of Interior, and the Royal Thai Police Force, Army and Navy, which led to an increase in crackdowns on irregular migrants.<sup>130</sup>

Compounding the vulnerability of refugees, Thailand's labor laws have also prohibited refugees without valid visas and work permits from working legally in the country. This results in refugees often engaging in the informal labor market where they are at risk of being subject to abusive, exploitative, and dangerous work environments.<sup>131</sup>

Despite these issues, Thailand's constitutional and statutory law provides for important protections for children. Indeed, the 2017 Constitution stipulates that the State should provide assistance to children to ensure quality living, and shall protect such persons from violence or unfair treatment.<sup>132</sup> By way of legislation, the Child Protection Act (CPA) acts as the principal legal framework for achieving such protections and assistance to children.<sup>133</sup> The Child Protection Act aims to shield children, defined as persons under eighteen years of age, from being mistreated, exploited, or discriminated against, as well as from inhumane practices. UNHCR points to the Child Protection Act as having largely domesticated protections guaranteed under the UN Convention on the Rights of the Child (CRC).<sup>134</sup> According to Child Protection Act Section 22, the treatment of a child in any case shall be made with the view to

maximize benefits to the child without unfairness and discrimination. As such, the CPA foresees that the treatment of the child in any case, no matter what his or her nationality or legal status is, must give primary importance to the best interests of the child.<sup>135</sup> Based on such obligations, the Government specifically extended social rights to migrant children in 2005 by granting non-Thai children access to basic education in Thai public schools.<sup>136</sup>

In the case of unaccompanied minors, Section 24 of the Child Protection Act governs the role of individual and independent guardians appointed for children.<sup>137</sup>

In addition to the Child Protection Act, the Anti-Trafficking Persons Act of 2008 (ATPA) provides for another relevant safeguard for both children and adults. The ATPA replaced previous legislation so as to recognize male victims of trafficking and to incorporate the definition of trafficking under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“Palermo Protocol”).<sup>138</sup> Under the ATPA, if an adult or child is deemed to be a victim of trafficking, the arresting official may refer the person to a government shelter, instead of sending the person to an IDC.<sup>139</sup>

The Juvenile and Family Court and Juvenile and Family Case Procedure Act, B.E. 2553, is the key law governing legal procedures for the custody, interrogation, and judicial process related to a child. Under the Act, the authorities are required to identify whether the person being arrested is a child; and if he or she is a child, the inquiry officer is to bring the child before the Juvenile and Family Court within 24 hours to verify the arrest and decide whether the child should be under state custody or parent custody.<sup>140</sup> Article 68 provides that a child cannot be detained except by court order or for 24 hours for the purposes of an investigation or interrogation. Article 142 provides courts with the discretion to impose alternatives to detention, including transfers to “a training centre” or conditional releases. Article 145 provides that where a fine is imposed and a child cannot pay it, a court must impose an alternative to detention rather than detain them immediately. These provisions do not apply to the immigration detention of children as it is considered an administrative rather than penal action.<sup>141</sup> Under Section 73 of the Criminal Code, Amendment Acts (No. 21) B.E. 2551 (A.D. 2008), a child “under 10 years of age shall not be punished for committing what is provided by the law to be an offence.”<sup>142</sup> Section 74 of the Criminal Code provides that children aged above 10 years but still not over 15 have diminished liability, and a court can order a range of other measures including by sending them to “a school or place of training and instruction.”<sup>143</sup>

Prior to the adoption of the MOU-ATD, many stakeholders made forceful arguments that even existing Thai law and policies could and should be applied to the benefit of migrant, refugee, and asylum-seeking children.<sup>144</sup> For example, UNHCR held that “a strong argument exists” that the Immigration Act:

does not actually require detention but rather that detention is discretionary and could be substituted with a regular reporting requirement, even if a person is under a deportation order [such that] there is clear scope within existing Thai law and practice to

make further use of both practical and/or compassionate grounds for applying alternatives to detention.<sup>145</sup>

Nevertheless, the lack of affirmative legislation prohibiting the detention of migrant children and their families resulted in the highly criticized record of arbitrary and indefinite detention and conditions of detention endured by migrant children and their families as described above.<sup>146</sup>

## 2. *International and Regional Law*

Thailand's domestic immigration laws, policies, and practices prior to the MOU-ATD clearly violated (and continues to violate) international law, including the core human rights treaties to which Thailand has long been a party. The following provides an overview of the applicable international and regional laws which were in effect in the period prior to the MOU-ATD, as well as today.

Although it is well established in international law that states have the right to control the entry of non-nationals into their territory—and thus the prerogative to expel non-nationals within it—this power is limited by the obligations enshrined in the international treaties for which states are a party, as well as international customary law.<sup>147</sup> This includes its obligations under international and regional human rights law.

Thailand is a party to several international agreements that guarantee certain human rights to those in its territory, among the most relevant are: The Convention on the Rights of the Child (CRC); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention Against Torture (CAT); and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>148</sup> All were ratified by Thailand over a decade prior to the MOU-ATD;<sup>149</sup> and each establishes legally binding obligations, covering a whole range of fundamental human rights, including rights which must be guaranteed without discrimination between citizens and aliens.<sup>150</sup>

The CRC is the core treaty addressing children's rights, setting out children's civil, political, economic, and social rights.<sup>151</sup> In particular, Article 37(b) stipulates that no child shall be deprived of liberty unlawfully or arbitrarily, and detention shall be used “only as a last resort measure” and “for the shortest appropriate period of time.”<sup>152</sup> Even in the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to Article 37(a) and (c) of the Convention.<sup>153</sup> Indeed, Article 3 of the CRC emphasizes that the best interests of the child shall be a primary consideration in all actions concerning children.<sup>154</sup> Based on these (and other) provisions, the Committee on the Rights of the Child, the UN treaty body responsible for interpreting the CRC (“CRC Committee”), has held that “[e]very child, at all times, has a fundamental right to liberty and freedom from immigration detention,” and that the CRC prohibits the detention of children for migration purposes in all circumstances, such that the “last resort” principle does not apply.<sup>155</sup> Child

immigration detention has been held to never be in a child's best interest,<sup>156</sup> violate a child's right to survival and development,<sup>157</sup> and may amount to cruel, inhumane and degrading treatment<sup>158</sup> and, in some circumstances, torture.<sup>159</sup>

Indeed, child immigration detention leads to and/or implicates numerous other children's rights violations, including CRC's Article 2 (right to non-discrimination), Article 12 (right to be heard), Article 24 (right to the enjoyment of the highest attainable standard of health), Article 27 (right to an adequate standard of living), Article 39 (right to recovery and reintegration if victim of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment), Article 31 (right to rest and leisure), Article 19 (right to be protected from all forms of violence), and Article 37(a) (right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment); as well as children's rights to family, including CRC's Article 20 (right of the unaccompanied child to special protection and assistance), Article 9 (right to family unity), Article 10 (right to family reunification), Article 16 (right to family life), Article 18 (right to family development).<sup>160</sup> Given the numerous rights at risk of being violated due to immigration detention and the uniqueness of these children's rights as compared to general human rights law provisions, immigration detention is arguably itself arbitrary and therefore prohibited outright under CRC Article 37(b).<sup>161</sup>

It has also been emphasized that the detention of children in the context of migration in order to "keep families together" or for their "protection," where alternative care is lacking, can never be a justification for detention.<sup>162</sup> Moreover, the CRC Committee has held that when a child's best interest requires "keeping the family together, the imperative requirement of not depriving a child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family."<sup>163</sup>

Although Thailand has placed a reservation on Article 22 of the CRC, which provides protections for refugee children,<sup>164</sup> Thailand's reservation does not release the Government of all of its obligations to refugee children under CRC, particularly, CRC's Article 2 (non-discrimination). The CRC Committee has clearly stated that Article 2's "principle of non-discrimination is fundamental and, in all its facets, applies with respect to children in the context of international migration."<sup>165</sup> Furthermore, the International Commission of Jurists concluded that because Article 22 does not include specific additional rights,<sup>166</sup> and the state is already obliged to protect all the CRC rights under Article 4, Thailand's reservation "should not make any legal difference."<sup>167</sup>

A further layer of protection for migrants and refugees with regard to arrest and detention is provided under the ICCPR. Under Article 9, Thailand is obliged to protect the liberty and security of all persons, and arbitrary arrest or detention is strictly prohibited.<sup>168</sup> The Human Rights Committee has interpreted Article 9 as requiring that detention, including administrative immigration detention, be "reasonable, necessary, and proportionate" in light of the particular circumstances of each case<sup>169</sup> —thus making mandatory immigration detention prohibited outright. Article 9(4) entitles all persons deprived of their liberty to bring their case before a court. This right applies equally to all persons regardless of their status<sup>170</sup>

and regardless of the form of deprivation of liberty.<sup>171</sup> More specific to children, the Human Rights Committee stated in its General Comment from 2014 that:

Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.<sup>172</sup>

While its General Comment employs the last resort principle in the specific context of cases involving immigration detention of families and children, in nearly all of its individual communications prior to 2014, the Human Rights Committee found there to be a violation of Article 9(1) based on lack of individualized assessment, as well as failure to account for the specific needs of a child, without the Committee ever referring to the last resort principle.<sup>173</sup>

In terms of the refugee-specific treaties, as previously noted, Thailand is not a signatory to either the Refugee Convention nor its 1967 Protocol,<sup>174</sup> and therefore, does not recognize refugees' rights as such. However, the Government is a member of UNHCR's Executive Committee,<sup>175</sup> and has repeatedly expressed a commitment especially in recent years to protect migrants in the country, including by adopting the Global Compact for Safe, Orderly and Regular Migration (GCM) and endorsing the Global Compact on Refugees during the UN General Assembly.<sup>176</sup> Under the GCM, Thailand has been noted to champion two issues: alternatives to detention, and access to healthcare.<sup>177</sup> Moreover, it is important to underscore that Thailand's obligations under the CRC as well as the ICCPR mandate that children must be offered protections "as required by his [or her] status as a minor."<sup>178</sup> Thailand is also obligated to uphold the cornerstone principle of international refugee law—that is, the principle of non-refoulement which prohibits states from returning anyone to a territory where they would be at risk of persecution or serious human rights violations. The principle of non-refoulement is protected under customary international law,<sup>179</sup> and is also protected under treaties to which Thailand is a party, including CAT Article 3,<sup>180</sup> which has been repeatedly affirmed by the Government.<sup>181</sup>

Detention is known to increase the risk of refoulement.<sup>182</sup> The UN Working Group on Arbitrary Detention, a special procedure of the Human Rights Council consisting of five experts, has repeatedly held that if the principle of non-refoulement makes expulsion impossible, "the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary."<sup>183</sup> More broadly, beyond the context of possible refoulement, the Working Group on Arbitrary Detention has held that the "deprivation of liberty of an asylum-seeking refugee or stateless or migrant child, including unaccompanied or separated children, is prohibited."<sup>184</sup>

More recently, Thailand ratified in 2013 the Palermo Protocol,<sup>185</sup> and in 2018 the Protocol of 2014 to the Forced Labour Convention of 1930 ("Protocol of 2014 to the Forced

Labor Convention”).<sup>186</sup> The Palermo Protocol was to facilitate international cooperation in investigating and prosecuting trafficking in persons cases, as well as to focus on prevention of exploitation especially involving women and children, and the protection and assistance of victims of trafficking.<sup>187</sup> Protocol of 2014 to the Forced Labor Convention provides victims of forced or compulsory labor with protection, including not only measures to be taken in terms of identification of victims, but also those involving their release, protection, and rehabilitation.<sup>188</sup> Pursuant to Protocol of 2014 to the Forced Labor Convention, victims of forced or compulsory labor are not to be punished for the unlawful activities they were compelled to do in the process of forced or compulsory labor under the penal code or under the national anti-trafficking laws. Consequently, the victim must not be put in detention due to contrary provisions in the legal framework or insufficient identification and referral procedures.<sup>189</sup>

Complementing its international legal obligations, Thailand has committed to several regional human rights protection mechanisms as a member of the Association for Southeast Asian Nations (ASEAN).<sup>190</sup> Key among them are the 2007 ASEAN Charter<sup>191</sup> and the 2012 ASEAN Human Rights Declaration (AHRD).<sup>192</sup> Although the AHRD is not legally binding and only mentions children’s rights briefly, it includes many relevant provisions. Among them are:

- Article 2: “Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.”
- Article 16: “Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.”
- Article 15: “Every person has the right to freedom of movement and residence within the borders of each State. Every person has the right to leave any country including his or her own, and to return to his or her country.”<sup>193</sup>

In addition, Thailand has adopted standards outside of ASEAN, which define “refugees” and provide guidelines as to their appropriate treatment, such as the Bangkok Principles on the Status and Treatment of Refugees of 1966.<sup>194</sup>

While the above discussion focuses on Thailand’s legal obligations applicable even prior to the MOU-ATD, it is noteworthy that less than a year after the MOU-ATD, Thailand and other ASEAN countries adopted the ASEAN Declaration on the Rights of Children in the Context of Migration in November 2019, wherein they agreed that states should develop effective procedures and alternatives to child immigration detention—ensuring that “the best interests of the child” is a primary consideration.<sup>195</sup> Thailand also took the lead in developing ASEAN’s Regional Plan of Action, approved at the ASEAN Summit, which aims to increase the number of countries that end immigration detention of children and implement alternatives by 2030.<sup>196</sup>

Based on the foregoing international and regional legal instruments and commitments, Thailand is obliged, and has committed, to protect the rights of migrant children and their families on its territory and subject to its jurisdiction. Thailand’s fairly robust treaty ratification



record and children's rights protections found in its Constitution remain, however, undercut by poor implementation as well as inconsistencies between Thailand's domestic laws and its international obligations.<sup>197</sup>

### **III. MOVEMENT SUPPORTING ALTERNATIVES TO IMMIGRATION DETENTION FOR CHILDREN**

In response to the arbitrary arrest and often indefinite detention endured by migrant children and their families,<sup>198</sup> stakeholders within Thailand and transnationally have collaborated to address these core international human rights and children's rights violations. Part III focuses on stakeholder efforts in support of ending the practice of migrant and refugee child detention by examining (A) the movement for reform among NGO and UN organizations; (B) governmental initiatives culminating in the 2016 UN pledge; and (C) NGO and governmental collaboration thereafter in developing the MOU-ATD.

#### **A. NGO and UN Initiatives**

In the years prior to the MOU-ATD's signing, Thai NGOs, INGOs, as well as UN organizations, regularly raised the issue of migrant and refugee child detention with the Government, promoted the use of ATDs, and helped to improve IDC conditions for children. NGOs and UN organizations engaged in the provision of direct legal and social services to children in detention, as well as research, documentation, report writing, coalition building, strategic advising, and advocacy.<sup>199</sup> Through such efforts, NGOs and UN organizations brought attention to the severity of migrant child detention, helped build a framework for better practices, and directly advocated for reform with Government officials.<sup>200</sup>

Key NGO and UN organizations having notable impacts on child immigration detention include Amnesty International, Asia Pacific Refugee Rights Network, Asylum Access Thailand, the Coalition for the Rights of Refugees and Stateless Persons (CRSP), Caritas Thailand, Center for Asylum Protection, Childline, Fortify Rights, Host International, Human Rights Watch, International Detention Coalition, Jesuit Refugee Services (JRS), Life Raft International, Sattachon Foundation, Step Ahead, UNHCR, UNICEF, and IOM. In addition, the Thai National Human Rights Commission, as well as the representative to AICHR, Dr. Seree Nonthasoot, and Dr. Sriprapha Petcharamesree, Institute of Human Rights and Peace Studies, Mahidol University, were key players.<sup>201</sup>

Observers noted that whereas international NGOs, like HRW, engaged in international human rights monitoring and produced a number of critical reports, employing a more "naming and shaming" confrontational approach with the Government, local NGOs pursued a more engagement-oriented strategy with the Government, and that this combination of multi-faceted campaign was critical for the development of the MOU-ATD.<sup>202</sup> Another dimension to the campaign's success was that beginning in 2015 more local Thai staff took the helm of executive

positions at international NGOs in Thailand and increasingly engaged with the Government directly.<sup>203</sup>

Another aspect of the campaign was that advocacy efforts on behalf of migrant worker children and refugee and asylum-seeking children also differed, with one interviewee suggesting there to be less emphasis on behalf of the children of migrant workers.<sup>204</sup> It has been suggested that this may be due to the mandate of most of the key NGO and UN stakeholders or that migrant children are detained for shorter period of time than refugee children.<sup>205</sup> Nevertheless, actors noted that by way of advocacy, the focus was on their status as children, rather than their immigration status. The explicit purpose was to make their migration status secondary – whether they were refugees, asylum seekers, failed asylum seekers, or migrants.<sup>206</sup>

*Below is a more detailed description of the various initiatives and activities pursued by UN and NGO actors in the years leading up to the Prime Minister's 2016 UN Pledge.*

IOM worked closely with the Government to improve the conditions of detention for migrant children. Indeed, IOM has been one of the few organizations that has been permitted by the Government to provide services to children and their families within IDCs.<sup>207</sup> One informant noted that the Government was open to allowing IOM, for example, to open schools in its facilities because the Government was seeking creative solutions for the unusual circumstances of the extra-continental migration flowing through the country and wanted to tackle the issue of refugees in its search for wider resolutions.<sup>208</sup> IOM operated a small children's day-care within a Bangkok IDC and would take children on a monthly trip to a local park.<sup>209</sup> According to IOM Thailand's Assistance to Migrant Children information sheet, IOM provides "...nutritional support, medical check-ups, vaccinations and non-food items," and also has psychologists to provide psychosocial support and organizes recreational activities to manage stress, including sports events and trips to the seaside. To support more holistic development, IOM also offers "skills" classes in areas such as English and Thai languages and cooking.<sup>210</sup>

In addition to its role in conducting RSDs, UNHCR has played a key role in advocating for reform of refugee detention practices in coordination with other stakeholders. As early as 2006, UNHCR collaborated with NGOs in Thailand to assess policy gaps and investigate abuses involving the treatment of refugees.<sup>211</sup> In 2011, UNHCR created an interagency Task Force on Detention, which included organizations such as UNICEF, OHCHR, IOM, JRS, Catholic Office for Emergency Relief and Refugees/Bangkok Refugee Center (COERR/BRC), Thai Committee for Refugees (TCR), Asylum Access Thailand (AAT), and UNHCR.<sup>212</sup> The ATD Task Force organized regular meetings to review national laws and practices on immigration detention and examined possible ways forward based on the existing Thai laws.<sup>213</sup> As part of this effort and within the framework of the UNHRC's Beyond Detention Global Strategy for 2014–2019, UNHCR later released a National Action Plan for Thailand in 2015, detailing steps to improve the situation of detention for migrants in the country.<sup>214</sup> The first goal mentioned in the National Action Plan was to end the detention of migrant children, citing specific articles in domestic Thai laws as support for the prohibition of migrant child detention.<sup>215</sup> UNHCR's strategy for Thailand also called for the official recognition by the Government of UNCHR-

issued documentation and the development of non-arrest and non-detention mechanisms with regular reporting requirements for identified POCs.<sup>216</sup> UNHCR also provided various monitoring support and material support for purposes of improving conditions in IDCs and conducted Best Interest Determinations jointly with the Ministry of Social Development and Human Security (MSDHS) and others.<sup>217</sup>

UNICEF initially took a more limited role concerning refugee and asylum-seeking children, in part because it was seen to be within the mandate of UNHCR, rather than UNICEF. A significant shift, however, occurred in late 2017 and early 2018 after the Government had already committed to moving towards ending child immigration detention.<sup>218</sup>

During the period, Thai NGOs and individuals, operating more independently as service providers, began to increasingly organize together and combine efforts. For example, the Bangkok Asylum Seeker and Refugee Assistance Network (BASRAN) was created in 2012.<sup>219</sup> Thai NGOs also began to put into effect the National Action Plan by monitoring the IDCs, providing direct bail assistance for refugee or stateless families, and assisting the release of children from detention.<sup>220</sup> UNHCR reported a significant increase in use of bail in two Bangkok IDCs from 2013–2015.<sup>221</sup>

Complementing such efforts, the National Human Rights Commission of Thailand's Subcommittee on Statelessness, Migration and Displaced Persons produced a report in 2013 on the rights of children in IDCs, finding that domestic law “unnecessarily criminalizes children by failing to differentiate between children and adults when arresting and detaining irregular migrants” and that children in IDCs suffered from serious physical ailments, including respiratory diseases and malnutrition.<sup>222</sup>

Beginning as early as 2008, certain international NGOs, in particular the International Detention Coalition, launched global alternatives to detention campaigns. Such initiatives helped to encourage Thai stakeholders to pursue a more human rights-focused framework with respect to refugee issues as opposed to the more dominant national security orientation of the Government,<sup>223</sup> and was also important in supporting the work of CSOs in the period that followed.<sup>224</sup> Human Rights Watch (HRW) also began documenting migrant worker and refugee related issues in Thailand, producing two reports in 2010 and 2012, respectively. Building off these reports, HRW put forward an important intervention with its 2014 report *Two Years with No Moon*.<sup>225</sup> In it, HRW detailed the international human rights violations associated with the detention of migrant children, including the arbitrary and indefinite detention as well as the severe neglect, abuse, and fetid environment many migrant children faced in Thai IDCs.<sup>226</sup> From lack of health and nutritional services to the squalid conditions of migrant holding cells, the report's testimonials laid bare the serious international law violations at issue.<sup>227</sup> HRW called on the Government to “immediately cease detention of children for reasons of their immigration status,” and adopt alternatives to detention.<sup>228</sup>

As part of their research for the report, HRW met with various Government officials, including with the Immigration Bureau and the human rights ombudsperson. They received a polite reception from the Government, but no policy concessions were made at that time, at least not publicly. While one source suggests that the direct impact of the *Two Years With No Moon* report on the Government appeared to have been limited, a number of informants believed that the report was particularly important for intermediary stakeholders, like UNHCR and Thai NGOs, who could then use the report's findings and recommendations to advocate on the issue.<sup>229</sup> Indeed, a collection of foreign embassies were present at the launch of the report, and were also engaged in outwardly supporting ending migrant child detention.<sup>230</sup> For example, the Swiss Embassy in Bangkok had advocated for the creation and running of a day-care center in the IDC and would regularly invite migrant children detained in Bangkok's IDC to the ambassador's residence.<sup>231</sup>

Shortly after HRW's report launch, in October 2014, UNHCR submitted a discussion paper to the Government titled, "A Framework for Alternatives to Detention."<sup>232</sup> The paper emphasized the existing provisions in Thai law, which provided for the non-detention of both adults and children, as well as Thailand's international legal obligations under the CAT, ICCPR, and CRC.<sup>233</sup> In response, in September 2015, the Government's inter-ministerial team began to evaluate different aspects of detention "in a non-1951 Refugee Convention, non-refugee law context."<sup>234</sup>

NGOs also presented several proposals to the Government for ATDs through collaborative roundtables and discussion papers.<sup>235</sup> For example, national roundtable that was held on February 25, 2015, in Bangkok, co-organized by International Detention Coalition, APRRN, and the Thai Human Rights Commission, and facilitated by Dr. Sriprapha Petcharamesree, Institute of Human Rights and Peace Studies, Mahidol University. The Roundtable focused on the issue of child immigration detention and opportunities for ATD for children in Thailand, whether accompanied, unaccompanied or separated, and whether refugees, asylum seekers, stateless or irregular migrants. A specific objective of the Roundtable was to bring together experts from the Asia-Pacific region to discuss ATD which had been implemented in other 'similarly-situated countries,' and to explore how these could be adapted to the situation in Thailand. The Roundtable was well attended by ten representatives from the Royal Thai Government (RTG), including the following divisions: Immigration Bureau, Ministry of Foreign Affairs, Ministry of Interior, Ministry of Justice, Ministry of Social Development and Human Security, and the National Security Council. Participants also included 25 representatives from CSOs, IGOs, academic institutions, and members of the NHRCT.<sup>236</sup> According to one of the organizers, a major outcome of the roundtable discussions was agreement between the participants that children should not be held in IDCs, given the detrimental impact of detention on their physical and mental health. Further, that ATD for children and their families should be implemented and institutionalized.<sup>237</sup> Another development that took place following this roundtable was that children were no longer required to pay bail to be released from immigration detention. While one informant noted that it is difficult to show that this outcome is linked, "the close proximity in time between the two" seems to indicate "it is possible."<sup>238</sup>

Subsequently, in November 2015, stakeholders held a regional expert roundtable in Bangkok to discuss ATDs for migrant children that could be feasibly implemented in countries such as Thailand.<sup>239</sup> The Thai roundtable participants recommended: (i) the specific development of an MOU-ATD between the Thai Immigration Bureau and the Thai Ministry of Social Development and Human Security (MSDHS); (ii) the exploration of foster care arrangements for unaccompanied migrant children; (iii) capacity building for the Government to adopt ATDs; (iv) regular monitoring of detention center conditions; and (v) follow-up studies on children who have been detained.<sup>240</sup> More specifically, some of the models and reforms proposed at the 2015 Expert Roundtable included:

- Delegating day-to-day care of children and foster arrangements to NGOs or the (MSDHS).
- Prioritizing small scale family-based arrangements, accompanied by case management support.<sup>241</sup>
- Developing shelters for unaccompanied migrant children and foster care arrangements.<sup>242</sup>
- Giving official recognition of UNHCR-issued documents by Thai officials to prevent the arrest of refugees and asylum seekers.<sup>243</sup>
- Having a caseworker conduct a “best interest of the child assessment” and determination based on the Bangkok Child Protection (BCP) Program developed by Jesuit Refugee Service (JRS), as part of a UNHCR and JRS-established 3-month pilot program.<sup>244</sup>
- Releasing unaccompanied minors into the community, based on a program led by Church World Service in Indonesia, where the state will allow the child to be “housed outside of an [IDC], subject to periodical mandatory reporting” or the child will be moved from an IDC to a shelter that is sponsored by the UNHCR’s NGO partner.<sup>245</sup>

The aim of the proposed ATDs emerging from these discussions was to reduce the number of migrants subject to arbitrary arrest and detention and provide effective community-based case resolutions.<sup>246</sup>

It was after the regional roundtable that several Thai NGOs, which had been working closely with UNHCR, came together to form the Coalition for the Rights of Refugees and Stateless Persons (CRSP), a network of advocates which became an instrumental to the development of the MOU-ATD.<sup>247</sup> CRSP is comprised of lawyers, several NGOs, CSOs, and UNHCR Thailand staff.<sup>248</sup> In addition to advocating for the use of ATDs for migrant children, CRSP advocates for the rights of refugees more broadly in Thailand.<sup>249</sup> While many member organizations have expertise and/or worked on either migration issues or children’s rights, the

formation of CRSP has been noted as being the first time a coalition has brought together Thai CSOs and international NGOs to collaborate on regional issues concerning stateless persons and urban refugees.<sup>250</sup> By forming the CRSP, member NGOs became increasingly viewed as advocates with significant expertise to be leveraged and shared with the Government, whereas previously they had been viewed more in terms of service providers.<sup>251</sup>

Although CRSP's mandate covered all refugees and stateless persons, the coalition decided as a strategic matter to target immigration detention policies related to children as an initial campaign because of Thailand's own child protection commitments,<sup>252</sup> and its longstanding role advocating for juvenile justice and other children's rights related issues among ASEAN countries.<sup>253</sup> Campaigners sought to reframe refugee related issues in Thailand, moving away from a focus on state security concerns towards a more human rights focus, addressing the detention of refugee children as an initial matter as a way to facilitate that reframing.<sup>254</sup>

Prior to the 2016 UN Pledge, the CRSP pressured the Government to uphold its commitments through a series of advocacy efforts—explicitly choosing a more engagement-oriented approach rather than a “naming and shaming” strategy.<sup>255</sup> One such effort was the development of a “scorecard” to grade countries like Thailand and indicate the country's progress towards ending the detention of migrant children.<sup>256</sup> To conduct the baseline assessment, the coalition worked with International Detention Coalition to evaluate Thailand's relevant laws, policies, and practices, including the average duration of child detention and access to services while in detention, e.g., health care and education.<sup>257</sup> The coalition subsequently invited the Government to meet with them and presented the scorecard as a way to further engage with the Government. Advocates point to the scorecard as an effective tactic and advocacy tool, and since that time the coalition regularly updates the scorecard.<sup>258</sup>

The CRSP also organized several related events to raise awareness with Government officials on the issues. For example, CRSP hosted technical experts to engage with relevant Government agencies about issues pertaining to children in detention, including the impacts of long-term detention on child development.<sup>259</sup> Some also noted the need to educate Government officials about this newer population of children born to urban refugees.<sup>260</sup>

In addition to these Thailand-based activities, CSOs and NGOs engaged with several UN treaty bodies through the Universal Periodic Review (UPR) processes. In part due to such engagement, several UN-treaty bodies and institutions weighed in expressing serious concern about migrant detention and the conditions of IDCs in Thailand.<sup>261</sup> Among the interventions in the years prior to the MOU-ATD include that of:

- The UN Committee against Torture in 2014: noting its concerns regarding “the use of lengthy and, in some cases, indefinite detention in immigration detention centres for asylum seekers and migrants who enter the State party undocumented, as well as at the lack of an independent and systematic review of such detention decisions and the restrictive use of alternatives to detention for asylum seekers”; and the “extremely high levels of overcrowding

and harsh conditions prevailing in detention facilities, including immigration detention centres.”<sup>262</sup>

- The UN Committee on Economic, Social and Cultural Rights in 2015: “recommend[ing] that Thailand [e]nsure that asylum seekers, refugees, and migrants be detained only when absolutely necessary and the time of detention is limited to a strict minimum.”<sup>263</sup>
- UNHCR and UNHCR’s country team in Thailand in 2015: “not[ing] that arrest and detention of refugees and asylum seekers, including children, continued to be a significant issue and regular event [. . . in] that regard, the country team, along with [UNHCR] recommend [. . .] that Thailand [. . .] institute a formal policy prohibiting the detention of refuge and asylum-seeking children and release all detained refugee and asylum-seeking children.”<sup>264</sup>
- UN Human Rights Committee’s Second Universal Periodic Review (UPR) for Thailand in 2017: expressing concern at reports of the extended detention of refugees and called on the Government to “[r]efrain from detaining refugees, asylum seekers, and migrants and implement alternatives to detention, including before deportation” and “[e]nsure that children are not deprived of liberty except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary concern, and that they are segregated from adult detainees who are not their family members.”<sup>265</sup>

While some informants point specifically to the UPR process as being instrumental in changing the Government’s position, other coalition members stress that it was the combination of factors which led to the development of the MOU-ATD, including: systematic domestic pressure, outreach to Government including by way of raising awareness and outlining proposed solutions, collaboration by international partners, as well as the “call-out” from international human rights treaty bodies.<sup>266</sup>

## **B. Government Action**

Due to the stakeholder initiatives discussed above, Thailand faced mounting pressure and engagement by various actors, which may explain the Government’s change in position concerning migrant child detention.<sup>267</sup> As early as 2015, the Government agreed to revise its migrant child detention policy, ending the use of bail for migrant children to be released from detention, as well as instituting other reforms.<sup>268</sup> Nevertheless, the Prime Minister’s 2016 announcement of the policy reform at the UN Summit on Refugees and Migrants was a surprise to many advocates involved.<sup>269</sup> The Prime Minister announced that Thailand would end the detention of children, as well as an effective national screening mechanism (NSM) which could have far-reaching impacts beyond the detention issue.<sup>270</sup> It has been noted that the Prime Minister’s announcement at the Summit allowed the new (military) Government to increase its political standing and reputation among the “international community.”<sup>271</sup>



Concurrently, Thailand, along with 151 countries, agreed to the Global Compact for Migration (the GCM), which provides that the detention of migrant children should be used only as a principle of last resort, and alternatives should be developed.<sup>272</sup> Although the GCM fails to prohibit outright the detention of migrant children contrary to the prevailing interpretation of international human rights treaties, as a compromise position, states committed to “protect and respect the rights and best interests of the child at all times, regardless of migration status, by ensuring availability and accessibility of a viable range of alternatives to detention.”<sup>273</sup> The Thai Representative “...called the GCM a starting point for forging international cooperation on migration...” and stated that the country “...would implement the GCM by strengthening regional and national mechanisms.”<sup>274</sup>

A few months after the UN pledge, in November 2016, there came a significant development by way of an unprecedented Thai domestic court ruling. A Chiang Rai Juvenile and Family Court held that “refugee children have rights to protection and to judicial determinations that prioritise their best interests” and thus refused to penalize a Somali refugee child for lack of status in Thailand.<sup>275</sup>

Two months later, in January 2017, the Government adopted Cabinet Resolution 10/01 B.E. 2560, setting up a “Committee for the Management of Undocumented Migrants and Refugees”, which would be tasked with developing policies concerning the screening and management of undocumented migrants and refugees and the National Screening Mechanism (NSM).<sup>276</sup> The adoption of the Cabinet Resolution sets forth the process to develop an NSM for refugees and asylum seekers entering the country.<sup>277</sup> This policy change was viewed as important for helping to manage the vast number of migrants without status in Thailand.<sup>278</sup> Thai advocates viewed the Cabinet Resolution as a concrete step towards actualizing the Prime Minister’s pledge. One informant called it a milestone in Thailand, hoping that “refugees and asylum seekers will no longer be recognized as ‘illegal’ migrants.”<sup>279</sup>

### **C. Government and NGO Engagement Following 2016 UN Pledge**

One member of the CRSP noted that it was the Prime Minister’s commitment at the UN Refugee Summit in 2016 that promoted the process of formulating the MOU-ATD to begin.<sup>280</sup> Although a precise and definitive explanation for what led to the Prime Minister’s commitment is difficult to discern, a number of advocates noted that it was likely a confluence of factors. Regardless, they view the initial pledge as important for giving NGOs further momentum to advocate against the detention of migrant children.

While initially the pressure of the international community was important for Thailand to consider ATD for migrant and refugee children, some note that the role of CSOs, especially following the UN pledge, was key. More specifically, coalition members noted that there was a significant change in the relationship between the non-profit advocacy community and the Government once Thai nationals were brought into the conversations and specifically appointed to positions within NGO organizations. The Asia Pacific Refugee Rights Network (APRRN), for example, has suggested that “the hiring of local Thai activists as operational coordinators in 2017” was an important development in advancing refugee rights in Thailand.<sup>281</sup>

Another NGO representative interviewed expounded on this point: “When you have a group of foreigners talk to the Thai Government, that’s one thing. But when you have the Thai staff come in to talk to the Government in Thai and present [the issues] to them in Thai, it works very well.”<sup>282</sup> Because Thai nationals working in CSOs have broad knowledge and deep understanding of the migrant and refugee populations, once the local CSOs had developed a coordinated advocacy strategy, they were able to communicate the nuances of the issues to the Government on behalf of the migrants, and thus more effectively influence the Government’s policy related to the child detention. They argue that this type of engagement allowed the Government to act more confidently, as officials had a deeper understanding of the issue due to the coalition’s information-sharing efforts.<sup>283</sup> This was also effective in helping the CSOs develop a media strategy, highlighting issues in the local media, and bringing them to the Government’s attention as examples of “bad practices.”<sup>284</sup>

Although the Government has not explicitly provided a reason for its policy shift, the general consensus from those interviewed is that ending child detention also aligns with the Government’s willingness to address and pay special attention to children’s rights issues.<sup>285</sup> The presumption is the Government was comfortable adding the issue of alternatives to detention for migrant children to the list of other areas for reform it is pursuing in an effort to better conform to international standards.<sup>286</sup>

Embolden by the Prime Minister’s commitment, local NGOs viewed the announcement as an opportunity to capitalize on the international and national focus on migration policy to campaign against detaining migrant and refugee children.<sup>287</sup> Following up on the UPR recommendations, in early 2017, CRSP submitted a ‘shadow’ report to the UN Human Rights Committee review of Thailand’s obligations under the ICCPR.<sup>288</sup> Soon thereafter, in mid-2017, CRSP had a meeting with the Director General of International Organizations at the Ministry of Foreign Affairs (MOFA), which proved critical to advocacy on the issue. While the MOFA claimed that the Immigration Bureau had indicated that children were in detention because their parents do not want to be separated from them, CSOs noted that this was not accurate. They informed MOFA that they knew, for example, of at least one UAM refugee in detention after not receiving an individualized assessment. (JRS-BCP had received a letter from the UAM seeking support and access to UNHCR RSD process.) In addition to the pressure from CSOs and the well-known individuals, like MR Supinda Chakraband, the founder of Childline Thailand Foundation, providing evidentiary support of refugee children in detention proved to be vital to encouraging MOFA to address the issue through its role in the secretariat with regards to the Prime Minister’s pledge and commitment to end detention of children. The support and push from Thailand’s MOFA Director General of International Organizations was substantial enough to make change in policy through PM commitment.<sup>289</sup>

In December 2017, the CRSP submitted a draft ATD policy to MOFA recommending that MOFA share it with the other government agencies. This draft followed the CAP model framework and practices from different countries in association with International Detention Coalition’s *There are Alternatives*, while taking into consideration Thailand’s particular

context.<sup>290</sup> Although many of the rights-based ATD components were removed from subsequent drafts,<sup>291</sup> MOFA agreed to pursue the idea of MOU-ATD, suggesting that it could be led by the Immigration Bureau and MSDHS (DCY). In or around June 2018, DCY called CRSP to support the development of MOU-ATD, and CRSP in turn invited UNHCR, IOM to join in the development process of the MOU-ATD.<sup>292</sup>

Other notable interventions during the period included the 2017 visit of Suan Plu IDC by Human Rights Commissioner of Thailand, after CSOs received reports that approximately four children who were arrested alone (at least one or two of their parents outside) were continued to be detained.<sup>293</sup>

Additionally, diplomatic missions played a helpful role in raising the issue. For example, the Canadian ambassador not only visited an IDC in 2018 and questioned the detention of children, but the ambassador also offered support to resettle some vulnerable children who accessed bail.<sup>294</sup> The US mission also played a significant role in refugee protection, funding urban refugee protection programs as well as advocating on ATD and NSM, and supporting the resettlement of refugees including some individuals held in detention.<sup>295</sup>

Throughout CSOs pursued media and public engagement.<sup>296</sup> In June 2018, NGOs, including APRRN, CRSP, and Fortify Rights, among others, issued a joint statement noting that since the adoption of the 2017 Cabinet Resolution 10/01, B.E.2560, the Government had made little progress and pursued only limited consultation with civil society with regard to implementing a NSM.<sup>297</sup> They also addressed concerns regarding the recent “forced returns of refugees to countries where they may be persecuted,” and as well as the “ongoing indefinite and arbitrary detention of refugees.”<sup>298</sup> To encourage further Government action, the NGOs shared with the Government its proposed draft regulation to recognize and protect refugees’ rights in Thailand.<sup>299</sup>

By the time the Government’s draft regulation was released, a two-fold NGO campaign consisting of coalition building and technical assistance to develop the MOU-ATD had already been established. With regard to the former, the NGOs, working as the CRSP, focused efforts on marshalling their influence to build a larger interagency governmental coalition that would advocate for the MOU-ATD.<sup>300</sup> The coalition consisted of NGOs, CRSP, and several governmental departments to assess current domestic practices for detaining migrant children and worked closely on developing protections in an effort to ensure the best interest of the child.<sup>301</sup> Coalition builders directly involved in these efforts cite, among others, Asylum Access Thailand, Fortify Rights, HRW, the Thai-based coalition CSRP, and the transnational coalition Asia-Pacific Refugee Rights Network (APRRN), as key organizations working on the campaign.<sup>302</sup>

The second aspect of the campaign involved the technical expertise, capacity building, and drafting of the MOU-ATD framework. While international and transnational NGOs provided the human rights monitoring through articles and reports, local NGOs collaborated to address and raise domestic concerns with the Government. For example, the local NGOs and

CSOs focused on policy implementation, and international NGOs and related UN agencies took the lead on monitoring and technical capacity building efforts.<sup>303</sup> Together, these groups worked with Government agencies to develop a MOU-ATD that was to align more closely with the CRC’s “best interests of the child” principle. In 2018, the CRSP and its members also developed a pilot project on ATD using the foster care model.<sup>304</sup>

During the period, NGO stakeholders worked closely alongside the Government to develop the MOU-ATD,<sup>305</sup> including through the organizing of public events on both the issue of the NSM and migrant child detention.<sup>306</sup> For example, CSRP organized a public discussion in August 2018 wherein a Representative from the Royal Thai Police’s Strategic Department stated that the Government “does not intend to detain children, and the [G]overnment wants no children in IDC” and “‘children’ include ‘family,’ so they can release parents along with children.” He also emphasized that the “police is not a social worker,” so they need increased civil society support.<sup>307</sup> While there existed “debates” among participants as to whether detention is national security, one source noted that Thai CSOs were able to effectively raise awareness as to “the international and domestic laws on the rights of children to release refugee children and families.”<sup>308</sup> In addition in October 2018, International Detention Coalition, the Thai National Human Rights Commission, and Save the Children Thailand, co-organized a National Roundtable on Ending the Immigration Detention of Children and Developing Community-Based Alternatives in Thailand. During this roundtable, groups shared global good practices from other countries in developing ATD for children, including a briefing paper by the International Detention Coalition for the Thai Government. The roundtable also allowed multiple government ministries to share their reflections, bringing together representatives from the Royal Thai Police, Immigration and DCY into a single panel. This represented one of the few times all three divisions had come together to discuss the issue.<sup>309</sup> Through such discussions and engagement, stakeholders developed a broad framework that could be implemented at the operational level in an interagency fashion. Indeed, some coalition-members have noted that they regard this work across the Government and multiple sectors as an achievement in the development of Thailand’s domestic policy.<sup>310</sup>

#### IV. TOWARDS ENDING IMMIGRATION DETENTION OF CHILDREN AND THE MOU-ATD

##### A. MOU-ATD Provisions

On January 21, 2019, representatives of seven Thai Government agencies—the Royal Thai Police, the Ministry of Social Development and Human Security, the Ministry of Foreign Affairs, Ministry of Interior, Ministry of Public Health, Ministry of Education, and Ministry of Labor—<sup>311</sup> signed the MOU-ATD,<sup>312</sup> confirming that the use of detention for migrant children would be used only as a measure of last resort and for the shortest possible duration, in part so as to better conform Thai practice to its international law obligations as provided by the CRC.<sup>313</sup>

During the signing ceremony, the Deputy Prime Minister and Minister of Defense, General Prawit Wongsuwan, stated that the Government “places high importance in fulfilling its commitment to humanitarian principles, particularly on the protection of children and adhering to the national agenda on human rights.”<sup>314</sup> Upon the signing of the MOU-ATD, the NGO members of the coalition as well as UN organizations welcomed the change noting it to be a “commendable step bring[ing] Thailand closer to international standards.”<sup>315</sup>

According to the MOU-ATD, its objectives are to:

- (i) serve as common guidelines for government agencies and related agencies to resolve cases concerning migrant children detained at Immigration Detention Centers of the Immigration Bureau and the Royal Thai Police, in accordance with immigration laws, and
- (ii) determine clear mechanisms and responsibilities among agencies to ensure that the rights of the child are protected in accordance with Thailand’s domestic laws and international obligations.<sup>316</sup>

The MOU-ATD does not prevent a child from being arrested or detained in what is termed “necessary and unavoidable” circumstances.<sup>317</sup> The process still functions pursuant to the Immigration Act, whereby a migrant child, for example, who is arrested with her parents would go through the court processing first.<sup>318</sup> The MOU-ATD’s provisions do not take effect until the child is already in custody at an IDC and is subject to deportation under the Immigration Act.<sup>319</sup> Once the child has been arrested and detained by the Immigration Bureau or other officials with jurisdiction, authorities then are to call the Department of Children and Youth (DCY) under the Ministry of Social Development and Human Security (MSDHS) and the two agencies are to work together on a case-by-case basis to assess the child’s vulnerabilities and determine the best interests of the child.<sup>320</sup>

During the determination process broadly set forth by the MOU-ATD, a Committee is to meet to discuss available options for each child.<sup>321</sup> The first factor the Committee assesses to help determine the best alternative to detention is whether the child is an unaccompanied minor or has a legal guardian who qualifies as such.<sup>322</sup> The current range of options available through the case management system includes foster care, release into the community, or movement into a government shelter (each is discussed below in further detail). The Committee then is to process the case and develop a care plan, subsequently working with NGOs to effectuate the care plan. For example, in a case where a child is separated from her family, DCY may work with NGOs to conduct family tracing and find the child’s parent(s); or, if the child is a refugee, DCY is to work with UNHCR, etc., on the refugee resettlement process.<sup>323</sup> For an unaccompanied child, NGOs are to work to find a foster care home or placement for the child in the community, and a government shelter, i.e., a closed facility, is to be considered as a last-resort.<sup>324</sup>

The MOU-ATD explicitly states that family-based care is to be given first priority, and the Government or privately-run reception centers are used as the last resort for the shortest

possible duration.<sup>325</sup> The provisions of the MOU-ATD itself appear to be modeled after a form of the Child-Sensitive Community Assessment & Placement (CCAP) strategy, prioritizing family-based care and turning to Government or privately run shelters as a last resort.<sup>326</sup> CCAP is a 5-step model which begins with preventive legislation against detention, proceeds with a needs assessment for each individual child, then to rights-based case management with regular review of the child's case and finally timely case resolution.<sup>327</sup> However, as will be discussed in Part V.A.1, the MOU-ATD is not legislation and does not include preventative legislation against detention. Furthermore, within the text of the MOU-ATD, a greater emphasis is placed on individual assessment and case management and less on case resolution.<sup>328</sup> DCY together with civil society stakeholders have agreed that family-based care is in the best interest of the child and should be prioritized. There are currently several alternatives to detention options that can be employed through the case management program.<sup>329</sup>

Under the MOU-ATD, children in custody are to have several rounds of screening and determination processing in the development of their individual cases.<sup>330</sup> After thorough screening and registration conducted by the Thai Immigration Bureau, a multidisciplinary working group (MWG), comprised of IDC officials, together with DCY and representatives of IOM, UNHCR, UNICEF,<sup>331</sup> are supposed to develop an individual care plan for each child and coordinate the implementation of each plan with the appropriate service providers. The MWG is also charged with appointing a case manager from civil society to coordinate with the appropriate service providers specified in the child's care plan.<sup>332</sup> Based on the MWG's assessment, a determination for alternative care and foster care is then supposed to be made.<sup>333</sup> Case managers and legal advisors are to support the migrant child and his or her family through the relevant immigration procedures.<sup>334</sup>

At the time of writing of this Report, the NGO assigned by DCY to handle much of the case management work is Host International.<sup>335</sup> With a small team of case workers, Host International works with DCY to develop each case plan, connect the child and his or her family with other organizations to provide needed services, and identify a place for the child and his or her family to stay.<sup>336</sup> Host International tries to find housing in the community familiar to the child and the child's family while ensuring that they have access to basic services, such as education and healthcare.<sup>337</sup>

If a family-based care plan cannot be achieved, especially for unaccompanied children,<sup>338</sup> the last resort in terms of ATDs is MSDHS or privately run reception centers, also known as "shelters," wherein children are to stay for the shortest possible duration.<sup>339</sup> The Government has built and is in the process of building residential shelters, which it refers to as an "alternative" to the IDCs.<sup>340</sup> These residential shelters are or will be reunification spaces for the mother and child to be together.<sup>341</sup>

As their individual care plans are developed, children and their mothers are also designated to wait in newly developed facilities called "mother and child reception centers." CSOs are hesitant to have children released in advance of the development of a care plan as they

want to ensure that children are protected in accordance with the Child Protection Act.<sup>342</sup> One source estimated that in fall 2020 roughly 30 children were being held in these new centers with their mothers.<sup>343</sup>

## **B. Key Achievements of the MOU-ATD**

The MOU-ATD and the associated framework and practices developed represents a major advancement for migrant children in Thailand and beyond. The aim of the MOU-ATD is to close the gaps between international standards and Thai policy and practice for the treatment of migrant children. More specifically, the MOU-ATD seeks to use detention only “as a measure of last resort” and “for the shortest possible duration.”<sup>344</sup> Although, as noted earlier, the CRC Committee has held that the ‘last resort’ principle is not applicable to child detention in the migration setting, a notable achievement of the MOU-ATD is that Thailand has grounded its policy on both Thai law and the CRC, prioritizing the ‘best interests of the child’ principle, along with the principle of ‘non-discrimination.’<sup>345</sup>

Before the MOU-ATD, it was apparent that migrant child detention was common practice, with some migrant children being kept in detention facilities indefinitely even for as much as several years.<sup>346</sup> Since the implementation of the MOU-ATD, although arrests still occur, officials now work to have children in custody released without penalty. Beginning in 2018, the Thai Government had already moved to ensure the release of several children in IDCs, such that at the time of the MOU-ATD’s signing in 2019, there were no children in detention. One advocate cites this period as an important experience for the Government in further developing the MOU-ATD’s SOP and manual.<sup>347</sup>

Since the signing of the MOU-ATD, many refugee children and their mothers have been released on bail from the Suan Plu IDC in Bangkok and permitted to reside in communities in rented accommodations provided through NGO and UNHCR support.<sup>348</sup> NGOs report that from 2019 to 2020, more than 230 women and children have been released through community-based and case management ATDs.<sup>349</sup> NGOs subsequently provide associated services, including legal support, case management, materials support, training, support with schooling and reporting with the Immigration Detention.<sup>350</sup>

The Government has also provided figures concerning the impact of its new policy, though with somewhat less precision, stating in its recent UPR submission that “from October 2018 to June 2021, 304 children and their families have received assistance while awaiting repatriation or travel to a third country.”<sup>351</sup> It defines ‘assistance’ here as including: ‘allowing the parent (on bail) to stay in the community with their children; allowing mothers and their children to stay on a temporary basis in the Child Assistance Centres run by the Department of Child and Youth Affairs; searching for foster families for unaccompanied children; and allowing mothers and their children to stay in the Mother and Child Reception Centres run by the Immigration Bureau.’<sup>352</sup>



The Government has also tried to address some of the conditions of detention for children through the establishment of separate facilities for mothers and children. The Immigration Bureau established the mother and child reception centers to house mothers and their children during the screening and assessment phase of the child's care plan development.<sup>353</sup> While the details of the internal conditions of these centers remain unknown, one advocate indicated that some of the material conditions in these centers may be better than the IDCs.<sup>354</sup> Another improvement is that children are not separated from their mothers within these centers.<sup>355</sup>

Advocates note that the overall focus on family-based care and the provisions for assessment, case management, and follow-up are also vast improvements in the treatment of migrant children compared to the situation prior, where there was no such Government involvement with case management.<sup>356</sup>

Another achievement of the MOU-ATD is that it allows for better coordination among different government agencies, as well as among the agencies and IGOs, NGOs, and CSOs.<sup>357</sup> The seven government agencies signatory to the MOU-ATD include the Royal Thai Police, the Ministry of Social Development and Human Security, the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Public Health, the Ministry of Education, and the Ministry of Labor. Under Section 5.3 of the SOP-ATD, for example, different governmental and non-governmental agencies are given particular responsibilities concerning the implementation of the MOU-ATD's principles and objectives along with points of coordination with other groups. The SOP-ATD also provides instruction specifically for UNHCR, IOM, UNICEF and CSOs to coordinate with these government agencies.<sup>358</sup>

According to one informant, the MOU-ATD is the first to bring all seven of these Government ministries together to tackle this specific issue.<sup>359</sup> Another interviewee has expressed approval for the MOU-ATD's collaborative approach to the issue, incorporating other social welfare and child protection agencies, which "tak[es] the response out of the sole control of migration institutions."<sup>360</sup> Indeed, the SOP-ATD explicitly states that a comprehensive and coordinated approach is required among government agencies so as to address the complexity of the issue.<sup>361</sup>

Another informant observed that the MOU-ATD has created an ease of doing work for CSOs by sanctioning goals that their organizations can work towards unobstructed.<sup>362</sup> One example can be seen in CRSP's shift from working primarily with UNHCR in an effort to improve initiatives, to coordinating with the Government directly.<sup>363</sup>

Strong political commitment and general buy-in from the Government are also identified as being critical achievements to producing the reform.<sup>364</sup> The impact of the Government's commitment is evident not only in the development of the MOU-ATD itself, but also can be seen in the greater participation of Government agencies in discussions concerning migrant child detention, such as the International Detention Coalition's regional roundtables.<sup>365</sup>

Indeed, another achievement of the ATD-MOU is that Thailand has since championed addressing the issue of children in immigration detention at the regional and global level.<sup>366</sup> For example, Thailand has attended as a panelist in roundtable discussions and co-organized a number of regional and international discussions focused on ATDs and access to health, including at the UN's May 2022 International Migration Review Forum (IMRF).<sup>367</sup> Thailand's engagements are critical not only for regional peer learning, but also for the Government to sustain its own commitment to improving the ATD system in Thailand. Such initiatives also provide a forum for CSOs to follow up with the Thai Government to promote government's accountability on the issue.<sup>368</sup>

## V. THE MOU-ATD: OUTSTANDING GAPS

While many advocates commend the MOU-ATD as an important and even groundbreaking step towards Thailand realizing its commitment to ending detention for migrant children, important gaps and inconsistencies in law, policy, and administrative practices remain.

### A. Law and Policy Gaps

Though the MOU-ATD is a major step towards promoting the “best interests of the child,” there are several important shortcomings.

#### 1. *Migrant and Refugee Child Arrest and Detention Still Allowed*

Foremost among them is that the MOU-ATD is not a law and does not outright prohibit the detention of migrant and refugee children. Indeed, the Immigration Law still is in effect, with the MOU-ATD framework not triggered until children have been arrested and arrive at detention.<sup>369</sup> Because the MOU-ATD is a policy, the officer can also choose whether to follow it without consequence.<sup>370</sup> Moreover, the MOU-ATD allows for children to be detained “as a measure of last resort”—and the SOP-ATD provides that children “shall not be detained, except in necessary and unavoidable circumstances, whereby they may be detained at the Immigration Detention Centres, as the last resort and for the shortest possible duration.”<sup>371</sup> As discussed previously (*infra* II.B.2), the detention of migrant children is strictly prohibited by international law,<sup>372</sup> and constitutes a violation of the CRC, namely Articles 3 and 37 (b), among other international treaties to which Thailand is bound, as well as Article 22 of Thailand's Child Protection Act which requires the best interests of the child to be given primary importance when considering the treatment of a child.<sup>373</sup> Since children are continuing to be detained in Thailand, this has led to other fundamental rights enumerated in the CRC, including violations of the rights to education (Article 29), health (Article 24), family unity (Article 9, 10, 16, 18), among many others.<sup>374</sup>

Advocates note as well that certain children, including a majority of Rohingya and those whose asylum cases at UNHCR are closed,<sup>375</sup> are excluded from the community-based ATD. As a result, many of them are held in a Government shelter, i.e., a closed facility, until they find case resolution / durable solution, e.g., resettlement.<sup>376</sup> Many Rohingya children who are considered

victims of trafficking are held in Government shelters of DCY, a majority of whom eventually abscond for Malaysia.<sup>377</sup> These shelters, although more open than Reception Centers, are not meant for children for more than three months.<sup>378</sup> In addition to potential violations associated with indefinite detention under ICCPR Article 9, Article 24, among others,<sup>379</sup> exclusions based on national origin, ethnicity, among other categories, violates the principle of non-discrimination, a central and foundational principle of child rights law<sup>380</sup> and international human rights law.<sup>381</sup>

Another salient gap in the MOU-ATD is that it fails to define the time frame involved for what is considered the “shortest possible duration” a child may be detained.<sup>382</sup>

## **2. *Lack of Legal Status for Migrant Children and their Families***

The MOU-ATD also does not address the underlying issue for migrant children and their families which is their lack of legal status in Thailand, making them vulnerable to arrest and detention. A core goal of the MOU-ATD is to resolve cases concerning migrant children and place them in alternative care,<sup>383</sup> providing a framework for the release of all children detained in IDCs.<sup>384</sup> The MOU-ATD and its accompanying documents do not contain a mechanism that prevents the arrest and detention of migrant children and their families, leaving the Immigration Act to continue to prevail over these matters.<sup>385</sup> Consequently, some children, e.g., those with closed UNHCR cases, are still being arrested and detained, despite the MOU-ATD.<sup>386</sup> Indeed, sources have noted that while for a period there were no more children detained in Suan Plu IDC, the main IDC in Bangkok,<sup>387</sup> due to the COVID situation, there appears to be some children being held in Suan Plu as of December 2021.<sup>388</sup> In addition, even before COVID-19, some children were being arrested and living in an Immigration Reception Center,<sup>389</sup> which is a “detention-like environment,” without freedom of movement and only limited access to basic services.<sup>390</sup>

Thailand’s refusal to sign and ratify the Refugee Conventions and its 1967 Protocol, as well as the Statelessness Conventions and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families persists as a core legal gap with important consequences in addressing the issue of migrant and refugee child detention.<sup>391</sup> Notwithstanding this, it should be noted that since the MOU-ATD, Thailand made additional commitments at the 2019 Global Refugee forum and had taken steps towards developing the NSM.<sup>392</sup> The Thai Cabinet approved in December 2019 the Prime Minister’s Office Regulation of Aliens Entering into the Kingdom and Unable to Return to their Country of Origin (B.E. 2562) (the Regulation).<sup>393</sup> The objective of the enacted Regulation is to manage “persons of concern” who enter into Thailand and are unable to return to their country of origin and is the first national law on the NSM for such persons.<sup>394</sup> The Regulation establishes a NSM to determine the status of such persons and to provide them with protection and assistance.<sup>395</sup> Although the implementation of the Regulation was delayed in part due to the Covid-19 crisis, the NSM officially came into force in June 22, 2020.<sup>396</sup> The Government maintains that it is still being developed by the relevant government agencies, but that once it is established Thailand “will have in place a comprehensive system to identify people in need of protection and to grant

them legal status and access to the necessary public services, permitting them temporary stay in the Kingdom and pursuing sustainable solutions.”<sup>397</sup>

While a full analysis of the Regulation is beyond the scope of this Report, the development of the NSM has critical implications for the issue of migrant families and child detention—consequently a brief overview of advocates’ concerns is included here.<sup>398</sup> Among the major issues with the Regulation are the vaguely formulated provisions which would allow for a wide margin of appreciation on the part of the Government.<sup>399</sup> For example, they did not define “refugees” in accordance with international human rights standards. Indeed, the Regulation provisions do not provide details on eligibility criteria for the purpose of status determination. The Regulation merely touches upon procedural issues without mentioning substantive criteria, including the definition of persons eligible for protection status.<sup>400</sup> This could raise “serious concerns over objectivity, transparency, predictability, and legitimacy of the Thai asylum application and screening procedure.”<sup>401</sup> For example, it remains unclear whether particular populations which the Government had previously excluded—including refugees from Myanmar (including Rohingya), Uyghurs, and North Koreans—would be continued to be under the National Security Council’s purview, thereby leaving only a limited number of refugees having access to the NSM.<sup>402</sup> At the time of writing of this Report, according to the NSM sub-committee assigned to develop the NSM SOP, it is being confirmed at sub-committee level that these groups will be managed by the National Security Council and whether excluded from NSM. In any case, sources indicate that the SOP needs to be reviewed and approved by the NSM committee.<sup>403</sup> The language being used for the NSM also blurs the distinction between individuals who the Government terms “protected person” and those who might be internationally recognized as “refugees,” raising some concern among stakeholders about what protections will be afforded to those being screened.<sup>404</sup> The authorities also have not provided adequate guarantees against refoulement, nor have they included a right of appeal to the status determination.<sup>405</sup>

Notwithstanding these concerns, advocates remain hopeful that the development of the NSM ultimately results in the Government no longer arresting refugees, particularly, urban refugees, and permitting them to temporarily stay in the country, thereby limiting the use of detention and even the need for alternatives to detention.<sup>406</sup>

### 3. *Deficient Bail System*

Another significant gap of the MOU-ATD is with respect to the bail system, which raises several concerns.<sup>407</sup> First, the Immigration authorities do not have bail criteria which reflect the MOU-ATD and continue to rely on the same criteria as before, even when considering whether to release parents of children.<sup>408</sup> According to both the previous Immigration order (No.53/2559) and the newly issued Immigration order (No. 85/2565), the criteria for persons who can request bail include: (i) a person who needs to get bail to process their travel document, e.g., passport; (ii) a UNHCR POC; (iii) a person with a serious medical problem; and (iv) a person with a force majeure circumstance who cannot be deported, e.g., has a court ruling that a person cannot be deported to their home country because of war/disaster.<sup>409</sup> The bail system permits by way of the second criteria, i.e., UNHCR POC, a mother in immigration custody

whose child is also in custody to pay a bail of 50,000 Thai Bhat (approximately \$1,500 USD) in exchange for release and reunification with her child in the holding shelters. But the cost of bail is too expensive for most migrants, particularly refugees who are denied access to employment.<sup>410</sup> If a mother or relative cannot pay the fee, the burden falls on CSOs to subsidize bail costs for the mother in order for children to not be alone or without a parental guardian.<sup>411</sup> CSOs are also obligated to sign as guarantors for the mother before the mother and child can be released.<sup>412</sup>

One key informant indicated that, in practice, until recently those NGOs working with refugees and asylum seekers lacked information concerning what were the applicable bail criteria used internally by immigration authorities such that the NGOs had difficulty facilitating access to bail except on rare occasions. However, once they received the proper information concerning the internal order, it became easier to put forward a bail application to secure bail for refugees and asylum seekers.<sup>413</sup>

Should there be a person applying for bail with a serious medical issue, i.e., the third category under the order, there are a number of barriers to accessing medical treatment, even when the Government doctor states that the person requires medical supervision and/or treatment. For example, the illness at issue must not be an obstacle to travel, nor a serious contagious disease that may affect the general public. In addition, the person must also present 2,000 Thai Baht to the immigration authorities in order to cover the person's own medical costs. Given the time involved for the process, this can also result in severe harm to the detainee. One source noted that in early 2022, an older man with serious illness, who Refugee Rights Litigation Project was trying to bail out, died in detention before being able to secure bail -- due to the long process, limited access to detainee, finding guarantor, bail money, immigration approval process.<sup>414</sup>

Another concern with respect to the bail system is that there appears to be no formal process for requesting or retrieving bail. When NGOs learn that a child has been detained, NGOs coordinate to solicit resources for bailing the mother and the child out of detention.<sup>415</sup> In addition, once the child and mother have been released on the condition of a guarantor, there exists no follow-up process from the Immigration Bureau or DCY to continually review the case and see if there are better solutions than the initially proposed care plan for the child and/or the family.<sup>416</sup> Application of the bail process also appears to be at the discretion of the Immigration Bureau, with the agency known to revoke bail and extend it intermittently. Those released on bail are obliged to return to detention when bail is revoked, placing pressure on NGOs to advocate for bail to be extended.<sup>417</sup>

Given this system, individuals who cannot be resettled or bailed are detained indefinitely, contrary to Thailand's obligation under Article 9 of the ICCPR that "no one shall be subjected to arbitrary arrest or detention." In addition, UNHCR has noted that "there appears to be no legal review mechanism following the issuance of a deportation order," which also is contrary to ICCPR Article 9's obligation to provide an individual "periodical review" of the "necessity of

detention” and its duration.<sup>418</sup> Furthermore, the lack of access to judicial review may also conflict with Article 90 of the Thai Criminal Procedure Code, which provides in principle for a right to “file a petition with the Local Court.”<sup>419</sup>

A further issue with the bail provisions is that they are exclusive to mothers; fathers are not generally given the option to pay bail to be reunited with their families.<sup>420</sup> This policy potentially leads to a violation of a child’s right to family life (Article 16 CRC), to family unity (Article 9 CRC), and to family development (Article 18 CRC).<sup>421</sup> Article 9 provides that “children should not be separated from their parent against their will,” unless “such separation is deemed in the best interests of the child, such as child abuse and neglect.” Consequently, non-custodial measures relating to children who are with families must take into account not only the child’s right to liberty, but also the child’s right to family life.”<sup>422</sup> Although one informant indicated that if the mother is not able to look after the children, the father can be subject to bail, this appears to be exceptional and depends on the circumstances of the case.<sup>423</sup> Moreover, the criteria for fathers to get bail is lacking.<sup>424</sup> After two year of the MOU-ATD’s implementation, NGOs managed to get father released on bail through fundraising and finding guarantors for them. By consequence, many fathers have been since reunited with their wives and children since the end of last year.<sup>425</sup>

In addition, advocates have raised the issue of children who are released on bail from detention but who upon turning 18 before their case has been resolved, they are returned to detention due to their lack of legal status.<sup>426</sup> Again, this illustrates the need for legislative reform which addresses the threshold issues which trigger the arrest in the first place.

#### 4. *Family Separation & Other Issues*

Another significant deficiency of the MOU-ATD is that it does not acknowledge family separation issues across IDCs, instead focusing on provisions for families (mothers and children) who have been detained in the same facility. Moreover, as noted above, it is applicable only to mothers who also have children in immigration custody.<sup>427</sup>

Similarly, the MOU-ATD does not consider a situation when both parents are detained, while their children are not—for example, if the children are at school at the time of arrest of the parents. In this case, children who are not detained may have to live alone if they do not have relatives or siblings.<sup>428</sup> Organizations have protested the family separation policy as undermining the rights of the child to family life (Article 16 CRC), to family unity (Article 9 CRC), and to family development (Article 18 CRC).<sup>429</sup>

Advocates noted that the MOU-ATD is designed to address the needs of children affected by long-term detention, rather than those who are in short-term detention, e.g., accompanying refugees who are subject to a voluntary deportation process. The MOU-ATD’s focus tends to be more on asylum seekers who will be detained longer than others who are normally only detained for a few days or weeks.<sup>430</sup>

In addition, the MOU-ATD does not discern between UNHCR-registered refugees and others; advocates indicated that UNHCR-registered refugees tend to receive different treatment as compared to non-registered refugees and/or migrants.<sup>431</sup>

### 5. *Gaps in Legislation and Legal Status of the MOU-ATD*

The MOU-ATD's broad framework leaves many key issues unaddressed and thus requires further legislation and/or issuing of regulations by the relevant authorities to effectuate its express objectives.<sup>432</sup> As discussed in *supra* V.A.1, a core issue is that the Immigration Act does not incorporate a prohibition on the detention of migrant and refugee children. One advocate noted that although the MOU-ATD demonstrates the Government is serious about its commitment to reform, it is also clear that there are substantial "loose ends" to be addressed.<sup>433</sup>

The SOP-ATD was developed and approved by the Government in August of 2019 to address specific policy-relevant questions in implementing the MOU-ATD.<sup>434</sup> Although the explicit objectives of the SOP-ATD are "[t]o practice, as the mutual procedures among relevant agencies to operate in line with the MOU-ATD" on alternatives to child detention, as well as "[t]o provide knowledge [and] increase understanding for operational staffs to be able to implement child protection case management effectively by considering the best interests of the child,"<sup>435</sup> the SOP-ATD does not fully substantiate the policies and procedures that need to be developed in order to effectuate the implementation of the MOU-ATD.<sup>436</sup>

As such, the Government and relevant stakeholders developed a manual, published in late 2020.<sup>437</sup> According to one NGO representative, the manual had already been drafted by the Government by fall 2020 and has since been shared with relevant NGOs.<sup>438</sup> The manual is supposed to address concerns at the operational level and include guidance for how each agency should carry out its mandate under the MOU-ATD.<sup>439</sup> Nevertheless, the Manual has not addressed many unanswered questions, including:

- Which organizations will be involved with each child's case;
- Will urban refugee children and non-urban refugee children be treated differently from migrant worker children;
- How long will certain groups of children remain in Thailand;
- What happens in the case of a national security concern;
- Where should children be released—into the government shelter or community;
- How can their safety be ensured;
- How will the various governmental and non-governmental institutions handle the increased workload, etc.<sup>440</sup>

Another important concern is the legal effect of the MOU-ATD and SOP-ATD themselves. Even though the MOU-ATD was signed by representatives of related governmental agencies, it does not impose any legal obligations on these agencies and could possibly be withdrawn by the Government at any time. One advocate even expressed concern over the risk



that negative comments from CSOs could lead to tension with the Government, which could result in the Government withdrawing the MOU-ATD.

Advocates note that it would be better if the MOU-ATD is incorporated into legislation.<sup>441</sup> Enacting appropriate legislation would also help address some inconsistencies in the governing laws and policies. For example, while the Government's policy prohibits children under 15 years old from being detained, Thailand does not have a law that prohibits the detention of all children under 18 years old.<sup>442</sup> Therefore, the status of migrant children between the age of 15 and 18 years old remains a significant legal gap. Indeed, advocates note that the MOU-ATD has not changed any of the existing laws, but rather was forged in order to encourage and mobilize the Government to abide by the existing legislation, namely the Child Protection Act.<sup>443</sup>

Advocates also note that the MOU-ATD does not sufficiently link to other laws that can give children access to services. While it is connected to the Child Protection Act and Immigration Act, it fails to fully incorporate the relevant legislation.<sup>444</sup>

## **B. Implementation Gaps**

In addition to the substantive gaps in law and policy, NGOs have identified several implementation gaps since the MOU-ATD's execution. While some have already been highlighted above, for example, related to the continued arrests of children and their families, and the problematic system and use of bail, the implementation gaps range from deficiencies in the ATD model employed by the Government, inadequacies in the support systems that surround the MOU-ATD, to delays in the development of essential committees and supporting guidelines to administrative and technical barriers. This section will outline each issue, analyzing how these implementation gaps currently weaken the implementation of the MOU-ATD and its core objectives.

### **1. *Lack of individualized prescreening, underdeveloped alternatives & other problematic practices***

As an initial matter, there is a lack of individualized screening by the Immigration Bureau at the beginning of the process when children are transferred to detention.<sup>445</sup> This results in Lack of individualized assessment and child sensitive procedure in early stage limited some vulnerable children to access to child protection mechanism. For example, if the child parent can manage their own bail, the immigration will not call DCY to assess / rescue them.<sup>446</sup>

Informants note as well that the treatment of children is not standardized such that different groups of children receive different treatment, which violates the principles of non-discrimination and best interests of the child.<sup>447</sup> For example, some Rohingya or non-POC children have been placed in institutional care for a long time, which has severe impacts on child development.<sup>448</sup> Due in part to the indefinite nature of their detention, it has been suggested that 70-80 percent of Rohingya children abscond from shelter care.<sup>449</sup>

Furthermore, among the ATDs currently being implemented by the Government, specific practices deemed by the Government to be alternatives, such as the mother and child reception centers and the foster care system, fall short of international standards and stakeholders' expectations.

First, the mother and child centers have been criticized by stakeholders as being essentially detention centers in everything but name.<sup>450</sup> Advocates argue that because the children and their mothers are still under the custody of the Immigration Bureau and cannot leave the facilities, these mothers and children are, in-fact, still in detention.<sup>451</sup> There is also concern among some that once these reception centers are fully developed, the Government will no longer release children and mothers into the community, instead preferring to employ these centers as an ATD.<sup>452</sup> The purpose of the shelter / reception center for mothers and children is to provide care for a short timeframe while waiting for a care plan, and then be transferred to family-based, community-based alternatives.<sup>453</sup> Yet increasingly mothers and children are being held in these reception centers for longer periods of time, due in part to the lack of communication and coordination among the ministries.<sup>454</sup> One complaint of immigration officials is that Reception Centers are now also holding older male children who appear more adult-like, whose "bone test" indicates that they are between the age of 17 to 19 years of age. Consequently, the authorities treat them as children, yet contend that having them live among women and children has caused problems.<sup>455</sup>

Advocates note that there is an overall prioritization of an 'enforcement' ATD model—e.g., including shelter, bail, reporting (every 15 days)—rather than the 'case management' ATD model.<sup>456</sup> The rationale offered is that this might be due to the relative ease of transferring a child from government to government.<sup>457</sup> Due to the focus on an enforcement model, some Rohingya children who are victims of trafficking abscond from the DCY shelter.<sup>458</sup> The reporting requirement for those released is so onerous that mothers and children released on bail are often unable to satisfy it – for example, having to travel from a suburb to the IDC every two weeks incurs significant transportation costs and time, including the child missing school and parent missing work – such that their bail is revoked and they are returned to detention.<sup>459</sup> Even for those who are able to withstand the burdensome reporting requirement, the children have noted that they feel stigmatized because of the frequency that they need to go to immigration authorities.<sup>460</sup>

A related issue is that 'community-based' alternatives to date has been perceived by the Government as involving a community placement, yet with limited case management attached.<sup>461</sup> Additionally, the Government has not worked with local government and local community to create local integration and community protection while the child is waiting for case resolution.<sup>462</sup>

The multidisciplinary working group (MWG), charged with developing an individual care plan for each child and coordinate the implementation of each plan with the appropriate service providers, appears to never have even had a meeting. Instead, only a few officials

communicate between DCY and Immigration.<sup>463</sup> Despite their expertise, NGOs are not involved in the MWG—and there exists a lack of NGO involvement in the policy more broadly speaking.<sup>464</sup>

Foster care—considered a ‘true’ ATD—also raises concerns.<sup>465</sup> The underlying issue is that the foster care system in Thailand is underdeveloped not only for migrant children, but also for Thai children as well.<sup>466</sup> Foster care is still not widely employed in Thailand, with most families that provide foster care for refugee children being foreign expatriates living in Thailand. One informant noted that the reluctance of Thai families taking in migrant children and becoming foster parents may have to do with the extra time and costs of taking in a foster child, as well as concerns potential foster parents have about language barriers.<sup>467</sup> Another issue raised by one source is that the Government requires that foster care families have valid visas.<sup>468</sup> To date, Childline Thailand Foundation (CTF), the Muslim Welfare Organizations of Thailand, and the Sattachon Foundation for Education and Orphans (SAF) have been working with the Government in identifying foster families,<sup>469</sup> but advocates note that further support is needed.<sup>470</sup> Others note as well the need for more ATD models. Although stakeholders in Thailand have been developing more community placement models since the MOU-ATD, they note that the “knowledge is new, and [they] need to continue to build it and sustain it.”<sup>471</sup>

Another practice inconsistent with the MOU-ATD and international law obligations is the detention of children who have the appearance of adults.<sup>472</sup> According to one informant, in some instances, children who are known to be under the age of 18 and yet have a mature appearance (e.g., boys who exhibit facial hair) are not allowed to be held in the mother and child centers.<sup>473</sup> The practice appears to be applied mostly to boys, with the Government’s purported concern stemming from fear of increased liability for sexual misconduct from the boys due to their appearance.<sup>474</sup> This practice of detaining such children is alleged to be known and accepted by the relevant Government agencies.<sup>475</sup> The Government contends that proper age assessments are hindered due to the “high number of migrant children” who are not registered with the authorities, or lack legal identification documentation, and has indicated that it is interested in pursuing a “more accurate and internationally accepted procedures.”<sup>476</sup> A best interest determination obliges the state to undertake a clear and comprehensive assessment of the child’s identity, conducted by qualified professionals with age- and gender-sensitive interviewing training.<sup>477</sup> Age assessments should be used only as a matter of last resort, and only where there are serious doubts as to a person’s declared age and where other approaches, including efforts to gather documentary evidence have failed to establish an individual’s age.<sup>478</sup>

A major issue highlighted by the Government is the limited opportunity for resettlement for persons of concern.<sup>479</sup> As a result of limited resettlement possibilities, refugees and asylum-seekers face a longer stay in Thailand which puts them not only at increased risk of arrest and detention (and longer stays in detention), but also results in increased pressure on the already limited resources and provisions for migrants.<sup>480</sup> Although the global decrease in resettlement opportunities is an important concern, advocates note that Thailand’s reliance on refugee resettlement and voluntary repatriation (and not local integration) for case resolution is itself its own limiting factor and cause of indefinite detention as an ongoing issue.<sup>481</sup>

## 2. *Insufficient Leadership, Capacity & Resources*

Several stakeholders have cited the lack of capacity on the part of the Government as well as CSOs as one of the key obstacles to the proper effectuation of the MOU-ATD.<sup>482</sup> Indeed, advocates note that there was no specific funding nor human resources allocated to the MOU-ATD implementation.<sup>483</sup> Instead, the Government relies on existing resources from the existing system. As a result, there is a sense among some officials that using resources to effectuate the MOU-ATD is taking away resources for Thai and could undercut the quality of existing services for Thai nationals. Consequently, NGOs are often left to provide support.<sup>484</sup>

From the lack of manpower to handle case management procedures for the influx of children being released resulting in delayed development of the children's care plans<sup>485</sup> to limited physical capacity in shelters to house children and their families leading to prolonged time in detention and reception centers,<sup>486</sup> capacity problems seem prevalent throughout the MOU-ATD's implementation.

Capacity issues may stem in part from the lack of involvement from Government agency signatories of the MOU-ATD, apart from the two main implementing agencies. The MOU-ATD involves seven Government agencies, each of which has different mandates and responsibilities regarding the issue of children in detention. The MOU-ATD states that these agencies will work together in tandem on the issue. Yet a key gap is that there is a lack of designated focal points from each ministry to work on the MOU-ATD and allow for effective coordination and communication.<sup>487</sup> In part related to this core gap is that there is no systematic assessment and review as to how to improve the system.<sup>488</sup>

Although seven Government agencies signed the MOU-ATD, only the Immigration Bureau and DCY appear to be actively involved in the actual implementation process.<sup>489</sup> Advocates report that CSOs do not meet with any of the other agencies, nor do the other agencies appear to be involved in the drafting and technical processes of the SOP-ATD nor the manual, other than providing approval or comment.<sup>490</sup> This has resulted in a lack of staff and resources to properly develop and implement each child's care plan, with some advocates suggesting that Government agencies are being spread too thin.<sup>491</sup> One advocate has suggested that, in some cases, the Government may rely on CSOs to implement certain provisions due to their flexibility to take swift action, which can effectively circumvent some cumbersome Government protocols.<sup>492</sup>

Another issue tied to capacity can be attributed to the frequent staff turnover and reshuffling of Government personnel in significant units, including the detention unit, which presents an added layer of complication to burden-sharing with the Government and effectuating the MOU-ATD.<sup>493</sup> With each turnover, NGOs are forced to re-start conversations and re-explain issues which involve great complexity and provide relevant training.<sup>494</sup> Consequently, there is no promise of continuity of conversations or processes that had been established with previous staffers. This adds to the lack of clarity about certain protocols among Government staff and CSO staff, mentioned above.<sup>495</sup>

Advocates quickly realized the gaps in understanding and technical capacity that existed in carrying out the MOU-ATD in late 2018 and 2019 when the Government released all children in detention at the time.<sup>496</sup> The 80 children who had been released became the responsibility of the case managers, and then the Government officials/social workers.<sup>497</sup> It became clear that there was a lack of staff in the agency. Moreover, there were a number of competing priorities among those responsible for implementing the MOU-ATD, for example, police and relevant officials continued to arrest children, and children continue to be subsequently detained until they can be seen by a case manager.<sup>498</sup> They also realized the need for further training, in particular, sensitivity training necessary for working on these cases. Informants noted that police officers are not trained to be child protection officers, so they lack training as to how to be careful about vulnerabilities that children have, especially children from other cultures and countries.<sup>499</sup> Lack of awareness and technical capacity among the implementation officers more generally remains an overriding concern.<sup>500</sup>

Throughout CRSP members have been working together closely on this issue, including conducting additional trainings for members to facilitate the development of protocols, and once the children are released from the IDC, they collaborate on what support and resources they will need. The implementation of the MOU-ATD is the first time that local NGOs have been directly involved in carrying out these post-case management processes.<sup>501</sup> CRSP has also sought outside guidance, working closely with international NGOs, such as Host International, to provide case management support.<sup>502</sup>

Informants note that there remains, however, a need to shift some of this work done by NGOs to the Government agencies. Apart from staffing and technical capacity issues, NGOs do not have the financial resources to provide long-term support to a child (or the child's family) once the child is out in the community. Although the Government shoulders the financial burden if a child is placed in a Government shelter, the Government does not cover the financial needs of a child who is placed on an alternative care plan.<sup>503</sup> If a child is released into the community, for example, CSOs, NGOs, and other organizations are the ones to provide financial support for the child as well as a temporary place to stay.<sup>504</sup> Once the mother and child are out in the community, however, they are on their own. This means that the mother is responsible for not only finding work but also taking care of her child, which creates its own form of financial stress.<sup>505</sup> A case manager may link them to Bangkok Refugee Center or JRS for financial support.<sup>506</sup>

### 3. *Ongoing Delays*

From the outset of the MOU-ATD's signing, delays in the development of key supporting documents and mechanisms have led some advocates to believe that the proper effectuation of the MOU-ATD has not been a priority for the Government.<sup>507</sup> According to MOU-ATD Section 6, the accompanying Standard Operating Procedure was to be established by the concerned agencies within 30 days of the document's signing in January 2019.<sup>508</sup> Yet a final draft was not submitted to the Thai National Security Council until six months later, in June 2019, with official adoption being delayed until September of the same year.<sup>509</sup>

Another delay concerned the release of the manual, developed by DCY in consultation with CSOs. The manual is meant to further clarify protocols for the implementation of the SOP-ATD.<sup>510</sup> While a number of CSOs held consultations with the Government on the development of the manual in January of 2020,<sup>511</sup> it took some time for the manual to be shared with NGOs,<sup>512</sup> but now all NGOs working on the issue do have the manual.<sup>513</sup> A number of the CSO representatives interviewed mentioned the importance of the manual in giving operational guidance to the proper implementation of the SOP-ATD.<sup>514</sup>

In conjunction with the release of the manual, informational training sessions with related agencies and local officials were meant to be conducted after the release of the SOP-ATD.<sup>515</sup> At the time of this Report's writing, it appears that there has been one session conducted with social workers, and the training for the multidisciplinary team has not been able to organize in person due to Covid-19 response measures.<sup>516</sup> Although the main objective of these trainings is to remedy the inconsistent application of the MOU-ATD and SOP-ATD,<sup>517</sup> one advocate stressed as well the importance of training personnel on the particular care needed for handling migrant children, e.g., the Thai Immigration Bureau.<sup>518</sup>

The delayed development of the NSM has left stakeholders concerned about what actual protections the Government plans to afford asylum seekers and refugees through this process, especially since the mechanism is not considered to be consistent with a strong asylum system.<sup>519</sup> Although the mechanism was passed in January 2020 and be entered into force in June 2020,<sup>520</sup> stakeholders have yet to see the effects of passing the measure. A "Protected Person Screening Committee" was established in May 2020 consisting of 12 representatives from Government agencies and four experts to set the rules of the mechanism. Subsequently, in April 2021, the Committee established an 18-person sub-committee, including representatives from UNHCR and two academics and one CSO representative, to develop the standard operating procedures for the NSM. The SOPs are still forthcoming. To date, the mechanism has yet to be in operation.<sup>521</sup> One observer attributed the delays to a lack of Government capacity,<sup>522</sup> while another has called for understanding that things take time to change once broad policies such as these have been implemented.<sup>523</sup> The COVID-19 crisis has also been noted to have contributed to the delay.<sup>524</sup>

#### **4. *Lack of Transparency***

The various delays have contributed to a sense among some CSO advocates that there is a lack of transparency from the Government on whether provisions of the MOU-ATD are being enacted as intended.<sup>525</sup> This has left many to doubt the capacity and intentions of the Government to properly effectuate the MOU-ATD. By way of example, one advocate has pointed to troubles and questions related to a MOU-ATD's "Follow-up and Assessment," provision which specifies reporting requirements for multiple governmental agencies. The informant noted that her organization has yet to see any such reports made nor have they been able to identify the Government official in charge of this provision.<sup>526</sup>

When trying to provide information on training and policy to the Government, advocates have noted that they often run into bureaucratic obstacles, especially with regard to the Immigration Bureau. Advocates tend to be in contact most frequently with DCY, who are supportive, but the lead and ultimate authority to release children from detention rests with the Immigration Bureau.<sup>527</sup> Advocates continue to first communicate with DCY to share information with the Immigration Bureau and other agencies so that other NGOs are able to provide case management or community support when the family gets released.<sup>528</sup> Lack of engagement and information specifically from the Immigration Bureau, considered the lead agency, remains a significant issue.<sup>529</sup>

### THAILAND'S IMMIGRATION DETENTION POLICY & PRACTICE FOLLOWING COVID-19

Due in part to the exceptional nature of the COVID-19 pandemic, and that most interviews for this Report were conducted in 2020, the authors have largely focused on the MOU-ATD and Thai state policy and practice in the period *prior* to COVID-19 had severely impacted the country. That said, COVID-19, especially beginning in 2021, has had severe impacts on migrant and refugee populations in Thailand, as well as Government immigration detention and deportation practices.<sup>530</sup> For example, previously, when undocumented migrants, including children, from Myanmar, Laos, and Cambodia, were arrested by the Thai authorities, they would be detained for generally not more than seven days before being deported to their respective countries. Because migrant children would often be repatriated within days of being arrested, migrant children were not being processed according to the MOU-ATD framework.<sup>531</sup> Since COVID-19, however, the deportation process has been significantly delayed such that migrants, including children, are now being detained by Thai authorities for a longer period of time. Sources note that this is because of closed borders due to COVID-19, which results in the Government not being able to “push back” migrants to the border as easily.<sup>532</sup> Instead the Government is deporting migrants whenever the border is opened, which can be once per month or on an inconsistent basis, also taking into account quotas.<sup>533</sup> Consequently, even though children and mothers are prioritized for deportation, migrant children may be staying in detention for one month before being deported.<sup>534</sup> Even with the longer stays, however, migrant children reportedly are still not being processed according to the MOU-ATD.<sup>535</sup> Meanwhile, due to COVID-19 related measures, some refugees, including children, are being released into the community so as to decrease the overcrowding, whereas previously they might have been detained for a much longer period of time.<sup>536</sup> Sources indicate however that there has not been any decline in arrest of irregular migrants, especially newcomers at the border, and arrests remain high.<sup>537</sup>



With the longer stays of migrants in detention, there are serious concerns that the number of people overall in the IDC in Bangkok is well over capacity, amounting to over 1900, whereas previously there were 1200.<sup>538</sup> As of November 2021, the number of migrant children in Suan Phlu IDC has been at approximately 10 per month. Most of these children are described as being from Myanmar, Laos, and Cambodia.<sup>539</sup>

Conditions at the IDCs are not subject to many of the regulations governing Thailand's regular prison system, and there have been ongoing complaints of overcrowding and unhealthy conditions,<sup>540</sup> which are particularly alarming in the context of COVID-19. Reports from 2020 and 2021 indicate significant COVID-19 outbreaks among migrant and refugees held in overcrowded IDCs.<sup>541</sup> Although it was reported that in 2020 the Immigration Bureau had transferred dozens of detainees from the Suan Phlu IDC in Bangkok to IDCs in other provinces, "refugee advocates reported that this reduced overcrowding in the Suan Phlu IDC, but overcrowding remained a problem in multiple IDCs throughout the country."<sup>542</sup> But overcrowding at Suan Phlu IDC became a problem again once the country started to open, which led to more migrants come to Thailand to work and more arrests at the border, purportedly to prevent COVID.<sup>543</sup> Additionally, although on January 26, 2021, a Cabinet Resolution was issued giving migrant workers in IDCs from Myanmar, Laos, and Cambodia in IDCs awaiting deportation to their country of origin (but unable to return due to COVID-19 crisis), the right to be released from immigration detention and have the right to work,<sup>544</sup> sources indicate that there are in practice significant barriers for migrants to satisfying the necessary requirements and benefit from the measure. For example, migrants would need to find the employer and ask them to be their guarantor, which itself is challenging for migrants in detention, but especially since many are day laborers.<sup>545</sup>

### 2021 COUP IN MYANMAR

In addition to the impacts of the COVID-19 crisis, the February 2021 coup in Myanmar resulted in thousands of people in Myanmar seeking refuge. Despite its obligations to respect the principle of non-refoulement, the Thai Prime Minister reportedly instructed the Immigration Bureau to "monitor and prevent illegal immigration" and "enforce strict inspection of the border crossings."<sup>546</sup> There are also reports that the Thai Government forcibly returned in May 2021 at least 2,000 refugees to Myanmar, in clear violation of the principle of non-refoulement.<sup>547</sup>

There is a small number of people from Myanmar's political conflict being arrested and detained. However, because they cannot register with UNHCR, they do not fall into UNHCR POC criteria allowing them to be released on bail. Some among them may not want to say that they are 'political refugees' due to fear that Thailand would send them back to Myanmar's military government.<sup>548</sup>

## VI. CONCLUSIONS AND RECOMMENDATIONS\*

In the years prior to the MOU-ATD, Thailand's arbitrary and indefinite detention along with the abysmal conditions of detention faced by migrant children and their families were clearly contrary to the Government's international law obligations, as well as Thailand's own Constitution and Child Protection Act—and commitment to “the best interests of the child” principle. Although Thailand is not a party to the Refugee Conventions, the advocacy and engagement of CSRP and others led the Government to adopt key principles and practices of refugee protection by emphasizing overlapping areas of international refugee protection and human rights. More specifically, stakeholders focused on children's rights and the “uncontroversial” proposition that children, regardless of status, should not be detained.<sup>549</sup> Due to stakeholder initiatives, the Government has attempted to in part close the gaps through its adoption of the MOU-ATD. Among the key positive developments and reforms associated with the MOU-ATD:

- The MOU-ATD explicitly embraces a children's rights framework and the overarching principles of best interests of the child and non-discrimination.
- The MOU-ATD makes it explicit in domestic policy that the detention of migrant children should be a measure of last resort and for the shortest possible duration.
- The Government released over 230 children and mothers from 2019 to 2020 employing community-based and case management alternatives to detention.<sup>550</sup>
- The MOU-ATD has resulted in an increased focus on family-based care, and the provisions for assessment, case management, and follow-up are also vast improvements in the treatment of migrant and refugee children.
- In support of the provisions of the MOU-ATD, the Government has tried to address the conditions of detention for children through the establishment of mother and child reception centers, which the Government claims prevents child separation and addresses some of the material conditions of detention.
- The MOU-ATD has brought together in principle various government agencies, taking the issue out of the sole control of the Immigration Bureau, and applying a more holistic multidisciplinary response.
- The MOU-ATD provides instruction for its effectuation including roles for specific government agencies, international organizations, and CSOs, subsequently removing prior obstacles and allowing for more effective coordination between relevant parties.
- The efforts of various CSOs, NGO and UN stakeholders have also proven significant in the initial development, drafting, and effectuation of the MOU-ATD. As noted, efforts to call attention to the issues facing migrant children and

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\* The conclusions and recommendations in this Report are based on FILP's desk research and interviews conducted primarily in 2019-2020, along with follow up interviews and correspondence in late 2021 and in early to mid-2022. They are not meant to be exhaustive but rather representative of the main recommendations put forward by various stakeholders at the time. The authors note that some of the gaps presented in the Report may have been addressed in the Government's manual on effectuating the MOU-ATD, as well as the ongoing development of the NSM.

their families in Thailand—from arbitrary arrest and indefinite detention to the squalid conditions of the country’s detention centers—helped to bring domestic and international focus to the issue. Indeed, non-governmental stakeholders also provided technical support to the Government, submitting various reports and proposals for ATDs prior to the signing of the MOU-ATD, as well as consultations with the Government on the development of the SOP-ATD and manual. Since CSOs, NGOs and UN organizations continue to provide technical support to the Government, especially in areas it lacks capacity.

These developments are significant—and indeed worthy of study and to an extent possible modeling elsewhere. However, as outlined in Part V, there are a number of critical substantive gaps and inconsistencies by way of Thailand’s laws and policies, as well as structural and implementation deficiencies, which need to be considered and improved upon for purposes of ensuring a child’s rights framework and indeed ‘better practices.’<sup>551</sup> Among the key outstanding gaps:

- The MOU-ATD does not contain a mechanism that precludes the arrest of migrant and refugee children, resulting in their continued arrest and subsequent detention.
- The Immigration Law continues to allow for the arrest and detention of migrant and refugee children. The MOU-ATD is not a law and does not outright prohibit the detention of migrant children, instead employs the ‘measure of last resort’ standard, contrary to prevailing interpretations of international law obligations.
- Some migrant and refugee children continue to be held in IDCs.
- Certain groups of migrant children, including some Rohingya or children whose asylum cases at UNHCR are closed, are exempt from the community-based ATD. As a result, many of them are held in a Government shelter—and some even are subject to indefinite detention.
- The MOU-ATD does not give migrant and refugee children any form of legal status, casting doubt as to what protections are afforded to them. Although the Government’s development of a NSM for “Protected Persons” is promising, to date, there are important inconsistencies with the criteria used to define “people in need of protection” and the protections offered and relevant international standards for refugees.
- The release of family members is provisional on certain conditions, such as bail, which consequently can lead to family separation and prolonged time in detention. Access to bail is extremely limited, based on the officials’ discretion, with burdensome conditions, including requests for a high amount for bail.
- Lack of designated focal points at each government ministry charged with overseeing the MOU-ATD.

- Lack of specific funds devoted to the MOU-ATD implementation and insufficient capacity of the Government in personnel and other resources has led to the slow development of care plans and prolonged time in detention.
- Delays in the development and provision of additional training and instructional materials have led to inconsistent application of the MOU-ATD.
- Underdevelopment of alternatives, and problematic practices leaves children in conditions largely unimproved from detention.

To address many of these deficiencies, various stakeholders have put forward the following key recommendations:<sup>552</sup>

#### **A. Preclude the arrest and detention of migrant and refugee children and their families**

Currently, the Immigration Act allows for the arrest and detention of migrant and refugee children, and even the MOU-ATD provides that detention may be used “as a measure of last resort.” The detention of children based on immigration status is inconsistent with Thailand’s international law obligations, including under the CRC. Stakeholders call on the Government to pass legislation that would prevent migrant and refugee “children and families arrest in order to preclude any future needs to seek alternatives to detention.”<sup>553</sup> Stakeholders have called for the Immigration Act to be amended so as to prevent indefinite detention of refugees and migrants without status and implement alternatives to detention.<sup>554</sup>

Providing refugee and asylum-seekers, including children, protected legal status in the country consistent with international law would affirmatively prevent their arrest and detention.<sup>555</sup> The Government should establish a legal framework,<sup>556</sup> ensuring that the NSM is consistent with the rights and protections afforded to refugees under international law, including individualized assessment and a right of appeal, and that it is effectively and efficiently implemented.<sup>557</sup> Notwithstanding the development of domestic legislation, stakeholders continue to urge the Government to sign and ratify the Refugee Convention and its 1967 Protocol, as well as the Statelessness Conventions the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>558</sup>

#### **B. End family separation and ensure family reunification**

A core focus of a children’s rights response must be the proactive prevention of family separation “by enabling families to move together, and to facilitate fast reunification when families are separated, to protect children’s lives and well-being.”<sup>559</sup> The current bail system does not generally give fathers the option to pay bail to be reunited with their children and also includes high bail fees. The rights of the child to family life are enshrined in international law and is part of the best-interest practices.<sup>560</sup> There is no doubt that the right of family reunification must be respected, and therefore, fathers must be allowed to be a part of the bail system, and the system needs to have more flexibility with a case-by-case approach, considering individual family conditions and the child’s best interests.<sup>561</sup>

Stakeholders call for parents/caregivers be included in the scope of the MOU-ATD.<sup>562</sup> It is necessary to consider children and their parents together for the sake of the best interest of the child. Even if migrant children are released from detention centers and receive sufficient protection, without a stable status for their parents or respect of family reunification best interests of children cannot be substantially attained. It is therefore important to extend the scope of the MOU-ATD to children's family members.<sup>563</sup>

Until families are no longer subject to detention, the Government must prevent arbitrary and indefinite detention, and the provide them with the ability to challenge their detention in a timely fashion.

### **C. Prioritize family-based care, community-based, non-custodial alternatives, with effective case-management – and institute ATD-specific legislation**

Currently, there appears to be a prioritization of the enforcement ATD model, i.e., a reliance on shelter, bail, and reporting (every 15 days).<sup>564</sup> Lack of development of true alternatives to detention may leave children in conditions unimproved from the system in place prior to the MOU-ATD. NGOs noted that there needed to be a clear definition of what the Government considers to be 'detention' and what constitutes 'alternatives to detention,'<sup>565</sup> that conformed with international obligations and standards. More broadly, there needs to be a prioritization of family-based care and community-based non-custodial alternatives, except in limited circumstances, e.g., where children may experience domestic violence from family.<sup>566</sup> Moreover, case management needs to be a core component of the ATD model, working with local government and the local community to create local integration and community protection.

Just as the prohibition of immigration detention of children needs to be transformed from a policy to legislation, stakeholders urge that the Government also adopt ATD measures by way of legislation so that the practice becomes standardized.<sup>567</sup>

### **D. Implement and sustain a whole Government-wide (horizontal and vertical) and a-whole-of-society approach**

The Government in its entirety needs to be engaged in implementing Thailand's international commitment of ending the detention of migrant children.<sup>568</sup> The MOU-ATD designates the Royal Thai Police and the Ministry of Social Development and Human Security as the main implementing agencies for the MOU-ATD. One advocate has pointed out, however, that the involvement of other Government agencies has been much less involved since the signing of the MOU-ATD and the need for other signatory agencies to take a more proactive role.<sup>569</sup> Other ministries, governmental agencies, as well as local authorities should be more closely engaged in order to build capacity and effectuate the goals of the MOU-ATD in a more systematic way. An interagency multidisciplinary approach has been noted as critical to address such a complex issue in a coherent and sustainable way.<sup>570</sup> Indeed, Thientong Prasanpanich,

Director of DCY's Protection System Development Division, has similarly noted that "[a]t present, the success of the ATD MOU is on an individual level when it should be more systematic. We believe that working as a network is crucial, and it is also important to discuss human rights protection within the national security framework. The ATD MOU's goal is never to place any child in detention, and we expected a clear systematic approach where all Ministries involved in the MOU come to work together in the near future."<sup>571</sup>

To effectuate this goal, advocates note that designating focal points from each ministry to work on the MOU-ATD policy would be important. In addition, advocates emphasize that it is critical to have local government agencies and local stakeholders engaged such that they can implement the community-based case management ATD.<sup>572</sup>

### **E. Increase Government capacity, training, and support**

Stakeholders commonly highlight lack of capacity as being a major obstacle to the proper effectuation of the MOU-ATD. The lack of resources among Government agencies has made it difficult to adequately handle case management procedures for the influx of children, which can result in delayed development of the children's care plans.<sup>573</sup> More personnel dealing with this issue, as well as a sufficient budget allocation for strengthening the capacity of related agencies is needed.<sup>574</sup> To date, it appears that no specific funding and human resources has been allocated to the MOU-ATD implementation.<sup>575</sup>

Stakeholders have specifically noted that DCY should be further supported in terms of personnel and funding so that the agency is able to effectively collaborate with the Immigration Bureau, as well as relevant UN organizations and NGOs.<sup>576</sup> It is also recommended that the Immigration Bureau staff be supported through capacity building and training focusing on children's rights and child protection.<sup>577</sup> The creation of a pool of interpreters is also a critically needed resource.<sup>578</sup>

CSOs and INGOs can assist the Government's efforts to build relevant capacity through workshops, seminars, and training courses for awareness-raising of Government officials and capacity-building to supplement the Government's limited resources and experience.<sup>579</sup> As before, CSO, NGO and UN stakeholders' role in not only advocating and pointing out issues but also complementing the limited capacity of the Government can be significant in this regard.<sup>580</sup> In particular, UN agencies can assist with providing technical support and capacity building to the Government, to improve implementation of the MOU-ATD.<sup>581</sup> Another suggestion made by one informant would be to institutionalize training for Government personnel with the understanding that coordination among so many different agencies requires a concerted effort in which all relevant parties and personnel are up to speed on proper procedure and conduct.<sup>582</sup> One of the related challenges that needs to be addressed is capacity-building for Government officials, as the personnel rotation in related organizations can relocate new staff with less relevant expertise and experience.<sup>583</sup>



#### **F. Improve access and monitoring for CSO, INGO, and IGO stakeholders**

The Government is working closely with UNICEF and the International Detention Coalition to develop the Monitoring, Evaluation, Accountability and Learning (MEAL) Framework. The MOU-ATD includes an obligation on the signed agencies to provide annual reporting while requiring the seven agencies to review the key elements in the MOU-ATD every year to assess the challenges, problems, and complications from the implementation of the MOU-ATD and propose ways to address them.<sup>584</sup> The Government needs regular support from the relevant UN agencies to monitor the implementation of the MOU-ATD to ensure it aligns with its international obligations.<sup>585</sup> Indeed, a systematic mechanism for monitoring as well as improving access for relevant stakeholders has been recommended. For example, reception centers only allow access to IOM, while other partners are still not permitted to enter reception centers.<sup>586</sup> Similarly, some have suggested that CSOs and NGOs have the capacity and willingness to assist detained children and can fill in gaps that the Government cannot support. According to one informant, the Government will open a place for NGOs to do some activities in the future, but this plan has not come to fruition yet. To effectively support children in mother and child centers, sufficient access for NGOs needs to be authorized.<sup>587</sup>

Currently, there is a lack of NGO involvement at the level of policy—for example, NGOs are not included in the multidisciplinary team. This should change.<sup>588</sup>

Some advocates also pointed out the lack of information from the Government regarding the MOU-ATD's implementation, in particular, from the Immigration Bureau.<sup>589</sup> Although the MOU-ATD explicitly outlines a reporting protocol, under which an annual report should be released in December of each year,<sup>590</sup> the MOU-ATD does not include a mandatory report their operation to the public, only to the National Security Council, which they have done.<sup>591</sup> To date, the Government has publicly shared its progress and challenges associated with the MOU-ATD in various international fora,<sup>592</sup> and the DCY invited CSOs to share their experiences.<sup>593</sup> However, increased transparency and regular discussions among Government and other stakeholders would improve communication as well as assist in sharing of relevant information, concerns, and requests in a timely manner. By establishing a regular dialogue with stakeholders, the Government can take advantage of such fora to share related information, request any support if necessary from partners to overcome existing gaps, as well as to strengthen collaborative relationship with other stakeholders.<sup>594</sup> Such communication would contribute to enhancing transparency, and filling in gaps for a more effective implementation of the MOU-ATD. Just as the MOU-ATD's success was predicated on communication, coordination, and collaboration, sustaining the MOU-ATD's provisions and keeping momentum to effectively end migrant child detention will require that Government, CSO, INGO and IGO stakeholders continue engaging on these issues, and bolstering interagency and multilateral capacities.<sup>595</sup> Moreover, having a systematic engagement could also allow for stakeholders to assess and review the current policies and procedures for purposes of improving the system more broadly.<sup>596</sup>



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Recognizing that serious gaps remain, on May 19, 2022, Thailand pledged at the International Migration Review Forum (and in a May 17 Cabinet Resolution) “to *effectively* implement alternatives to detention measures for migrant children”<sup>597</sup> as well as “to promote public perception regarding the positive contribution of migrants and to end discrimination and stigmatization against them.”<sup>598</sup> These pledges are important. The same drivers, which the Government and other stakeholders noted were pivotal to achieving the MOU-ATD—the commitment to the principle of the best interests of the child, political will on the part of the Government, and collaboration among multiple stakeholders—remain critical for ending immigration detention of children.<sup>599</sup> Stakeholders continue to press the Government to honor its commitments, advocating for swift implementation of the MOU-ATD, as well as further reforms to ensure that Thailand conforms to its obligations under international and domestic law predicated on the best interests of the child principle and the principle of non-discrimination.<sup>600</sup> CRSP and others are hopeful that Thailand will continue to advance in this regard and have placed 2023 as the year in which the immigration detention of children and their caregivers will effectively end in both law and practice.<sup>601</sup>

## VII. APPENDICES

### A. Appendix I: Glossary

**Alternatives to detention (ATD)** are defined by the International Detention Coalition as “any legislation, policy or practice, formal or informal, that ensures people are not detained for reasons relating to their migration status.”<sup>602</sup> International Detention Coalition notes that “[e]ven though the phrase ‘alternatives to detention’ is present in numerous international human rights instruments, it is not an established legal term or a prescriptive concept. In fact, different stakeholders often use varying definitions of the term.”<sup>603</sup> UNICEF notes that ATD for children and families include a “range of options such as supported community placement, including placement with host families, bail schemes to ensure compliance with immigration proceedings or reporting requirements, or schemes whereby guarantors or sponsors agree to support the care and supervision of a migrant family in the community.”<sup>604</sup>

**Anti-Trafficking in Persons Act B.E. 2551 (2008) (ATPA)** “if the arresting officials identify an adult or a child as a victim of trafficking, they may refer that person to a government shelter instead of sending them to detention.”

**Asylum-seekers** refers to an individual who “is claiming or applying for protection as a refugee and who has not yet received a final decision on his or her claim”; or “has not yet submitted an application for refugee status recognition (has not yet formalised the administrative requirements in national law) but may nevertheless be in need of international protection.”<sup>605</sup> It has been noted that, according to UNHCR’s policies in Thailand, an individual who is forcibly displaced is not considered an asylum seeker until they are registered by UNHCR. In Thailand, “the term ‘asylum seeker’ is used during the time period when an individual is undergoing the process by which they seek refugee status, called refugee status determination (RSD).”<sup>606</sup>

**Civil Society Organizations (CSOs)** are community-based organizations that operate independently of any government. Civil society organizations may include those that are registered as NGOs but do not include those registered as international NGOs.

**Child Protection Act of Thailand B.E. 2546 (2003) (CPA)** is to provide protections to children in Thailand, including for “children to receive suitable parenting, nurturing and development which in turn will promote the stability of the family institution, and prevent children from being abused, exploited or discriminated against.”<sup>607</sup>

**Durable solutions** refer to “[a]ny means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to live normal lives. UNHCR traditionally pursues the three durable solutions of (i) voluntary repatriation, (ii) local integration and (iii) resettlement.”<sup>608</sup>

**Immigration Act of Thailand B.E. 2522 (1979) (“Immigration Act”)** is the primary law defining migrants and refugees’ relationship to the Thai state—does not distinguish between refugees and other foreigners.<sup>609</sup> “Section 54 of the Immigration Act stipulates that any alien (non-Thai person) entering or staying in the Kingdom of Thailand without permission, or with permission that is expired or revoked, may be repatriated from the Kingdom by the competent official. Upon the order to repatriate such alien, the competent official shall have the power to (1) allow the alien to stay in the Kingdom on the condition that such alien shall report to the official on the date, time and place as prescribed, with bond or with bond and security, or the competent official may detain such alien at a place for however long as is necessary.”<sup>610</sup>

**Immigration Detention Centers (IDCs)** are where Thai Government authorities detain undocumented migrants, refugees, asylum seekers, and foreign nationals who are alleged to have violated Thailand’s immigration laws. There are 22 IDCs in Thailand. “Severe overcrowding is endemic at detention facilities and conditions are reportedly abysmal.”<sup>611</sup>

**International non-governmental organizations (INGOs)** are NGOs that engage in programming in multiple countries.

**Migrant** is any person “who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.”<sup>612</sup> The term “migrant” is being used in this report as a general term to refer to foreign nationals in Thailand and does not exclude the possibility that such individuals may be an asylum seeker or refugee.

**Memorandum of Understanding on the Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centres B.E. 2562 (MOU-ATD)** was signed by seven concerned Thai agencies (Royal Thai Police, Ministry of Social Development and Human Security, Ministry of Foreign Affairs, Ministry of Interior, Ministry of Public Health, Ministry of Education and Ministry of Labour) on January 21, 2019. “The MOU stipulates the responsibilities of the concerned authorities and provides common guidelines to integrate procedures on non-detention of migrant children under the age of 18. Under the MOU, measures are put in place to provide social services and alternative care for children in accordance with their needs by placing them under the care of the Ministry of Social Development and Human Security, Immigration Detention Centers, private organizations and civil society organizations.”<sup>613</sup>

**Multidisciplinary Working Group (MWG)** was established “[i]n order to determine, monitor and evaluate the implementation of alternative measures to detention of children ... as per the SOP, comprising of Immigration Detention Centers’ officials, competent officers under the Child Protection Act of 2003, and representatives from UNHCR, UNICEF and IOM. The MWG shall consider an alternative measure to detention and individual plan for each child.”<sup>614</sup>

**National Screening Mechanism (NSM)** was approved by the Thai Cabinet (Regulation on the Screening of Aliens Entering into the Kingdom and Unable to Return to their Country of Origin, B.E. 2562) on December 24, 2019, and the Regulation came into force on June 22, 2020. The purpose of the NSM is to identify people in need of protection and provide for specific processes for this category of migrants. Since Thailand is not a signatory to the 1951 Refugee Convention nor its 1967 Protocol, the NSM “has been widely lauded as a significant landmark in the evolution of human rights protection in the country, and is the first policy instrument to recognize, albeit implicitly, international obligations towards the protection of persecuted non-citizen populations.”<sup>615</sup> The Regulation establishing the NSM itself avoids any direct commitment to respect the 1951 Refugee Convention and leaves open many important core issues, including the criteria to determine who is a “protected person,” and what specific “protections” are envisaged.<sup>616</sup>

**Non-governmental Organizations (NGOs)** are non-profit organizations, operating independently of any government.

**Persons of Concern (POC)** is the term used by the Government to refer to persons who informants note are essentially refugees.<sup>617</sup> According to UNHCR, a person of concern is an individual “whose protection and assistance needs are of interest to UNHCR, [including] refugees, asylum-seekers, stateless people, internally displaced people and returnees.”<sup>618</sup>

**Refugee** is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>619</sup> Until 2016, the Thai Government had never used the term “refugee” in its national policies.<sup>620</sup>

**Standard Operating Procedure – SOP Under MOU-ATD on The Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centers B.E.2562** “has been agreed upon by [] seven Thai agencies with the approval of the Prime Minister. It describes procedures to protect children in immigration detention from the point of reception to repatriation, where efforts are made to avoid separation of children from their parents. Special consideration is given to vulnerable children, namely, (1) unaccompanied children (2) children separated from their parents (3) children with UNHCR’s Persons of Concern (POC) status (4) children who were victims of human trafficking and abuse (5) disabled children and children with health conditions (6) young children who still rely on breastfeeding as well as pregnant mothers (7) children with history of being incarcerated or detained for crimes (8) children without identity (9) children who were beggars or street children and (10) children with other issues that demands protection.”<sup>621</sup>

**Stateless persons** are those who are “not considered as a national by any State under the operation of its law.”<sup>622</sup>

**Unaccompanied minors** (also referred to as unaccompanied children) are children under the age of 18 years “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 to do so.”<sup>623</sup>

**Urban refugees** refer to refugees in Thailand living in the cities or surrounding areas who have fled largely from Cambodia, Vietnam, and Syria—and typically does not refer to refugees from Myanmar, North Korea, and some groups from Vietnam, due to separate Government arrangements for these groups, who are also not registered with UNHCR.<sup>624</sup>

## **B. Appendix II: Stakeholders**

### **1. Government**

- a) Department of Children and Youth (DCY)
- b) Ministry of Education
- c) Ministry of Foreign Affairs
- d) Ministry of Interior
- e) Ministry of Labor
- f) Ministry of Public Health
- g) National Human Rights Commission of Thailand (HHRCT), National Subcommittee on Human Rights, Statelessness, Migration and Displaced Persons
- h) Royal Thai Police
- i) Thai Immigration Bureau
- j) Thai Ministry of Social Development and Human Security (MSDHS)
- k) Thai National Security Council

### **2. *Non-Governmental Organizations & Civil Society Organizations***

- a) Amnesty International
- b) Asylum Access Thailand
- c) Bangkok Refugee Center
- d) Catholic Office for Emergency Relief
- e) Catholic Victims and Refugee Agency
- f) Caritas Thailand
- g) Center for Asylum Protection
- h) Childline Thailand Foundation
- i) Coalition for the Rights of Refugees and Stateless Persons (CRSP)
- j) Host International
- k) Human Rights Watch (HRW)
- l) International Detention Coalition
- m) Jesuit Refugee Services
- n) Life Raft International
- o) Muslim Welfare Organizations of Thailand
- p) Sattachon Foundation for Education and Orphans
- q) Step Ahead
- r) Thai Committee for Refugees

3. *Intergovernmental Organizations*

- a) Association of Southeast Asian Nations (ASEAN)
- b) International Organization for Migration (IOM)
- c) United Nations High Commissioner for Refugees (UNHCR)
- d) United Nations Children Fund (UNICEF)



### **C. Appendix III: Memorandum Of Understanding On The Determination Of Measures And Approaches Alternative To Detention Of Children In Immigration Detention Centres (MOU-ATD)**

#### **1. Preamble**

International political situations and economic development affect the quality of life of migrating populations, especially children who are accompanying their parents or guardians or traveling alone. These children are highly vulnerable and at risk of various forms of exploitation. They might also be arrested and detained at Immigration Detention Centers.

Child protection law stipulates that, as a matter of importance, treatment of children in all cases shall take into account the best interests of the child and shall be non-discriminatory, while the Constitution of the Kingdom of Thailand B.E. 2560 (2017) stipulates that government agencies shall exercise their powers by taking into account individual rights and freedoms as well as in a non-discriminatory manner. The Constitution also stipulates that the government shall assist children to enable them to have quality life, protect and prevent children from violence or unjust treatment, as well as allocate sufficient budget to support them on the basis of needs and requirements in accordance with their gender, age, and situation. In addition, the Convention on the Rights of the Child (CRC), to which Thailand has become party by ratification on 12 February 1992 and entered into force on 26 February 1992, General Comments No. 6 on Treatment of Unaccompanied and Separated Children outside Their Country of Origin, 2005, and the United Nations General Assembly Resolution 64/142 on the United Nations Guideline on Alternative Care, 2009, oblige Thailand to support and protect all children in the country, enable them to have quality life in a protected and caring environment.

Situations regarding migrant children stem from multiple causes and factors and are complex, requiring comprehensive and integrated cooperation among agencies. The Royal Thai Police and the Ministry of Social Development and Human Security therefore convened meetings with the National Security Council, the Ministry of Foreign Affairs, the Ministry of Justice, the Office of the Attorney General, the Ministry of Interior, the Ministry of Public Health, the Ministry of Education, the Ministry of Labour, and the National Human Rights Commission, to establish this Memorandum of Understanding to guide the Royal Thai Police, the Ministry of Social Development and Human Security and other relevant agencies in assisting and protecting children detained at Immigration Detention Centers, in accordance with Thailand's domestic laws and international obligations.

## 2. Objectives

2.1 To serve as common guidelines for government agencies and related agencies to resolve cases concerning migrant children detained at Immigration Detention Centers of the Immigration Bureau, the Royal Thai Police, in accordance with immigration laws.

2.2 To determine clear mechanisms and responsibilities among agencies to ensure that the rights of the child are protected in accordance with Thailand's domestic laws and international obligations.

## 3. Definition of children who shall be assisted

“Children” refers to foreigners under the age of 18 who are detained at Immigration Detention Centres of the Immigration Bureau, the Royal Thai Police, in accordance with immigration laws.

## 4. Principles

4.1 Children shall not be detained, except in necessary and unavoidable circumstances, whereby they may be detained at the Immigration Detention Centres, as the last resort and for the shortest possible duration.

4.2 Decisions and/or actions affecting the child shall always take into consideration his/her best interests and views.

4.3 Children are entitled to basic livelihood standards sufficient for their physical, intellectual, mental, moral, and social development.

4.4 In determining ways to provide care for children, family-based care shall be given first priority. Reception centers of the Ministry of Social Development and Human Security, or privately-run reception centers registered under relevant laws shall be the last resort and used for the shortest possible duration.

4.5 In placing the child under alternative care, his/her physical and mental development shall be taken into consideration while seeking sustainable solutions.

4.6 Concerned agencies shall take appropriate measures in providing appropriate protection and assistance to the child.

## 5. Operations

5.1 “Reception” refers to the taking care of children under the care of the Immigration Bureau, the Royal Thai Police, before referring them to other agencies for further assistance.

5.2 “Assistance and welfare protection” refers to child assistance and welfare protection as provided for in child protection laws.

5.3 “Return” refers to the returning of the child to his or her country of origin or a third country in a safe and dignified manner and under the relevant international criteria.

## 6. Child Protection Process on Individual Basis

The Royal Thai Police, together with the Ministry of Social Development and Human Security and concerned agencies, shall cooperate to carry out measures to ensure that children are protected and assisted by a multi-disciplinary team in the following:

1. 6.1 Screening and making personal records
2. 6.2 Determining appropriate care
3. 6.3 Prescribing an assistance plan on individual basis
4. 6.4 Coordinating and referring children to appropriate services
5. 6.5 Determining services and alternative care
6. 6.6 Determining standards of foster care
7. 6.7 Processing return to family and society, and seeking sustainable solutions

After the date of signing of this Memorandum of Understanding, concerned agencies shall establish the Standard Operating Procedures within 30 days.

## 7. Cooperation with international organizations, the private sector, and civil society

7.1 To ensure the effective implementation of this Memorandum of Understanding, the Royal Thai Police, the Ministry of Social Development and Human Security, the Ministry of Foreign Affairs, and other concerned agencies shall jointly determine directions for cooperation with international organizations, the private sector, and civil society in providing assistance, including welfare and protection as well as return or any other undertaking in accordance with their respective mandates.

7.2 Concerned agencies in 7.1 shall jointly consider a list of international organizations, private organizations, and civil society organizations to collaborate with under this Memorandum of Understanding.

## 8. Follow-Up and Assessment

8.1 Follow-Up: Convene meetings among concerned agencies to follow-up, review and monitor the implementation of this Memorandum of Understanding and ensure that it is in accordance with the relevant legal and policy frameworks.

8.2 Reporting: The reporting period should be at least once a year as follows:

(1) Implementation in the first 6 months of the year should be reported within 30 days from 30 June of each year.

(2) Implementation during the 12 month-period should be reported within 30 days from 31 December of each year.

(3) The Police Strategy Bureau, the Royal Thai Police, and the Ministry of Social Development and Human Security shall furnish the reports as specified in 8.2 in coordination with and with information from relevant government and private agencies that have collaborated in the implementation of this Memorandum of Understanding. The reports shall also be submitted to the Office of the National Security Council.

## 9. Revision and Termination

9.1 The Royal Thai Police, the Ministry of Social Development and Human Security, the Ministry of Foreign Affairs, the Ministry of Interior, the Ministry of Public Health, the Ministry of Labour, and the Ministry of Education shall review the key elements in this Memorandum of Understanding every year to assess challenges, problems and complications from the implementation of this Memorandum of Understanding and propose recommendations to address them.

9.2 In case the review finds that the key principles or elements in this Memorandum of Understanding have changed as a result of legal contexts or other regulations, concerned agencies may consider terminating this Memorandum of Understanding, as appropriate.

## 10. Enforcement

This Memorandum of Understanding shall come into force on the day after it is signed by authorized persons of the Royal Thai Police, the Ministry of Social Development and Human Security, the Ministry of Foreign Affairs, the Ministry of Interior, the Ministry of Public Health, the Ministry of Education, and the Ministry of Labour. This Memorandum of Understanding is done in 7 copies with all texts being equally authentic. Each agency shall retain 1 authentic copy to inform relevant officers in order to implement this Memorandum of Understanding accordingly.

This Memorandum of Understanding is done at ..... on .....

.....

Police General Chakthip Chaijinda, Commissioner-General, The Royal Thai Police

.....

Dr. Poramettee Vimolsiri,

Permanent Secretary, Ministry of Social Development and Human Security

.....  
Mrs. Busaya Mathelin,  
Permanent Secretary, Ministry of Foreign Affairs

.....  
Mr. Chatchai Phromlert,  
Permanent Secretary, Ministry of Interior

.....  
Dr. Sukhum Kanchanapimai,  
Permanent Secretary, Ministry of Public Health

.....  
Mr. Karoon Skoonpradit,  
Permanent Secretary, Ministry of Education

.....  
Mr. Jarin Chakkaphark,  
Permanent Secretary, Ministry of Labour



## VIII. ENDNOTES

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<sup>1</sup> The expansion and normalization of child immigration detention in recent decades has been well documented. See, e.g., *End Child Detention*, INTER-AGENCY WORKING GROUP (IAWG) TO END CHILD IMMIGRATION DETENTION 5 (2016), [https://endchilddetention.org/wp-content/uploads/2016/09/IAWG\\_Advocacy-Brochure\\_Aug-2016\\_FINAL-web.pdf](https://endchilddetention.org/wp-content/uploads/2016/09/IAWG_Advocacy-Brochure_Aug-2016_FINAL-web.pdf) (discussing states' increasing use of migrant child detention). Compare Manfred Nowak, *United Nations Global Study on Children Deprived of Liberty*, UNITED NATIONS 463 (Nov. 2019), <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/495> [hereinafter *UN Global Study*] (finding that only 24 jurisdictions do not detain children for migration purposes). At least 80 states deprive children of liberty for migration purposes, with at least 330,000 children deprived of liberty each year for reasons related to migration, and even that number "is likely to be a significant under-estimation of the true figure, due to limitations regarding the quality, consistency and coverage of information around the world." *UN Global Study*, *supra* note 1, at 465.

<sup>2</sup> Reports indicated that Thailand arrested and detained thousands of migrant, refugee and asylum-seeking children each year, with migrant children generally being detained for a few days, weeks, or even months before being deported, and refugee and asylum-seeking children being detained much longer, in some cases for a period of years. See, e.g., *Two Years with No Moon: Immigration Detention of Children in Thailand*, HUMAN RIGHTS WATCH, 21 (Sept. 2014), <https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand> (noting that at least 4,000 children per year experience short-term detention in Thailand's immigration detention system, and approximately 100 children are detained on a long-term basis) [hereinafter *Two Years with No Moon*]; cf. *Unlocking Childhood: Current immigration detention practices and alternatives for child asylum seekers and refugees in Asia and the Pacific*, SAVE THE CHILDREN & ASIA PACIFIC REFUGEE RIGHTS NETWORK 27 & notes 84 (2017) (noting that Report's figures are based on UNHCR data), [https://resourcecentre.savethechildren.net/node/12161/pdf/unlocking\\_childhood.pdf](https://resourcecentre.savethechildren.net/node/12161/pdf/unlocking_childhood.pdf) [hereinafter *Unlocking Childhood*]. Since 2016, Thailand has publicly committed to ending the practice and expanding the use of alternatives to detention, culminating in its MOU-ATD of 2019. See Ministry of Foreign Affairs of the Kingdom of Thailand, *Press Release: Signing Ceremony of the Memorandum of Understanding on the Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centers* (Jan. 24, 2019) [hereinafter *Thai Ministry of Foreign Affairs MOU-ATD Press Release*].

<sup>3</sup> See, e.g., *Memorandum of Understanding on the Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centres* B.E. 2562 (MOU-ATD), Jan. 21, 2019 [hereinafter *MOU-ATD*], available at: [shorturl.at/yGQ78](http://shorturl.at/yGQ78).

<sup>4</sup> See *Thailand Migration Report: 2019*, UN THEMATIC WORKING GROUP ON MIGRATION IN THAILAND, 111 (2019), <https://thailand.un.org/index.php/en/50831-thailand-migration-report-2019> [hereinafter *UN Thematic Working Group 2019 Thailand Migration Report*].

<sup>5</sup> *Thailand pledged additional assistance to alleviate the plights of displaced persons*, MINISTRY OF FOREIGN AFFAIRS KINGDOM OF THAILAND (Sept. 21, 2016), <https://www.mfa.go.th/en/content/5d5bd05815e39c306001eacfc?cate=5d5bcb4e15e39c3060006834>.

<sup>6</sup> Thailand is not signatory to the 1951 Convention relating to the Status of Refugees (Refugee Convention), nor the 1967 Protocol Relating to the Status of Refugees (1967 Protocol). See *infra* II.B.1. UNHCR is currently conducting Refugee Status Determinations instead of the Government. Remote Interview of Confidential Informant No. 4 (2020). But according to the arrangement with the Government, UNHCR is prohibited from screening North Koreans, Burmese, Rohingya and ethnic Hmong from Laos. Adam Severson, *Thailand's Changing of the Guard*:



*Negotiating the Transition from UNHCR Refugee Status Determination to a National Refugee Screening Mechanism*, REFUGEE LAW INITIATIVE BLOG, SCHOOL OF ADVANCED STUDY UNIVERSITY OF LONDON (Nov. 19, 2020), <https://rli.blogs.sas.ac.uk/2020/11/19/thailands-changing-of-the-guard-negotiating-the-transition-from-unhcr-refugee-status-determination-to-a-national-refugee-screening-mechanism/>.

<sup>7</sup> *Migration: TRIANGLE in ASEAN – Thailand*, INT’L LABOUR ORG. (2021), [https://www.ilo.org/asia/projects/WCMS\\_622435/lang--en/index.htm](https://www.ilo.org/asia/projects/WCMS_622435/lang--en/index.htm) (last visited Oct. 30, 2021). Cf. Pungpond Rukumnuaykit, *A Synthesis Report on Labour Migration Policies, Management and Immigration Pressure in Thailand*, INT’L LABOUR ORGANIZATION iii (2009), [http://www.oit.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_103923.pdf](http://www.oit.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_103923.pdf).

<sup>8</sup> See, e.g., *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers*, HUMAN RIGHTS WATCH Sept. 4, 2012, <https://www.hrw.org/reports/thailand0912.pdf>; *Migration: TRIANGLE in ASEAN – Thailand*, INT’L LABOUR ORGANIZATION (2021), [https://www.ilo.org/asia/projects/WCMS\\_622435/lang--en/index.htm](https://www.ilo.org/asia/projects/WCMS_622435/lang--en/index.htm) (last visited Oct. 30, 2021). Won Geun Choi, *Advancing Refugee Protection from Bottom-Up: Case of the Asia Pacific Refugee Rights Network (APRRN)*, PhD Dissertation, University of Hawai’i at 113 (2020).

<sup>9</sup> For discussion of estimated numbers of migrants (documented and ‘irregular’), refugees, asylum-seekers, and stateless persons in Thailand and their vulnerability to arrest, detention and deportation, see *infra* Part II.A.

A **migrant** is any person “who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.” INT’L ORG. FOR MIGRATION, *IOM Definition of “Migrant,”* (2019) <https://www.iom.int/who-is-a-migrant>.

The term *migrant* is being used in the Report as a general term to refer to foreign nationals in Thailand and it is important to emphasize that the Report’s usage of the term does not preclude the possibility that such individuals may be an asylum seeker or refugee.

A **refugee** is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Convention relating to the Status of Refugees, art. 1A(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

The Royal Thai Government does not use the term “refugee,” but instead refers to refugees as “displaced persons and Persons of Concern (POC).” See, e.g., National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Thailand, A/HRC/WG.6/39/THA/1, at 14-15 (Aug. 17, 2021), <https://undocs.org/A/HRC/WG.6/39/THA/1> [Hereinafter *RTG 2021 UPR Submission*].

An **asylum-seeker** refers to an individual who: “is claiming or applying for protection as a refugee and who has not yet received a final decision on his or her claim”; or “has not yet submitted an application for refugee status recognition (has not yet formalised the administrative requirements in national law) but may nevertheless be in need of international protection.” EU AND UN, EXPERT GROUP ON REFUGEE AND INTERNALLY DISPLACED PERSONS STATISTICS — INTERNATIONAL RECOMMENDATIONS ON REFUGEE STATISTICS 22 (March 2018) [hereinafter *INTERNATIONAL RECOMMENDATIONS ON REFUGEE STATISTICS*].

A **stateless person** is an individual who is “not considered as a national by any State under the operation of its law.” Convention relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter *Statelessness Convention*]. This definition of stateless persons is widely considered to be international customary law. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, 58th session, at 36 (2006), [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf).

According to UNHCR, a **person of concern** is an individual “for whom UNHCR is mandated to provide [protection](#), [solutions](#) and assistance. This includes [refugees](#), [asylum-seekers](#), [refugee returnees](#), [stateless persons](#), and, in many situations, [internally displaced persons](#) (IDPs) including those who may also receive

protection and assistance from State and other partners.” UNHCR – Master Glossary of Terms Glossary, UNHCR (defining “persons of concern”), <https://www.unhcr.org/glossary/#p>. “Persons of concern” is the term often used by the Government to refer to persons who informants note are essentially refugees. See Interview of Confidential Informant No. 4, *supra* note 6.

All legal and/or specialized terms are defined in the glossary (*see infra* Appendix I) and further explained in subsequent sections of the Report.

<sup>10</sup> Both the MOU-ATD and the SOP-ATD are to guide the implementation of suitable alternatives to detention (ATDs) for migrant children. MOU-ATD, *supra* note 3. On 21 January 2019, seven concerned Thai agencies (Royal Thai Police, Ministry of Social Development and Human Security, Ministry of Foreign Affairs, Ministry of Interior, Ministry of Public Health, Ministry of Education and Ministry of Labour) signed the MOU-ATD. *Id.* Standard Operating Procedure under the MOU-ATD (SOP). Meanwhile, Cabinet Resolution 10/01 B.E., 2560 was passed to sanction a committee with the development of “a mechanism to screen and manage the refugee population in Thailand.” *Thailand Ensure New Refugee Regulation Meets International Standards, 2019*, Joint NGO Statement, ASIA PACIFIC REFUGEE RIGHTS NETWORK ET AL. 1 (Nov. 11, 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/Joint-Statement-Thailand-Refugees-NSM-2019-2-Dec-2019.pdf>.

<sup>11</sup> Declaration on the Rights of Children in the Context of Migration of the Association for Southeast Asian Nations, Nov. 2, 2019, <https://asean.org/asean-declaration-on-the-rights-of-children-in-the-context-of-migration/>. *Compare Ensure New Refugee Regulation Meets International Standards, Joint NGO Statement*, AMNESTY INTERNATIONAL (AMNESTY), ASIA PACIFIC REFUGEE RIGHTS NETWORK (APRRN), ASYLUM ACCESS THAILAND (AAT), CROSS CULTURAL FOUNDATION (CRCF), COALITION FOR THE RIGHTS OF REFUGEES AND STATELESS PERSONS (CRSP) et al. (Dec. 3, 2019) (noting among other things that Thailand took the leading role in developing the ASEAN Declaration), <https://reliefweb.int/report/thailand/ensure-new-refugee-regulation-meets-international-standards>.

<sup>12</sup> Regional Plan of Action on Implementing the ASEAN Declaration on the Rights of Children in the Context of Migration, ASEAN (2021), available at <https://asean.org/wp-content/uploads/2021/11/5.-ASEAN-RPA-on-CCM-Final.pdf>. Thailand has also been ‘championing’ alternatives to immigration detention at the international level. See, e.g., Royal Thai Government, Dep’t of Children and Youth, Ministry of Social Development and Human Security, Presentation, “Working to end child immigration detention through peer learning,” An online side-event at the International Migration Review Forum (May 19, 2022) (on file with the author) [Hereinafter *2022 Thailand Gov’t DCY IMRF Presentation*]. For further discussion on Thailand’s international and regional role in “championing” ATD peer learning, *see infra* note 274.

<sup>13</sup> Local and international NGOs outlined in a joint press release a number of remaining issues following the MOU-ATD, including arbitrary arrest and bail requirements. See *Thailand: Joint Statement on MoU to End Immigration Detention of Children*, ASIA PACIFIC REFUGEE RIGHTS NETWORK (APRRN), ASYLUM ACCESS THAILAND (AAT), CENTER FOR ASYLUM PROTECTION (CAP), COALITION FOR THE RIGHTS OF REFUGEES AND STATELESS PERSONS (CRSP), FORTIFY RIGHTS, HUMAN RIGHTS WATCH (HRW), MIGRANT WORKING GROUP (MWG) (Jan. 21, 2019), <https://www.hrw.org/news/2019/01/21/thailand-joint-statement-mou-end-immigration-detention-children> [hereinafter *Joint Statement on MoU to End Immigration Detention of Children*]. *Compare UNICEF Submission to the Thematic Report of the United Nations Special Rapporteur on the Human Rights of Migrants* (May 2020) (“While [the MOU-ATD] falls short of the protection of asylum-seeking, refugee, migrant and stateless children from arbitrary detention, it could be recognized as a step in the right direction. The MoU prioritizes the best interests of the child, affirms the government responsibility to ensure children remain in their family’s care, and underlines that children should only be detained or transferred to shelters as a measure of last resort.”).

<sup>14</sup> *UN Global Study*, *supra* note 1, at 448 (concluding that “the detention of children for purely migration-related reasons, whether with their families or as unaccompanied or separated children, can never meet the [best interests of the child] standards”). See also *UNICEF Submission to the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them* (May 2020) (“Child immigration detention is always a child rights violation; is never in a child’s best interests; is contrary to every child’s right to non-discrimination, to survival and development, and to be heard and have her views taken into consideration in line with her evolving capacities; and it amounts to cruel, inhumane and degrading treatment.”).

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<sup>15</sup> MOU-ATD, *supra* note 3.

<sup>16</sup> See Remote Interview of Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition (Nov. 10, 2021); compare Joint Submission Universal Periodic Review of Thailand Cycle 3, 39th Sessions, Asia Pacific Refugee Rights Network, Asylum Access Thailand, People Empowerment Foundation, Refugee Rights Litigation Project, ¶¶15, 16,17 (June 15, 2021), [https://asylumaccess.org/wp-content/uploads/2021/06/Refugee-Rights-Network-in-Thailand\\_en.pdf](https://asylumaccess.org/wp-content/uploads/2021/06/Refugee-Rights-Network-in-Thailand_en.pdf). Some, for example, have questioned how the MOU-ATD will influence the protection of children and families if they were screened from the NSM. Remote Interview of Chawaratt Chawarangkul, *supra* note 16. For discussion on the potential deficiencies of the NSM, see *infra* Part V.A.2.

<sup>17</sup> For discussion of the relevant international conventions to which Thailand is a party, see *infra* Part II.B.2. In its 2019 *Global Study on Children Deprived of Liberty*, the United Nations called for states to employ alternatives to detention in the migration context, finding that there exists an emerging consensus that detention of migrant children “for purely migration-related reasons” is prohibited under international law. *UN Global Study*, *supra* note 1, at 451.

<sup>18</sup> Individuals and organizations interviewed include, among others: Asylum Access Thailand; Alice Farmer, refugee lawyer (speaking in her individual capacity); Coalition for the Rights of Refugees and Stateless Persons (CRSP); International Detention Coalition; Nicolás Espejo Yaksic, Visiting Fellow, Exeter College, University of Oxford and Researcher at the Centre for Constitutional Studies, Mexico; and Refugee Rights Litigation Project.

<sup>19</sup> For a brief overview of Covid-19’s impacts on Thai policy and practice regarding migrant and refugee child detention, see *infra* Part V.

<sup>20</sup> A **migrant** is any person “who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.” International Organization for Migration, *IOM Definition of “Migrant,”* (2019) <https://www.iom.int/who-is-a-migrant>.

The term *migrant* is being used in the Report as a general term to refer to foreign nationals in Thailand and it is important to emphasize that the Report’s usage of the term does not preclude the possibility that such individuals may be an asylum seeker or refugee.

A **refugee** is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Convention relating to the Status of Refugees, art. 1A(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

An **asylum-seeker** refers to an individual who: “is claiming or applying for protection as a refugee and who has not yet received a final decision on his or her claim”; or “has not yet submitted an application for refugee status recognition (has not yet formalised the administrative requirements in national law) but may nevertheless be in need of international protection.” EU AND UN, EXPERT GROUP ON REFUGEE AND INTERNALLY DISPLACED PERSONS STATISTICS — INTERNATIONAL RECOMMENDATIONS ON REFUGEE STATISTICS 22 (March 2018) [hereinafter INTERNATIONAL RECOMMENDATIONS ON REFUGEE STATISTICS].

A **stateless person** is an individual who is “not considered as a national by any State under the operation of its law.” Convention relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter Stateless Convention]. This definition of stateless persons is widely considered to be international customary law. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, 58th session, at 36 (2006), [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf).

All legal and/or specialized terms are defined in the glossary (see *infra* Appendix I) and further explained in subsequent sections of the Report.

<sup>21</sup> Several organizations have published reports documenting the abusive conditions for children in immigration detention in Thailand. See, e.g., *Two Years with No Moon*, *supra* note 2; *Unlocking Childhood*, *supra* note 2.

<sup>22</sup> *No Choice in the Matter: Migrants' Experience of Arrest, Detention and Deportation*, MEKONG MIGRATION NETWORK 22 (June 2013), [http://www.mekongmigration.org/wp-content/uploads/2019/03/No-Choice\\_Eng-1-1.pdf](http://www.mekongmigration.org/wp-content/uploads/2019/03/No-Choice_Eng-1-1.pdf) [hereinafter *No Choice in the Matter*].

<sup>23</sup> The World Bank In Thailand: Overview, The World Bank (2021), <https://www.worldbank.org/en/country/thailand/overview#1>, last visited Oct. 29, 2021 (describing Thailand's economic growth since 1960s).

<sup>24</sup> *Thailand Migration Report: 2019*, UNITED NATIONS THEMATIC WORKING GROUP ON MIGRATION IN THAILAND I, 10, 12 (2019), <https://thailand.un.org/index.php/en/50831-thailand-migration-report-2019> [hereinafter *UN Thematic Working Group 2019 Thailand Migration Report*]. It should be noted that estimates of the total population of non-Thai citizens living in Thailand, stateless persons and irregular migrants are “subject to a large margin of error due to the limitations of the official data.” *UN Thematic Working Group 2019 Thailand Migration Report*, *supra* note 24, at 10, 12. Compare Choi, *supra* note 8, at 113 (“Recently, there are 104,615 refugees, 2,077 asylum-seekers, and 486,440 stateless persons in Thailand, mostly from Myanmar, Cambodia, and Laos.”). Also compare *Two Years with No Moon*, *supra* note 2, at 10 (noting that as of 2014 there were 375,000 migrant children in Thailand). For definitions of migrants, refugees, asylum seeker and stateless individuals, see *supra* note 20, or *infra* VI.A (Appendix: Glossary).

<sup>25</sup> See *UN Thematic Working Group 2019 Thailand Migration Report*, *supra* note 24, at 11 (noting there to be over 800,000 irregular migrants, but that estimates are unreliable); but see Titiporn Tuangratananon et al., *Education Policy for Migrant Children in Thailand and How It Really Happens; A Case Study of Ranong Province, Thailand*, 16 INT'L J. ENV. RES. PUBLIC HEALTH 3, 430 (Feb. 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6388250/> (“So far, there are approximately over 3 million migrant workers from Cambodia, Lao PDR and Myanmar (so-called CLM migrants) in Thailand. The majority of these people crossed the Thai border without valid travel documents as so-called undocumented migrants.”); *Thailand: Migrant Worker Law Triggers Regional Exodus*, Human Rights Watch (July 17, 2017), <https://www.hrw.org/news/2017/07/07/thailand-migrant-worker-law-triggers-regional-exodus> (noting there to be approximately 3 million unregistered workers). *No Choice in the Matter*, *supra* note 22, at 23 (Despite [regularization] efforts, it is estimated that up to two million irregular migrants remain in irregular status and have not participated in the nationality verification process.”).

<sup>26</sup> Press Release, UNICEF, *European Union contributes 82 million Baht to support the protection of children affected by migration in Thailand* (March 12, 2019), <https://www.unicef.org/eap/press-releases/european-union-contributes-82-million-baht-support-protection-children-affected>.

<sup>27</sup> The 300,000-400,000 estimate of migrant children in Thailand is based on data of those children in the Thai school and/or health system, yet there are no estimates as to the number of undocumented children in Thailand, as there exists no administrative data that is comprehensive. Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>28</sup> *Two Years with No Moon*, *supra* note 2, at 10.

<sup>29</sup> *UN Thematic Working Group 2019 Thailand Migration Report*, *supra* note 24, at 2 (“One of the first official announcements of the National Council for Peace and Order (NCPO) was that any irregular migrant workers found in Thailand would be arrested and deported by Thai authorities.”).

<sup>30</sup> Maryann Bylander and Georgia Reid, *Criminalizing Irregular Migrant Labor: Thailand's Crackdown in Context*, MIGRATION POLICY INSTITUTE 1-3 (Oct. 11, 2017).

<sup>31</sup> *Id.* at 1. Compare ROYAL DECREE ON MANAGEMENT OF FOREIGN WORKERS' EMPLOYMENT, B.E. 2560, Chapter VIII (2017) (noting different penalty amounts – between 5,000-50,000 for foreign workers, and 10,000-100,000 for employers). An unofficial English translation is available at: <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/107728/132775/F1245017527/THA107728%20Eng.pdf>. See RTG 2021 UPR Submission, *supra* note 9, at ¶ 102 (“The Government enacted the Emergency Decree on Management of Foreign Workers' Employment B.E. 2560 (2017) in order to enforce the Alien Workers Act B.E. 2551 (2008) and the Emergency Decree on Rules on Bringing Migrant Workers to Work with Employers in the Country (No. 2) B.E. 2561 (2018), thereby enhancing efficiencies in implementing policies to prevent labour trafficking. The Emergency Decrees also cover enhanced labour regulation, prevention, protection, remedy and coordination between the relevant sectors to benefit migrant workers and workers in the fisheries industries.”).



<sup>32</sup> See, e.g., Maryann Bylander and Georgia Reid, *supra* note 30, 1, 4 (noting “such harsh penalties are rare, even among countries known for being tough on irregular migrants”). Some argued that the risks associated with the severe prison sentences and fines could create “new forms of exploitation,” as migrants even before the 2017 decree reported paying bribes so as not to be deported or jailed. *Id.*

<sup>33</sup> Vigneswaran, D. *Migrant protection regimes: Beyond advocacy and towards exit in Thailand*, 46 REV. INT’L STUD. 652-671, at 663 (Nov. 2020).

<sup>34</sup> ROYAL DECREE ON RULES ON BRINGING MIGRANT WORKERS TO WORK WITH EMPLOYERS IN THE COUNTRY (No. 2) B.E. 2561 (2018). An unofficial English translation is available here: [https://www.doe.go.th/prd/assets/upload/files/legal\\_th/e64d9efe6d8cb299501a5e07bf9da569.pdf](https://www.doe.go.th/prd/assets/upload/files/legal_th/e64d9efe6d8cb299501a5e07bf9da569.pdf).

<sup>35</sup> UN Thematic Working Group 2019 Thailand Migration Report, *supra* note 24, at 3.

<sup>36</sup> *Id.* By August 2019, there were 2.8 million registered migrant workers in Thailand. Thailand (July – Sept. 2019), Triangle in ASEAN Quarterly Briefing Note, INTERNATIONAL LABOR ORGANIZATION 1, [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms\\_614383.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_614383.pdf).

<sup>37</sup> *Thailand Bound: An Exploration of Labor Migration Infrastructures in Cambodia, Myanmar, and Lao PDR*, VERITE 4, 6 (May 2019), <https://www.verite.org/wp-content/uploads/2019/05/Thailand-Bound-An-Exploration-of-Migration-Infrastructures-in-Cambodia-Myanmar-Lao-PDR-1.pdf> [hereinafter *Thailand Bound*]. Cf. UN Thematic Working Group 2019 Thailand Migration Report, *supra* note 24, at 10, 12; cf. also Titiporn Tuangratananon et al., *Education Policy for Migrant Children in Thailand and How It Really Happens; A Case Study of Ranong Province, Thailand*, 16 INT’L J. ENV. RES. PUBLIC HEALTH 3, 430 (Feb. 2019).

<sup>38</sup> UN Thematic Working Group 2019 Thailand Migration Report, *supra* note 24, at 12.

<sup>39</sup> Press Release, UNICEF, *European Union contributes 82 million Baht to support the protection of children affected by migration in Thailand* (March 12, 2019), <https://www.unicef.org/eap/press-releases/european-union-contributes-82-million-baht-support-protection-children-affected>. The Ministry of Interior reported that there were approximately 145,000 stateless children registered with the Government. *Id.* Other sources estimate that there could be over two million stateless persons in Thailand. See UN Thematic Working Group 2019 Thailand Migration Report, *supra* note 24, at 11. One informant noted that designations as to who qualifies as ‘stateless’ is contested and that even within the Thai Government particular ministries have different designations. Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>40</sup> See UNHCR Analysis of Gaps in Refugee Protection Capacity Thailand, COMMITTEE FOR THE COORDINATION OF SERVICES TO DISPLACED PERSONS IN THAILAND (CCSDPT) & UNHCR’s ‘COMPREHENSIVE PLAN ADDRESSING THE NEEDS OF DISPLACED PERSONS ON THE THAILAND/MYANMAR BORDER’ AND THE STRENGTHENING PROTECTION CAPACITY PROJECT-THAILAND (SPCPT-THAILAND) 7 (2006), <https://www.unhcr.org/457ed0412.pdf> [hereinafter *UNHCR Analysis of Gaps in Refugee Protection Capacity Thailand*](noting that Thailand had hosted almost 3 million refugees as of 2006).

<sup>41</sup> UN Thematic Working Group 2019 Thailand Migration Report, *supra* note 24, at 10, 12; see also Joint Submission Universal Periodic Review of Thailand Cycle 3, 39th Sessions, Asia Pacific Refugee Rights Network, Asylum Access Thailand, People Empowerment Foundation, Refugee Rights Litigation Project, ¶1 (June 15, 2021) [hereinafter *Refugee Rights Network Joint Submission 2021 UPR Thailand*].

<sup>42</sup> UN Thematic Working Group 2019 Thailand Migration Report, *supra* note 24, at 4, 12. Cf. Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights’ Compilation Report Universal Periodic Review: 2nd Cycle, 25th Session Thailand, UNHCR (Sept. 2015), 1 <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=2709&file=EnglishTranslation> [hereinafter *UNHCR 2015 Thailand UPR Submission*]. Cf. also UNHCR – Thailand, UNHCR (2021), <https://www.unhcr.org/th/en#:~:text=Today%20there%20are%20some%2097%2C000,and%20asylum%2Dseekers%20of%20some> (noting that as of December 2021 there were “some 97,000 refugees in Thailand,” the majority from ethnic minorities from Myanmar, mainly Karen and Karenni, and “live in nine camps in four provinces along the Thai-Myanmar border” and an additional 5,000 or so “refugees and asylum-seekers of some 40 nationalities who live in Bangkok and the surrounding urban areas”). The Thai Government does not use the term ‘camp,’ instead it employs the term ‘temporary shelter.’ See Submission to the Human Rights Council at the 25th Session of the Universal Periodic Review – Thailand, INSTITUTE ON STATELESSNESS AND INCLUSION n.13, ¶21 (Sept. 21, 2015), <https://files.institutesi.org/ThailandUPR2015.pdf>.

<sup>43</sup> See Joint Statement, AAPRN, CRSP, and Fortify Rights, *Thailand: Ensure Refugee Rights and Protections Through Refugee Regulation* (Dec. 2, 2019). In 2018, approximately 55 percent of the urban refugees are from Pakistan, 10 percent are from Vietnam, six percent are from Palestine, and the remaining 30 per cent are from Somalia, Syria, Iraq, Sri Lanka, Cambodia, China, Iran, and others. See Michaelle Tauson, *Forgotten Futures: The lives of refugee children in urban areas of Indonesia and Thailand*, SAVE THE CHILDREN 9 (2018), [https://resourcecentre.savethechildren.net/node/13474/pdf/forgotten\\_futures\\_online\\_version.pdf](https://resourcecentre.savethechildren.net/node/13474/pdf/forgotten_futures_online_version.pdf) [hereinafter *Forgotten Futures*].

<sup>44</sup> UNHCR in Thailand, *Refugees in Thailand*, UNHCR (Dec. 31, 2021), <https://www.unhcr.org/th/en/> (last visited Oct. 22, 2021) (“Today there are some 97,000 refugees in Thailand,” most of whom “(91,408 as of December 2021, under reverification) are ethnic minorities from Myanmar, mainly Karen and Karenni, who live in nine camps in four provinces along the Thai-Myanmar border. There are also approximately 5,000 refugees and asylum-seekers of some 40 nationalities who live in Bangkok and the surrounding urban areas”).

<sup>45</sup> *UNHCR Analysis of Gaps in Refugee Protection Capacity Thailand*, *supra* note 40, at 4. The number of urban refugees is smaller than those refugees who fled from Myanmar. Samitra Parthiban and Khoo Ying Hooi, *Detention of Refugee Children in Malaysia and Thailand: Are Alternatives to Detention (ATD) Workable?*, 3 J. SE. ASIAN HUM. RTS. 1, 71 (2019) [hereinafter *Detention of Refugee Children in Malaysia and Thailand*].

<sup>46</sup> *160,000 refugees. Nine camps. 28 years*, ASYLUM ACCESS (Aug. 2013), <https://asylumaccess.org/160000-refugees-nine-camps-28-years/>.

<sup>47</sup> Naiyana Thanawattho, Waritsara Rungthong and Emily Arnold-Fernández, *Advancing refugee rights in non-signatory States: the role of civil society in Thailand*, 67 FORCED MIGRATION REV. 61 (July 2021) [hereinafter *Advancing refugee rights in non-signatory States: the role of civil society in Thailand*], <https://www.fmreview.org/issue67/thanawattho-rungthong-arnoldfernandez> (emphasis added).

<sup>48</sup> Refugees in the camps are required to obtain permission to leave the camp, “which can be obtained for official activities (e.g. a training organized by an NGO), but not for personal reasons, including work. The camps’ remote locations further restrict movement.” Submission to the U.N. Committee on the Elimination of Racial Discrimination on Thailand’s Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, ASYLUM ACCESS, ASIA PACIFIC RIGHTS NETWORK, CSRP, AND FORTIFY RIGHTS 10 (Sept. 2020), <https://asylumaccess.org/wp-content/uploads/2021/08/submission-to-CERD-sept-002.pdf>.

<sup>49</sup> *UNHCR Analysis of Gaps in Refugee Protection Capacity Thailand*, *supra* note 40, at 5.

<sup>50</sup> *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers*, HUMAN RIGHTS WATCH 68 (Sept. 2012). It should be noted that the estimated figure used in the HRW report is from a 2009 source. More recent sources estimate the Burmese migrant worker population to be 2.3 million. *Flow Monitoring Surveys: Insights into the Profiles and Vulnerabilities of Myanmar Migrants to Thailand (Round Three)*, IOM (Aug. 2019), <https://reliefweb.int/report/thailand/flow-monitoring-surveys-insights-profiles-and-vulnerabilities-myanmar-migrants-1>.

<sup>51</sup> See discussion *infra* Section II.B. Consequently, the Government’s asylum policies are often critiqued as being insufficient and ad hoc. *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers*, HUMAN RIGHTS WATCH (Sept. 2012), <https://www.hrw.org/reports/thailand0912.pdf>; *Two Years with No Moon*, *supra* note 2, at 14. See generally *Advancing refugee rights in non-signatory States: the role of civil society in Thailand*, *supra* note 47; Choi, *supra* note 8, at 5. Since 1975, UNHCR has operated in Thailand at the request of the Government. Nevertheless, UNHCR has no formal mandate or legislative framework for its work in Thailand. UNHCR’s work includes: “assisting and providing ‘temporary protection’ to refugees living in camps;” and registering and engaging in RSD for asylum seekers from the urban refugee population, which can lead to resettlement opportunities in third countries. *Unlocking Childhood*, *supra* note 2, at 27.

<sup>52</sup> See *UNHCR Analysis of Gaps in Refugee Protection Capacity Thailand*, *supra* note 40, at 18; *Two Years with No Moon*, *supra* note 2.

<sup>53</sup> See *Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 70-71. Cf. E-mail from Confidential Informant No. 20, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (2021) (on file with the author).

<sup>54</sup> *Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 70. Cf. E-mail from Confidential Informant No. 20, *supra* note 53 (noting Chinese Uyghur are also excluded).

<sup>55</sup> *Two Years with No Moon*, *supra* note 2, at 17 (noting Burmese, Lao Hmong, and North Koreans are specifically excluded from the RSD); cf. E-mail from Confidential Informant No. 20, *supra* note 53 (noting that Chinese Uyghur are also excluded from the RSD; Rohingya are also excluded from UNHCR RSD).

<sup>56</sup> *Thailand: Let UN Refugee Agency Screen Rohingya*, Human Rights Watch (May 21, 2020). See also *Thailand: Protect Rohingya 'Boat Children'*, HUMAN RIGHTS WATCH (Jan. 6, 2014), <https://www.hrw.org/news/2014/01/06/thailand-protect-rohingya-boat-children>. The Government has also refused to permit Rohingya to register as legally documented migrant workers. *Thailand: Let UN Refugee Agency Screen Rohingya*, Human Rights Watch (May 21, 2020). Since the enactment of Myanmar's 1982 Citizenship Law, Rohingyas have been effectively deprived of their citizenship and rendered stateless and have suffered from systematic persecution and discrimination. Children born to Rohingya parents are also deprived of their right to a nationality. See Michiel Hoornick, *The statelessness-trafficking nexus. A case study in Thailand*, 87 INT'L INST. FOR ASIAN STUD. NEWSLETTER (Fall 2020), <https://www.ias.asia/the-newsletter/article/statelessness-trafficking-nexus-case-study-thailand>.

<sup>57</sup> E-mail from Confidential Informant No. 20, *supra* note 53.

<sup>58</sup> *Id.*

<sup>59</sup> "Durable solution" refers to "[a]ny means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to live normal lives." UNHCR traditionally pursues the three durable solutions of voluntary repatriation, local integration and resettlement." UNHCR – Glossary, UNHCR (defining "durable solutions"), <https://www.unhcr.org/449267670.pdf>. Cf. E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (Dec. 20, 2021) (on file with the author) (noting Thailand has recognized and positioned itself as a transit country).

<sup>60</sup> *Forgotten Futures*, *supra* note 43, at 12.

<sup>61</sup> Asylum Access et al., Joint NGO UPR Submission – Thailand, ¶8 (Sept. 21, 2015), <https://asylumaccess.org/wp-content/uploads/2019/12/UPR-2016-Thailand-NGO-Submission.pdf> (noting on average that the wait time is four years).

<sup>62</sup> *Forgotten Futures*, *supra* note 43, at 9. Among urban refugees, from 2006 to 2017, approximately 110,000 refugees from the camps along the border were resettled in third countries. *Camps in Thailand*, THE BORDER CONSORTIUM (2017), <https://www.theborderconsortium.org/where-we-work/camps-in-thailand/> (last visited Oct. 28, 2021).

<sup>63</sup> *UNHCR Analysis of Gaps in Refugee Protection Capacity Thailand*, *supra* note 40, at 19.

<sup>64</sup> *Two Years with No Moon*, *supra* note 2, at 12-13; see also *No Choice in the Matter*, *supra* note 22, at 1.

<sup>65</sup> *Two Years with No Moon*, *supra* note 2, at 17-18.

<sup>66</sup> *Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 71. Compare E-mail from Confidential informant, NGO, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (2021) (noting illegal entry to be another reason for arrest) (on file with the author).

<sup>67</sup> *Two Years with No Moon*, *supra* note 2, at 13.

<sup>68</sup> Given the estimated numbers of irregular migrants, unregistered stateless, and refugee populations in Thailand, the population of those vulnerable to arrest under Thailand's Immigration Law appears to be in the millions. See *supra* notes 22, 23. Remote Interview of Confidential Informant, NGO (2021). Cf. *Two Years with No Moon*, *supra* note 2, at 12 (noting hundreds of thousands of Burmese adults and children are vulnerable to arrest).

<sup>69</sup> See *Forgotten Futures*, *supra* note 43, at 8, 14 ("With a lack of any formal legislation or even informal policies and agreements, refugees will be unable to legally work, rent homes, access an education, or access proper health care. They may also be living in constant fear of indefinite detention, restricting their movement, and further hindering their ability to sustain a livelihood, access health care and obtain an education. This situation is extremely detrimental to children as they will grow up without what is needed for appropriate mental, physical, and psychological development.").

<sup>70</sup> *Two Years with No Moon*, *supra* note 2, at 12.

<sup>71</sup> Press Release, Human Rights Watch, *Thailand: Migrant Children Locked Up* (Sept. 1, 2014), <https://www.hrw.org/news/2014/09/01/thailand-migrant-children-locked>.

<sup>72</sup> *Unlocking Childhood*, *supra* note 2, at 27 & notes 84-86.

<sup>73</sup> *UNHCR 2015 Thailand UPR Submission*, *supra* note 42, at 10-11. See also *Two Years with No Moon*, *supra* note 2, at 18.



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<sup>74</sup> *Two Years with No Moon*, *supra* note 2, at 43.

<sup>75</sup> See *id.* at 13; cf. also *Corruption as a Facilitator of Smuggling of Migrants and Trafficking in Persons in the Bali Process Region with a focus on Southeast Asia*, UNODOC 23 (2021), [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2021/Corruption of SoM and TiP with a focus on Southeast Asia Mar2021.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2021/Corruption%20of%20SoM%20and%20TiP%20with%20a%20focus%20on%20Southeast%20Asia%20Mar2021.pdf).

<sup>76</sup> The Coalition for the Rights of Refugees and Stateless Persons (CRSP), Thailand End Child Detention Scorecard report: Comparison and Analysis of 2017, 2018, and 2019 (2020) (unpublished working paper, on file with the author).

<sup>77</sup> *Two Years with No Moon*, *supra* note 2, at 19.

<sup>78</sup> *Id.* at 2.

<sup>79</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59; cf. *Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 71.

<sup>80</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>81</sup> *Two Years with No Moon*, *supra* note 2, at 24.

<sup>82</sup> See Remote Interview of Waritsara Rungthong, Project Manager, Refugee Rights Litigation Project (2020).

<sup>83</sup> The Coalition for the Rights of Refugees and Stateless Persons (CRSP), Thailand End Child Detention Scorecard report: Comparison and Analysis of 2017, 2018, and 2019 (2020) (unpublished working paper, on file with the author).

<sup>84</sup> *Two Years with No Moon*, *supra* note 2, at 1, 21-22 (describing situations wherein migrant children can be subject to detention for months or years – e.g., if they do not have enough money to pay for repatriation or if they are waiting for resettlement to a third country).

<sup>85</sup> *Id.* at 10.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> Remote Interview of Alice Farmer, refugee lawyer (speaking in her individual capacity)(Oct. 2020).

<sup>88</sup> *Id.* (noting that from the outside of the IDC in Bangkok people walking by would never know that inside the building there were hundreds being indefinitely detained).

<sup>89</sup> See E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>90</sup> *Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 72. Cf. Remote Interview of Chawaratt Chawarangkul, *supra* note 16 (noting that this practice of separation by gender appears to refer to immigration detention in Suan Plu).

<sup>91</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>92</sup> *Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 72. But see The Secretary-General, U.N. Global study on children deprived of liberty, delivered to the General Assembly, ¶56, U.N. Doc. A/74/136 (July 11, 2019) (“Research for the study recognizes that migration-related detention of children cannot be considered as a measure of last resort and is never in the best interests of the child and, therefore, should always be prohibited. This applies to unaccompanied and separated children, as well as to children with their families. Detaining children to “keep families together” or for their “protection”, where alternative care is lacking, can never be a justification.”); *UNHCR 2015 Thailand UPR Submission*, *supra* note 42, at 12 (“Linking responsibilities under the ICCPR and the CRC with the Thai Penal Code and CPA, a strong argument exists that while detained parents may be compelled for lack of options to request that their children be detained with them, the best interest of the child requires that children be released from detention, along with a parent, in order to minimize the harm to children.”).

<sup>93</sup> *Two Years with No Moon*, *supra* note 2, at 24, 43 (“The government separated families, holding adult men and some male children, including unaccompanied boys, indefinitely in immigration detention centers, and detaining others, primarily women and younger children, in closed shelters run by the Ministry of Social Development and Human Security (MSDHS).”) (internal citations omitted). Cf. *Forgotten Futures*, *supra* note 43, 18-19 (discussing unaccompanied minors vulnerabilities in Bangkok, highlighting one case of unaccompanied child detained for over one year).

<sup>94</sup> E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (Nov. 10, 2021) (on file with the author).

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<sup>95</sup> This has been noted as being an issue particularly for unaccompanied boys. See *Two Years with No Moon*, *supra* note 2, at 24, 25.

<sup>96</sup> *Forgotten Futures*, *supra* note 43, at 17.

<sup>97</sup> Compare *id.* at 23 (“Rumours of trafficking were not confirmed during this [Report’s] research, although some fears had circulated among service providers that it might be a concern. According to interviews with a Thai government agency, the profile of those trafficked are unaccompanied children and children looking for work.”).

<sup>98</sup> *Id.* at 18.

<sup>99</sup> Royal Thai Government’s Country Report on Anti-Human Trafficking Efforts, ROYAL THAI GOVERNMENT 20 (2018), <http://www.thaianti-humantraffickingaction.org/Home/wp-content/uploads/2019/07/Royal-Thai-Government-Report-2018.pdf>.

<sup>100</sup> E-mail from Confidential Informant No. 20, *supra* note 54; Remote Interview of Confidential Informant No. 20 (2021).

<sup>101</sup> *Two Years with No Moon*, *supra* note 2, at 41.

<sup>102</sup> *Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 72.

<sup>103</sup> *Two Years with No Moon*, *supra* note 2, at 3.

<sup>104</sup> See *Submission to the UN Human Rights Committee (CCPR), 117<sup>th</sup> Session, Country Report Task Force for the adoption of the list of issues - Thailand*, GLOBAL DETENTION PROJECT 1 (Apr. 7, 2016), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT\\_CCPR\\_ICO\\_THA\\_23524\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_ICO_THA_23524_E.pdf).

<sup>105</sup> *Two Years with No Moon*, *supra* note 2, at 41-53. See also Tunya Sukpanich, *A Childhood Behind Bars*, BANGKOK POST (Sept. 22, 2013), <https://www.bangkokpost.com/thailand/special-reports/370898/a-childhood-behind-bars> (citing study: Kongchantuek, Rasasiripong, and Kanchanatiwat, *Preliminary Study of the Situation of Children in SuanPlu Immigration Detention Centers, Bangkok, Thailand*, SAVE THE CHILDREN INTERNATIONAL (2013)). One source indicated as well a high risk of sexual assault for children. *Forgotten Futures*, *supra* note 43, at 19.

<sup>106</sup> *Report on Regional Expert Roundtable on Alternatives to Immigration Detention for Children*, ASIA PACIFIC REFUGEE RIGHTS NETWORK, AICHR THAILAND, INTERNATIONAL DETENTION COALITION at 11-12 (Apr. 2016), [https://idcoalition.org/wp-content/uploads/2016/04/Regional\\_Experts\\_Roundtable\\_ATD\\_Report\\_2016.pdf](https://idcoalition.org/wp-content/uploads/2016/04/Regional_Experts_Roundtable_ATD_Report_2016.pdf) [hereinafter *Report on Regional Expert Roundtable*]. See generally American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, PEDIATRICS 6 (Apr. 2017), <https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf> (highlighting negative impacts of detention on child and family health).

<sup>107</sup> See, e.g., *Hidden children in migrant workers: Is the state ready to take care of it?* Thairath.co.th (Sept. 28, 2013) (discussing 2013 report produced by Thai National Subcommittee on Statelessness, Migration and Displaced Persons documenting severe physical ailments of children in detention), <https://www.thairath.co.th/content/372506>; *Forgotten Futures*, *supra* note 43, at 19 (highlighting how children become ‘broken’ following detention); *Two Years with No Moon*, *supra* note 2, at 28; *Unlocking Childhood*, *supra* note 2, at 24; *No Choice in the Matter*, *supra* note 22, at 26.

<sup>108</sup> As noted, several organizations have published reports documenting the abusive conditions for children in immigration detention in Thailand. See, e.g., *Two Years with No Moon*, *supra* note 2; *No Choice in the Matter*, *supra* note 22, at 26.

<sup>109</sup> *Two Years with No Moon*, *supra* note 2, at 10.

<sup>110</sup> As previously noted, Thailand is not a signatory to the Refugee Convention, nor does its domestic law provide a legal framework for offering protection or legal status to urban refugees and asylum seekers. See UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019*, at 11 (2014) [hereinafter *UNHCR Beyond Detention*] (“Thailand has no specific domestic legal framework for protection of urban refugees and asylum seekers. As such, urban refugees and asylum seekers may be treated as illegal aliens unless they have a valid visa issued pursuant to the Immigration Act. Absent a valid visa, they may be subject to arrest, prosecution, and detention on immigration charges, irrespective of their status with UNHCR.”). See *Unlocking Childhood*, *supra* note 2, at 5 (“Lack of legal status [in Thailand] renders individuals vulnerable to arrest and detention and inclined to live in a way that decreases their visibility in their host community.”); compare The United Nations General Assembly, Human Rights Council, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21* (March 7, 2016), <https://documents->

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<https://www.unhcr.org/doc/UNDOC/GEN/G16/044/06/PDF/G1604406.pdf?OpenElement> (“The Committee on Economic, Social and Cultural Rights urged Thailand to adapt its legal framework to ensure due protection of asylum seekers and refugees in line with its international obligations and the full enjoyment of their economic, social and cultural rights.”). *Two Years with No Moon*, *supra* note 2, at 14.

<sup>111</sup> See *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers*, HUMAN RIGHTS WATCH 1 (Sept. 12, 2012); *Unlocking Childhood*, *supra* note 2, at 4-5.

<sup>112</sup> IMMIGRATION ACT OF THAILAND B.E. 2522 (1979) [hereinafter IMMIGRATION ACT]. Unofficial English translation of the Immigration Act is available at: <https://shorturl.at/yGQ78>.

<sup>113</sup> ALIEN WORKING ACT, B.E. 2551 (2008). An unofficial English translation is available here: <http://www.thailawforum.com/database1/Alien-Working-Act.html>.

<sup>114</sup> *Thailand Bound*, *supra* note 37, at 14-17; cf. *RTG 2021 UPR Submission*, *supra* note 9.

<sup>115</sup> See *No Choice in the Matter*, *supra* note 22, at 24-26; see also *Thailand Bound*, *supra* note 37, at 14-17. For an overview of the Thai legal system, see generally Joe Leeds, *Update: A Summary of the Thailand Law and Legal System*, GlobalLex, Hauser Global Law School Program (Apr. 2020), <https://www.nyulawglobal.org/globalex/Thailand1.html>.

<sup>116</sup> IMMIGRATION ACT, *SUPRA* note 112, at §§19, 20. Section 19 of the Immigration Act provides:

In conducting inspection and considering whether an alien is prohibited from entering the Kingdom, the competent official shall have authority to permit said alien to stay at an appropriate place after the affirmation from the alien that he or she will come to see the competent official to acknowledge his or her order on a specified date, time, and place, or if the competent official deems appropriate he or she may call for a bond or a bond and security, or the competent official may detain said aliens at any place for further actions to be carried out under this Act. For the purpose of the provisions of paragraph one, the competent official shall have power to call before him a person, whose statement the competent official reasonably believe may be useful in case of doubt, to give testimony under oath or affidavit. If there is a reasonable suspicion that any alien has entered the Kingdom for the purpose of committing acts specified in Section 12 (8) or taking part therein, or any woman or child has entered the Kingdom for such purpose, the competent official may permit said person(s) a temporary stay in the Kingdom and order them to report in person and answer questions, or the competent official may order them to report and answer to the police officer at the police station with the jurisdiction over the locality in which they reside at the time prescribed by the competent official but the time interval for each reporting and question answering session shall not be less than seven days.

Section 20 of the Immigration Act provides:

In a case where the competent official has detained any alien under the provisions of Section 19, the competent official shall have power to detain said alien in so far as it is necessary under the circumstances but not more than forty eight hours after the arrival of the alien at the office of the competent official. If necessary, the forty eight hour detention time may be extended but not to exceed seven days, and the competent official shall put in record the reason for such time extension. If it is necessary to detain any alien longer than the period of time provided in paragraph one, the competent official shall apply to the court seeking power to further detain said alien. The court may grant power for further detention as necessary but not exceeding twelve days at a time. However, if the court deems fit, it may order a provisional release on bail bond or on bail bond and security.

<sup>117</sup> IMMIGRATION ACT, *supra* note 112, §19.

<sup>118</sup> *Id.* Cf. E-mail from Chawaratt Chawarangkul, *supra* note 59 (noting there is no protection principle provided under the immigration law and there is no indication of how long people can be held in detention, which means that the length of time will depend on the ‘readiness of Immigration or the detainee for deportation’).

<sup>119</sup> E-mail from Confidential informant, NGO, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (Dec. 20, 2021) (on file with the author).

<sup>120</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>121</sup> IMMIGRATION ACT, *supra* note 112, §17. Cf. E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>122</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>123</sup> Unofficial (and unpublished) translation of Immigration Order No.53/2559 (on file with the author); *compare* E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (May 22, 2022) (on file with the author) (discussing differences between Immigration Order No.53/2559 and Immigration Order No.85/2565). The more recent Immigration order No. 85/2565 includes criteria related to persons who committed a serious crime, received court sentencing for more than three years and finished their sentence and transferred to immigration detention pending their deportation required 100,000 Thai Bhat bail or required officer to ask for their e-mail or line contacts before bail. *Id.*

<sup>124</sup> E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (March 22, 2022) (on file with the author).

<sup>125</sup> *Thailand Bound*, *supra* note 37, at 16 (discussing penalties associated with Royal Decrees 2561). Cf. *Two Years with No Moon*, *supra* note 2, at 23 (discussing penalties associated with 2008 Alien Employment Act).

<sup>126</sup> ROYAL DECREE ON RULES ON BRINGING MIGRANT WORKERS TO WORK WITH EMPLOYERS IN THE COUNTRY (No. 2) B.E. 2561 (2018); see *Thailand – Revisions to Decree “Managing the Work of Aliens,”* KPMG (Sept. 27, 2018), <https://home.kpmg/xx/en/home/insights/2018/09/flash-alert-2018-127.html>.

<sup>127</sup> *Two Years with No Moon*, *supra* note 2, at 23 (citing *Hidden Children in Foreign Workers, Is the State Ready to Take Care?*, THAIRATH ONLINE, Sept. 28, 2013, <https://www.thairath.co.th/content/372506>).

<sup>128</sup> *Id.* at 14 (“Thailand’s refugee policies are fragmented, unpredictable, and ad hoc, leaving refugees and asylum seekers unnecessarily vulnerable to arbitrary and abusive treatment.”).

<sup>129</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>130</sup> *Two Years with No Moon*, *supra* note 2, at 23.

<sup>131</sup> Joint Statement, AAPRN, CRSP, and Fortify Rights, *Thailand: Ensure Refugee Rights and Protections Through Refugee Regulation*, June 18, 2018. Pursuant to a 2016 Cabinet Resolution, however, Rohingya victims of trafficking were granted permission to work. The Secretariat of the Cabinet, *Cabinet Resolution to allow survivor and witness of human trafficking case to stay temporarily in the kingdom and able to work according to the law, after the case finishes* (Dec. 13, 2016), [http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top\\_serl=99322401&key\\_word=&owner\\_dep=&meet\\_date\\_dd=13&meet\\_date\\_mm=12&meet\\_date\\_yyyy=2559&doc\\_id1=&doc\\_id2=&meet\\_date\\_dd2=&meet\\_date\\_mm2=&meet\\_date\\_yyyy2=](http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99322401&key_word=&owner_dep=&meet_date_dd=13&meet_date_mm=12&meet_date_yyyy=2559&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=). On January 26, 2021, a Cabinet Resolution was issued which gave migrant workers from Myanmar, Laos, and Cambodia, in IDCs awaiting to return to their country of origin but unable to return due to COVID-19 crisis, the right to be released from immigration detention and have the right to work. See Government of Thailand Public Relations, *Revision of Guidance for Foreign Worker Management during the COVID-19 Situation* (Jan. 29, 2021). However, the barriers to detained migrants being able to satisfy the requirements are high such that in practice those detained have not been able to benefit from the Resolution. Remote Interview of Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition (Nov. 23, 2021).

<sup>132</sup> CONSTITUTION OF THE KINGDOM OF THAILAND §§ 71, 54 (APR. 6, 2017). An unofficial English translation of the Constitution of Thailand is available at:

[https://www.constituteproject.org/constitution/Thailand\\_2017.pdf?lang=en](https://www.constituteproject.org/constitution/Thailand_2017.pdf?lang=en).

<sup>133</sup> CHILD PROTECTION ACT B.E. 2526 (2003) [hereinafter CHILD PROTECTION ACT]. Unofficial translation of the Child Protection Act is available at:

[http://web.krisdika.go.th/data/outside/outside21/file/CHILD\\_PROTECTION\\_ACT\\_B.E.\\_2546.pdf](http://web.krisdika.go.th/data/outside/outside21/file/CHILD_PROTECTION_ACT_B.E._2546.pdf) (last visited Oct. 18, 2021).

<sup>134</sup> *Beyond Detention Global Strategy National Action Plan for Thailand, Summary*, UNCHR 2 (Oct. 2015), <https://www.unhcr.org/uk/56333d559.pdf> [hereinafter *UNHCR Beyond Detention National Action Plan for Thailand, Summary*].

<sup>135</sup> CHILD PROTECTION ACT, *supra* note 133, at 10.

<sup>136</sup> Titiporn Tuangratananon et al., *Education Policy for Migrant Children in Thailand and How It Really Happens; A Case Study of Ranong Province, Thailand*, 16 INT'L J. ENV. RES. PUBLIC HEALTH 3, 430 (Feb. 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6388250/>. See also *Forgotten Futures*, *supra* note 43, at 26. Approximately 164,000 non-Thai children are enrolled in Thai schools. But sources estimate that over 200,000 migrant children remain out of school and are not receiving any form of education. It should be noted, however, that the precise number is not known, given the lack of official data regarding the aggregate number of migrant children in Thailand. *UN Thematic Working Group 2019 Thailand Migration Report*, *supra* note 24, at 102.

<sup>137</sup> Section 24 states that:

Permanent Secretaries, provincial governors, district chiefs, assistant district officers as head of sub - districts or administrative heads of local administration organizations have the duty to protect the safety of children living in the areas under their jurisdiction, regardless of whether or not they have parents or guardians, and also have the authority and duty to supervise and inspect nurseries, remand homes, welfare centers, safety protection centers, development and rehabilitation centers and observation centers falling under their jurisdiction.

Findings of the inspections shall be reported to the Bangkok Metropolis Child Protection Committee or the Provincial Child Protection Committee, depending on the case. They shall also have the same authority and duties as those of competent officials according to this Act.

CHILD PROTECTION ACT, *supra* note 133, §10.

<sup>138</sup> Courtland Robinson, *Anti-Human Trafficking In Thailand: A Stakeholder Analysis Of Thai Government Efforts, The U.S. Tip Report And Rankings, And Recommendations For Action*, Johns Hopkins Bloomberg School of Public Health at 30 (June 2016), <http://hopkinshumanitarianhealth.org/assets/documents/Anti-Trafficking-in-Thailand-30Jun2016.pdf>.

<sup>139</sup> ANTI-TRAFFICKING IN PERSONS ACT B.E. 2551 §29 (2008) [hereinafter ATPA]. See *Two Years with No Moon*, *supra* note 2, at 23. See generally *UNHCR 2015 Thailand UPR Submission*, *supra* note 42, at 2 (“Some have been determined to be victims of trafficking, in theory entitling them to temporary stay and work permits, as well as non-detention, under the Anti-Trafficking in Persons Act (the ATPA), although consistent application of this well-drafted Thai law has been a challenge.”). In April 2019, amendments to the ATPA were published in the Thai Government Gazette. The amendments were meant to revise Thai law so that it conformed with the ILO’s Protocol of 2014 to the Forced Labour Convention No. 29, 1930 (P029). *New Amendment to Thailand’s Labor Protection Act Taking Effect in 2019*, Ogletree Deakins (May 20, 2019).

<sup>140</sup> JUVENILE AND FAMILY COURT AND JUVENILE AND FAMILY CASE PROCEDURE ACT, 2010, B.E., §§70, 72, 73, and 78. An unofficial translation is available at:

2553<https://jla.coj.go.th/cms/s17/u672/%E0%B8%81%E0%B8%B2%E0%B8%A3%E0%B9%80%E0%B8%9C%E0%B8%A2%E0%B9%81%E0%B8%9E%E0%B8%A3%E0%B9%88%E0%B8%84%E0%B8%B3%E0%B9%81%E0%B8%9B%E0%B8%A5%E0%B8%81%E0%B8%8E%E0%B8%AB%E0%B8%A1%E0%B8%B2%E0%B8%A2/4.pdf>.

<sup>141</sup> The Coalition for the Rights of Refugees and Stateless Persons (CRSP), *Thailand End Child Detention Scorecard report: Comparison and Analysis of 2017, 2018, and 2019 (2020)* (unpublished working paper, on file with the author).

<sup>142</sup> CRIMINAL CODE, AMENDMENT ACTS (No. 21) B.E. 2551 (A.D. 2008), §73.

<sup>143</sup> CRIMINAL CODE, *SUPRA* note 142, §74.

<sup>144</sup> See *UNHCR Beyond Detention National Action Plan for Thailand, Summary*, *supra* note 134, at 1 (citing Thai laws and policies that could be applied to benefit child asylum seekers and refugees, including Thai Immigration



Act's Articles 19 and 54, the Penal Code's Articles 73 and 74, Child Protection Act's Article 22, and Anti-Trafficking in Person Act's Article 37).

<sup>145</sup> *UNHCR 2015 Thailand UPR Submission*, *supra* note 42, at 12 ("Article 19 (addressing border entry points) and Article 54 (addressing persons who have already entered) of the 1979 Immigration Act, both provide for detention as only one alternative for administrative control in the context of pending deportation proceedings.").

<sup>146</sup> See *infra* discussion Part II.A.

<sup>147</sup> As a general principle of international law, it is at the discretion of the State to grant entry to its territory to non-nationals. However, in exercising control of its borders, a State must act in conformity with its international human rights obligations. *Migration and International Human Rights Law: A Practitioner's Guide*, INTERNATIONAL COMMISSION OF JURIST 50 (2014); see also Mathieu Leloup, *The principle of the best interests of the child in the expulsion case law of the European Court of Human Rights: Procedural rationality as a remedy for inconsistency*, 37 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 50 (2019). The dignity of human beings is a basic value that every state protects, and international human rights law lays down obligations which states are bound to respect. Such obligations require states to protect individuals and groups against human rights abuses. ANTONIO CASSESE, INTERNATIONAL LAW 397 (2005).

<sup>148</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter CAT]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

<sup>149</sup> Thailand ratified the CRC in 1992, the ICCPR in 1996, ICESCR in 1999, CAT in 2007, and ICERD in 2003. *No Choice in the Matter*, *supra* note 22, at 23.

<sup>150</sup> General comment No. 15: The position of aliens under the Covenant, 1986, UN Human Rights Committee. Several treaties deal with specific areas, such as children, refugees, and women. ANTONIO CASSESE, INTERNATIONAL LAW 382 (2005). See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Refugee Convention, *supra* note 20; Protocol Relating to the Status of Refugees, 31 Jan. 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

<sup>151</sup> CRC, *supra* note 148. It is noteworthy that Thailand was the first Asian country to ratify the CRC. Jamie Collins, *Legislative Intent: The Convention on the Rights of the Child: Is Thailand to Blame?* 17 CHILD. LEGAL RTS. J. 82, 83 (2015). In addition to the CRC, there are several international treaties which promote and protect the rights of children. See, e.g., ICCPR, *supra* note 148, at arts. 14, 24; ICESCR, *supra* note 148, at arts. 10, 12. Among the other international instruments ratified by Thailand include: the Stockholm Agenda for Action against Commercial Sexual Exploitation of Children (1996), the ILO Convention 182 on the Worst Forms of Child Labour and signed the UN Convention against Transnational Organized Crime (2001), and the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and Protocol against the Smuggling of Migrants by Land, Sea and Air (2001), Supplementing the UN Convention against Transnational Organized Crime (2000). UNITED NATIONS SECRETARY-GENERAL, *Study on Violence against Children Questionnaire to Governments: Thailand* (2003).

<sup>152</sup> CRC, *supra* note 148, at art. 37 (b) ("State Parties shall ensure that: (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time").

<sup>153</sup> UN Comm. on the Rights of the Child, Gen. Comments No. 6, ¶ 61, at 19 (2005).

<sup>154</sup> CRC, *supra* note 148, at art. 3(1) ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.").

<sup>155</sup> Comm. on Migrant Workers & CRC, Joint Gen. Comment No. 4/23, ¶10, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017) [hereinafter CMW/CRC Joint General Comment No. 4/23]. As discussed, the UN Global Study found that after surveying international law and treaty bodies over the course of nearly two decades that there was an emerging consensus that international law prohibits the detention of children based on immigration status. *UN Global Study*, *supra* note 1, at 448.

<sup>156</sup> Office of the UN High Commissioner for Human Rights and the Committee on the Rights of the Child, 2012 *Day of General Discussion: The Rights of All Children in the Context of International Migration*, ¶ 32 (2012), <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> (Detention of children based only on their immigration status is “never in their best interests and is not justifiable.”). Cf. CMW/CRC Joint Gen. Comment No. 4/23, *supra* note 155, ¶ 10 (holding that “the possibility of detaining children as a measure of last resort, which may apply in other contexts such as child criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interest of the child and the right to development”).

<sup>157</sup> CRC, *supra* note 148, art. 6. Cf. CMW/CRC Joint Gen. Comment No. 4/23, *supra* note 155, ¶ 10 (holding that “the possibility of detaining children as a measure of last resort, which may apply in other contexts such as child criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interest of the child and the right to development”).

<sup>158</sup> CMW/CRC Joint General Comment No. 4/23, *supra* note 155, ¶9; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or Punishment, A/HRC/28/68, ¶80 (March 5, 2015) (“Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment or punishment of migrant children.”).

<sup>159</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68, ¶ 60 (March 5, 2015). Compare UNICEF Submission to Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them (July 2020), available at <https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/CallEndingImmigrationDetentionChildren.aspx> (“Child immigration detention is always a child rights violation; is never in a child’s best interests; is contrary to every child’s right to non-discrimination, to survival and development, and to be heard and have her views taken into consideration in line with her evolving capacities; and it amounts to cruel, inhumane and degrading treatment.”).

<sup>160</sup> CRC, *supra* note 148, arts. 2, 12, 24, 27, 39, 31, 19, 37(a), 24, 27, 20, 9, 10, 16, 18. See Ciara Smyth, *Towards a Complete Prohibition of Immigration Detention of Children*, HUMAN RIGHTS L. REV. 25, 25-26 (2019).

<sup>161</sup> CRC, *supra* note 148, art. 37(b). It has been argued that examining the ‘arbitrariness’ of immigration detention in the light of children’s rights might be stronger than relying on ‘last resort’ argumentation. Smyth, *supra* note 160, at 20-26 (“Suffice to note that the rights [of the child] surveyed here [-- are all at risk of being violated by immigration detention) and] are either sui generis (that is, not found in human rights law and thus child-specific) or *lex specialis* (having a different material scope than their general human rights counterpart). It is precisely the uniqueness of these rights that makes them incompatible with immigration detention because it renders the detention arbitrary.”). The Inter-American Court of Human Rights (IACHR) has held that the deprivation of liberty of migrant children as a punitive sanction for migration control is ‘arbitrary’ and contrary to the American Convention on Human Rights. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No. 21 ¶147 (Aug. 14, 2014).

<sup>162</sup> U.N. Doc. A/74/136, *supra* note 92, ¶56. Cf. UN Comm. on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc. CRC/GC/2005/6, ¶61 (June 3, 2005) (CRC Committee observing in 2005 General Comment that “detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof”); cf. also Office of the UN High Commissioner for Human Rights and the Committee on the Rights of the Child, 2012 *Day of General Discussion: The Rights of All Children in the Context of International Migration*, ¶78 (2012), <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> (“detention of a child because of their or their parent’s migration status constitutes a child rights violation.”).

<sup>163</sup> CMW/CRC Joint General Comment No. 4/23, *supra* note 155, ¶11. Compare generally Inter-American Court of Human Rights, Advisory Opinion OC 21-14 on the ‘Rights and Guarantees of Children in the Context of Migration



and/or in Need of International Protection', ¶158 (Aug. 19, 2014) ("When the child's best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.").

<sup>164</sup>In particular, CRC Article 22 Section 1 provides that states "shall take measures to ensure that refugee children receive protection and assistance in the enjoyment of their rights and in other human rights to which the said States are Parties." CRC, *supra* note 148, art. 22(1). Article 22 Section 2 obligates states to cooperate with the UN, IGOs, and NGOs for purposes of protecting refugees and asylum seekers. CRC, *supra* note 148, art. 22(2). Thailand's reservation states that "[t]he 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." *Reservations To The Convention On The Rights Of The Child: A Look at the Reservations of Asian State Parties*, INT'L COMM'N OF JURISTS 33 (1994), <https://www.icj.org/wp-content/uploads/2013/10/Asia-Convention-Rights-of-the-Child-non-legal-submission-1994-eng.pdf> [hereinafter *Reservations To The Convention On The Rights Of The Child*].

<sup>165</sup> CMW/CRC Joint General Comment No. 4/23, *supra* note 155, ¶¶21, 22. The CRC has held that "[i]n all actions concerning children, States should be guided by the overarching principles of non-discrimination (art.2); best interests of the child (art. 3); the right to life, survival and development (art. 6); and the right of the child to express his or her views in all matters affecting him or her, and to have those views taken into account (art. 12)." *Id.* at ¶19.

<sup>166</sup> *Reservations To The Convention On The Rights Of The Child*, *supra* note 164, at 33; *but compare with* Ciara Smyth, *supra* note 160 (Under Article 22, "protection can be understood as the international protection to which asylum-seekers and refugees are entitled under the 1951 Convention relating to the Status of Refugees-a convention which itself discourages detention. Accordingly, when the right of the unaccompanied child to special protection and assistance is interpreted schematically, it becomes clear that it is inconsistent with immigration detention.").

<sup>167</sup> A reservation which is incompatible with the object and purpose of the treaty is invalid as a matter of treaty law. Vienna Convention on the Law of Treaties arts. 19, 26, 27, 30, 1155 U.N.T.S. 331 [hereinafter VCLT]. While Thailand is not a party to the Vienna Convention on the Law of Treaties, the Treaty is a codification of customary international law. Karl Zemanek, Vienna Convention on the Law of Treaties, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <https://legal.un.org/avl/ha/vclt/vclt.html>. "CRC art. 22 gives three protections to refugee children. First, the state promises to help refugee children get the rights which are 'applicable' to them. This promise, however, does not give any additional rights to refugees. Under CRC art. 4, the state already must implement all CRC rights... Because [CRC] article 22 does not really give refugee children any new rights, Thailand's reservation should not make any legal difference." *Reservations To The Convention On The Rights Of The Child: A Look at the Reservations of Asian State Parties*, INT'L COMM'N JURISTS 32-37 (1994), <https://www.icj.org/wp-content/uploads/2013/10/Asia-Convention-Rights-of-the-Child-non-legal-submission-1994-eng.pdf>. *Compare UNHCR 2015 Thailand UPR Submission*, *supra* note 42, at 6 ("Thailand maintains a reservation with respect to Article 22 of the CRC, (related to refugee and asylum-seeking children), such that the Government generally, although perhaps not correctly or formally, considers that refugee and asylum-seeking children are not covered by the CRC and key provisions of the 2003 Child Protection Act (the CPA).); *cf. also* Bryant Yuan Fu Yang, Comment: *Life And Death Away From The Golden Land: The Plight Of Burmese Migrant Workers In Thailand*, 8 ASIAN-PACIFIC L. & POL'Y J. 485, 528 (2007). Nevertheless, some have noted that regardless of the validity of the reservation, "the reality remains that Thailand continues to be a member of the Convention on its own terms." Ian Werrett, *Protecting Vulnerable Children in Thailand*, 17 THAILAND J. L. & POL'Y 1 (2014), <http://thailawforum.com/articles/rights-of-refugee-children-in-thailand.html>.

<sup>168</sup> ICCPR, *supra* note 148, art. 9.

<sup>169</sup> UN Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), ¶18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

<sup>170</sup> UN Human Rights Comm., General Comment No. 32: Right to equality before courts and tribunals and to fair trial (Article 14), UN Doc. CCPR/C/GC/32, ¶9 (2007).

<sup>171</sup> UN Human Rights Comm., General Comment No. 8: Article 9, Right to liberty and security of persons, UN Doc. CCPR ¶1 (1982); UN Human Rights Comm., General Comment No. 15: The Position of Aliens under the Covenant, UN Doc. CCPR, ¶9 (1986).

<sup>172</sup> UN Human Rights Comm., General comment No. 35 Article 9 (Liberty and security of person)\* CCPR/C/GC/35 (Dec. 16, 2014).

<sup>173</sup> See Smyth, *supra* note 160, at 10.

<sup>174</sup> UNHCR Global Appeal 2015, Thailand, UNHCR, <https://www.unhcr.org/5461e60b17.pdf>. One hundred forty-nine countries are parties to the Refugee Convention and/or its 1967 Protocol. The Refugee Convention and its 1967 Protocol contain a set of rights and entitlements that follow from the recognition of refugee status. *Migration and International Human Rights Law: A Practitioners' Guide*, INT'L COMM'N OF JURIST 55 (2014). The Convention provides a quasi-universal definition of the term "refugee" as well as rights and protections to those designated with refugee status. A refugee is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." Refugee Convention, *supra* note 20, art. 1A(2).

<sup>175</sup> Executive Committee of the High Commissioner's Programme, Provisional list of Participants 42 (Oct. 5, 2021), <https://www.unhcr.org/en-us/excom/announce/6155e42e4/provisional-list-of-participants.html>. The UNHCR Executive Committee is to include states "with a demonstrated interest in, and devotion to, the solution of the refugee problem." UN Economic and Social Council, Establishment of the Executive Committee of the Programme of the UN High Commissioner for Refugees, E/RES/672 (XXV) (1958), <http://www.unhcr.org/3ae69eccc.html>.

<sup>176</sup> Thailand: Joint Statement on MOU-ATD to End Immigration Detention of Children, *supra* note 13.

<sup>177</sup> E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (March 24, 2022) (on file with the author). See Letter from Nadhavathna Krishnamra, Director-General Dep't of Int'l Organizations, RTG Ministry of Foreign Affairs, to Gita Sabharwal, UN Resident Coordinator in Thailand (Aug. 28, 2020), [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/thailand\\_confirmation\\_letter\\_gcm\\_implementation\\_champion\\_country\\_dg\\_signed.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/thailand_confirmation_letter_gcm_implementation_champion_country_dg_signed.pdf).

<sup>178</sup> ICCPR, *supra* note 148, art. 24.

<sup>179</sup> UN General Assembly, Note on International Protection, UN Doc. A/AC.96/951, ¶16 (Sept. 13, 2001).

<sup>180</sup> CAT, *supra* note 148, art. 3. See also ICCPR, *supra* note 148, art. 7. Treaty bodies have interpreted treaties that do not specifically include the principle of non-refoulement to still prohibit acts that would expose individuals to the human rights abuses proscribed in the treaty. See, e.g., UN Human Rights Comm., General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, ¶12 (May 26, 2004); CRC/GC/2005/6, *supra* note 162, at 6. See generally *Between a Rock and a Hard Place: Thailand's Refugee Policies and the Violations of the Principle of Non-Refoulement*, AMNESTY INTERNATIONAL (2019), <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA3970312017ENGLISH.pdf> [hereinafter *Between a Rock and a Hard Place*].

<sup>181</sup> See, e.g., RTG 2021 UPR Submission, *supra* note 9, ¶108.

<sup>182</sup> Detention and Freedom of Movement for Persons of Concern, UNHCR EMERGENCY HANDBOOK <https://emergency.unhcr.org/entry/44484/detention-and-freedom-of-movement-of-persons-of-concern> ("Detention increases the risk of refoulement."). Compare *Between a Rock and a Hard Place*, *supra* note 180, at 10-11 (discussing different forms of refoulement and constructive refoulement).

<sup>183</sup> U.N. Human Rights Council, Report on the Working Group on Arbitrary Detention, 39<sup>th</sup> Session, Sept. 2018, U.N. Doc. A/HRC/39/45, Annex ¶¶26, 27 (July 2, 2018) (citing A/HRC/13/30, ¶63; A/HRC/7/4, ¶48; and A/HRC/10/21, ¶82); see also U.N. Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 22-27 November 2020, U.N. Doc. A/HRC/WGAD/2020/70, ¶¶106, 107 (2020), [https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session89/A\\_HRC\\_WGAD\\_2020\\_70.pdf](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session89/A_HRC_WGAD_2020_70.pdf).

<sup>184</sup> UN Working Group on Arbitrary Detention Revised Deliberation No. 5 on deprivation of liberty of migrants, ¶11 (Feb. 7, 2018), [https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation\\_AdvanceEditedVersion.pdf](https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf).

<sup>185</sup> RTG Ministry of Foreign Affairs, Thailand Ratifies UN Convention against Transnational Organized Crime (UNTOC) and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Oct. 20, 2013), <https://www.mfa.go.th/en/content/5d5bcd2515e39c306000f543?cate=5d5bcb4e15e39c3060006834>.

<sup>186</sup> Int'l Labour Org., Protocol of 2014 to the Forced Labour Convention of 1930, Protocol No. 29 (2014)

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/Protocol2014ForcedLabourConvention.aspx> [hereinafter Protocol of 2014 to the Forced Labor Convention]. See also Patthara Limsira, *Thailand's Ratification of the 2014 Protocol to the Forced Labour Convention of 1930*, 12 J. E. ASIA & INT'L L. 193, 194 (2019). Protocol of 2014 to the Forced Labor Convention is to update the widely ratified Forced Labour Convention of 1930 (of which Thailand is a party) in order to address contemporary abuses, including against migrants and in the private sector. See Protocol of 2014 to the Forced Labor Convention, *supra* note 186, preamble.

<sup>187</sup> *Global Report on Trafficking In Persons*, UN Office on Drugs and Crime (UNODC) 23 (2020), [https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP\\_2020\\_15jan\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf).

<sup>188</sup> Protocol of 2014 to the Forced Labor Convention, *supra* note 186, art. 3. The time table for Thailand to enact such changes is within one year following ratification. Limsira, *supra* note 186, at 48.

<sup>189</sup> Protocol of 2014 to the Forced Labor Convention, *supra* note 186, art. 4(2). See also Limsira, *supra* note 186,

<sup>190</sup> Regional human rights treaty regimes constitute one of its fundamental pillars by complementing and often improving human rights law on a regional level, putting human rights in a local context. Whereas the Americas, Africa and Europe have specific human rights treaties, Asia and the Pacific region “remains the only UN-defined region without a specific human right treaty and without a region-wide mechanism directed at the promotion and protection of human rights.” *The Role of Regional Human Rights Mechanisms*, DIRECTORATE-GEN'L FOR EXTERNAL POLICIES POL'Y DEP'T, EUROPEAN PARLIAMENT 82 (2010),

[https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI\\_ET\(2010\)410206\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf). Compare Choi, *supra* note 8, at 1-2 (“Asia is the only remaining region without

regional refugee protection mechanisms, despite the presence of 10 million refugees and 18 million other displaced persons including IDPs, asylum-seekers, and stateless persons”; Asia also has the lowest ratification rate of the 1951 Refugee Convention and its 1967 Protocol and “the region does not have a regional consensus or legal mechanism to respond to the refugee crisis, while the other regions have regional frameworks to provide appropriate protection to changing dynamics of refugee crisis.”).

<sup>191</sup> Charter of the Association for Southeast Asian Nations, Nov. 20, 2007, <https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf> [hereinafter ASEAN Charter].

<sup>192</sup> Human Rights Declaration of the Association for Southeast Asian Nations, Nov. 18, 2012, <https://asean.org/asean-human-rights-declaration/> [hereinafter AHRD].

<sup>193</sup> AHRD, *supra* note 192, arts. 2, 15, 16.

<sup>194</sup> As a member of Asian-African Legal Consultative Organization, Thailand adopted the Bangkok Principles, which provides definitions of the status of refugees as well as guidance to the member states on refugee issues for purposes of encourage member states to adopt national legislation relating to the status and treatment of refugees. The Bangkok Principles are, however, not legally binding, and arguably have had little impact on state practice. See Merrill Smith, *Bangkok Principles on the Status and Treatment of Refugees*, RIGHTS IN EXILE PROGRAMME, Dec. 3, 2011, <https://rightsinexile.tumblr.com/post/13676403836/the-bangkok-principles-on-the-status-and-treatment>; see also Savitri Taylor, *Refugee Protection in the Asia Pacific Region*, RIGHTS IN EXILE PROGRAMME, 2018, <https://www.refugeelegalaidinformation.org/refugee-protection-asia-pacific-region>.

<sup>195</sup> Declaration on the Rights of Children in the Context of Migration of the Association for Southeast Asian Nations, Nov. 2, 2019, <https://asean.org/asean-declaration-rights-children-context-migration/> [hereinafter ASEAN Declaration on Rights of the Child in Migration]. The ASEAN Declaration has been viewed by UNICEF among others as representing a positive step forward and a solid commitment made by ASEAN members States towards the better protection of children's rights. Press Release, UNICEF, *UNICEF Welcomes ASEAN's Continued Commitment to Children's Rights* (Nov. 6, 2019), [www.unicef.org/eap/press-releases/unicef-welcomes-aseans-continued-commitment-childrens-rights](http://www.unicef.org/eap/press-releases/unicef-welcomes-aseans-continued-commitment-childrens-rights).

<sup>196</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>197</sup> Compare *The Human Rights of Stateless Rohingya in Thailand*, EQUAL RIGHTS TRUST 6 (Feb. 2014) (noting Thailand's “strong treaty ratification record” and protections found in the Thai Constitution as being undermined by both poor implementation and domestic law's lack of compliance with its international law commitments).

<sup>198</sup> See discussion *infra* Part II.A.

<sup>199</sup> Several reports reflect some of the efforts of different organizations. See, e.g., *Two Years with No Moon*, *supra* note 2; *UNHCR Beyond Detention National Action Plan for Thailand*, *supra* note 134; *Report on Regional Expert Roundtable on Alternatives to Immigration Detention for Children*, ASIA PACIFIC REFUGEE RIGHTS NETWORK,

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AICHR THAILAND, INTERNATIONAL DETENTION COALITION (Nov. 2015), [https://idcoalition.org/wp-content/uploads/2016/04/Regional\\_Experts\\_Roundtable\\_ATD\\_Report\\_2016.pdf](https://idcoalition.org/wp-content/uploads/2016/04/Regional_Experts_Roundtable_ATD_Report_2016.pdf) [hereinafter *Report on 2015 Regional Expert Roundtable*].

<sup>200</sup> Many of these groups continue to engage in advocacy and technical support concerning the treatment of migrant children. Cf. Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>201</sup> See E-mail from Confidential Informant No. 21 to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (2021) (on file with the author).

<sup>202</sup> See Remote Interview of Parinya Boonridrerthaikul, former Coordinator, Coalition for the Rights of Refugees and Stateless Persons (CSRP) (2020).

<sup>203</sup> *Advancing refugee rights in non-signatory States: the role of civil society in Thailand*, *supra* note 47.

<sup>204</sup> Remote Interview of Waritsara Rungthong, *supra* note 82. Due in part to the institutional mandates of various NGO and UN organizations, many reports focus on the rights of asylum seekers and refugees and place less emphasis on migrant workers. For example, much of the language in reports on immigration detention often focused on the release of refugee and asylum seeking children. See, e.g., *UNHCR Beyond Detention National Action Plan for Thailand: Summary*, *supra* note 134; *Unlocking Childhood*, *supra* note 2.

<sup>205</sup> Remote Interview of Waritsara Rungthong, *supra* note 82. Many of the most prominent organizations and advocates for prohibition of migrant child detention in the country are asylum and refugee rights-focused groups, such as UNCHR, and many of the NGOs in the CRSP are also predominantly asylum seeker and refugee focused, such as Asylum Access Thailand. *Compare Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 73.

<sup>206</sup> E-mail from Confidential Informant No. 21, *supra* note 201.

<sup>207</sup> See Remote Interview of Confidential Informant No. 7 (2020).

<sup>208</sup> See Remote Interview of Alice Farmer, *supra* note 87.

<sup>209</sup> *UNHCR Beyond Detention National Action Plan for Thailand: Summary*, *supra* note 134, at 2.

<sup>210</sup> *Assistance to Migrant Children*, INT'L ORGANIZATION FOR MIGRATION THAILAND, 2 (2016), <https://thailand.iom.int/sites/g/files/tmzbd11371/files/documents/IOM%20Infosheet%20-%20Assistance%20to%20Migrant%20Children%20%281%29.pdf>.

<sup>211</sup> *UNHCR Analysis of Gaps in Refugee Protection Capacity Thailand*, *supra* note 40.

<sup>212</sup> *UNHCR Beyond Detention National Action Plan for Thailand*, *supra* note 134, at 2.

<sup>213</sup> Choi, *supra* note 8, at 114.

<sup>214</sup> *UNHCR Beyond Detention National Action Plan for Thailand*, *supra* note 134.

<sup>215</sup> *Id.* at 1 (citing Thai laws and policies that could be applied to benefit child asylum seekers and refugees, including Immigration Act's Articles 19 and 54, Penal Code's Articles 73 and 74, Child Protection Act's Article 22 and Anti-Trafficking in Person Act's Article 37). The national plan also summarized UNHCR's past and continued work with NGOs working with migrant children, as well as continued talks with the Thai Government to help advise it with moving towards the use of ATDs for migrants. *Id.* (detailing UNHCR's collaborative efforts with CSOs and Thai Government to support the use of ATDs, including internal roundtables with the Government in 2014, as well as the creation of a task force in 2011 with other UN offices and CSOs).

<sup>216</sup> *Id.* at 2. This follows a suggestion for the creation of a protective framework for Rohingya refugees that, in a separate document, UNCHR suggested can be partially modeled after provisions detailed in Thailand's ATPA, which includes the issuance of temporary work permits (which can greatly benefit families) and access to basic services. UNCHR Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: *2nd Cycle, 25th Session*, Thailand at 4 (2015).

<sup>217</sup> *UNHCR Beyond Detention National Action Plan for Thailand*, *supra* note 134, at 1, 2.

<sup>218</sup> E-mail from Confidential Informant No. 21, *supra* note 201 (noting that among the potential reasons was that UNICEF secured a 12 million EUR in funding for a project on children affected by Migration in Southeast, South, and Central Asia).

<sup>219</sup> *Organizations in Bangkok combine efforts for refugee assistance*, ASYLUM ACCESS (Feb. 18, 2014), <https://asylumaccess.org/organizations-in-bangkok-combine-efforts-for-refugee-assistance/>.

<sup>220</sup> Choi, *supra* note 8, at 114-15.



<sup>221</sup> *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019, Progress Report Mid-2016*, UNHCR 72 (2016), <https://www.refworld.org/pdfid/57b850dba.pdf>.

<sup>222</sup> *Two Years With No Moon*, *supra* note 2, at 23, 36 (citing *Hidden children in migrant workers: Is the state ready to take care of it?* Thairath.co.th (Sept. 28, 2013), <https://www.thairath.co.th/content/372506>).

<sup>223</sup> Choi, *supra* note 8, at 111-12.

<sup>224</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16. After the CRSP coalition was created, the International Detention Coalition supported CSRP network on various activities, including: Develop a framework and launch detention scorecard; Organize the theory of change to develop ATD advocacy strategy and work plan; Organize MEL training and technical accompaniment; Provide technical knowledge and guidance in their advocacy papers; Regional ATD implementer meeting (CSOs) sharing good practices, strategic direction among CSOs; Regional roundtable on ATD – (GOV – CSO) from Thailand, Malaysia, Indonesia, Australia, New Zealand and motivate the Thai government to be a Champion country in ATD as a strategy to push Thailand to do better following to the international commitment and CSOs holding their accountability on the ground; Funding some CRSP activities at the early stage. E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>225</sup> *Two Years With No Moon*, *supra* note 2, at 6 (noting that *Two Years With No Moon* report was building on HRW's earlier reports, in particular, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand* and *Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers*). See generally *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand*, HUMAN RIGHTS WATCH (2010), [https://www.hrw.org/sites/default/files/reports/thailand0210\\_insert\\_low.pdf](https://www.hrw.org/sites/default/files/reports/thailand0210_insert_low.pdf); *Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers*, HUMAN RIGHTS WATCH (Sept. 4, 2012), <https://www.hrw.org/reports/thailand0912.pdf>. The first HRW report detailed the abuse of migrant workers perpetrated by Thai officials, while the second report criticized the Government's lack of adequate policy and infrastructure to handle the country's growing refugee and asylum-seeker populations.

<sup>226</sup> *Two Years With No Moon*, *supra* note 2, at 45-50. The HRW researchers for *Two Years No Moon* interviewed 105 people, 41 of whom were children—each had been detained, arrested, or had in some way been affected by Thailand's police and immigration procedures. Relying on interviews from both adults and children who had been detained, some of whom had spent several months to years in IDCs, the victims' testimonies exposed the horrors of migrant child detention. See *Id.* at 31.

<sup>227</sup> *Id.* at 41-42 (detailing specific ways in which Government violated basic international human rights of migrants and refugees, including placing financial burden on migrants themselves to provide for basic needs while in detention, as well as hygiene and cleanliness of detention facilities).

<sup>228</sup> *Id.* at 4, 5, 61 (recommending, among other things, that Government pass legislative reforms ending migrant child detention, implement alternatives to detention, and improve the conditions of detention for children). The Government, as well as a number of foreign embassies, responded to the HRW report. In a letter to HRW included in its report, the Thai Ministry of Foreign Affairs stated:

[T]he Thai Government is well aware of the issues and problems relating to illegal migrants especially migrant children [including improving IDC conditions] [. . .] [and] trying its best to address and accommodate the needs of migrant children bearing in mind the humanitarian consideration and fundamental human rights.... Thailand will continue to work closely with various international partners to assist in any way we can to end the plight of irregular migrant children.

<sup>229</sup> See Remote Interview of Alice Farmer, *supra* note 87. Cf. Remote Interview of Chawaratt Chawarangkul, *supra* note 131.

<sup>230</sup> See Remote Interview of Alice Farmer, *supra* note 87.

<sup>231</sup> See Embassy of Switzerland in Thailand, Facebook Posting (Jan. 28, 2019, 11:24 PM), available at <https://m.facebook.com/SwissEmbassyBangkok/posts/2243757175947907> (last visited April 4, 2022) (welcoming MOU-ATD); see also Remote Interview of Alice Farmer, *supra* note 87.

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<sup>232</sup> *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019*, UNHCR 72 (2016), <https://www.refworld.org/pdfid/57b850dba.pdf>.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Report on Regional Expert Roundtable*, *supra* note 106, at 6, 22. See also *UNHCR Global Strategy Beyond Detention National Action Plan for Thailand, Summary*, *supra* note 134 at 1, 2.

<sup>236</sup> E-mail from Confidential Informant No. 21, *supra* note 201. The Thai Government also heard from a presenter from Hong Kong – Ms. Adrielle Panares, who was the Programme Director for the ‘Asylum Seekers, Torture Claimants and Refugees Project’ of the International Social Services, Hong Kong. ISS-HK partners with the HK government to implement its ATD programs there. *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019*, UNHCR 22 (2016), <https://www.refworld.org/pdfid/57b850dba.pdf> (“UNHCR was invited to participate in a two-day Regional Expert Roundtable on Alternatives to Detention for Children in November 2015 hosted by Thailand’s representative to the ASEAN Intergovernmental Commission on Human Rights (AICHR) and co-organized by the IDC [the International Detention Coalition] and IDC Advisory Committee member, the Asia Pacific Refugee Rights Network (APRRN). [Fifty] participants, including representatives from governments, NGOs, UNHCR and academics from three focus countries (Indonesia, Malaysia and Thailand) participated in the event.”).

<sup>240</sup> *Report on Regional Expert Roundtable*, *supra* note 106, at 5-6.

<sup>241</sup> *Id.* at 5-6, 22 (quotations omitted).

<sup>242</sup> *Id.* at 5-6, 22.

<sup>243</sup> *UNHCR Beyond Detention National Action Plan for Thailand*, *supra* note 134, at 1, 2.

<sup>244</sup> *Report on Regional Expert Roundtable*, *supra* note 106, at 12.

<sup>245</sup> *Id.* at 5, 13.

<sup>246</sup> *Id.* at 8.

<sup>247</sup> *Id.* at 6 (“A working group comprised of NGOs, academic institutions and international organisations be established to pursue the above recommendations.”) *id.* at 22.

<sup>248</sup> See *Report on the Implementation of the International Covenant in Civil and Political Rights the Regard to the Rights of Refugees and Asylum Seekers in Thailand*, ASYLUM ACCESS, ASIA PACIFIC REFUGEE RIGHTS NETWORK, THE COALITION FOR THE RIGHTS OF REFUGEES AND STATELESS PERSONS, CENTER FOR ASYLUM PROTECTION 13 (Feb. 2017), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT\\_CCPR\\_CSS\\_THA\\_26552\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_CSS_THA_26552_E.pdf).

The NGOs of CRSP include Asylum Access Thailand, Caritas Thailand, Center for Asylum Protection, Jesuit Refugee Services, Host International, and Step Ahead. See *Submission to the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them*, THE COALITION FOR THE RIGHTS OF REFUGEES AND STATELESS PERSONS (July 2020), <https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/CallEndingImmigrationDetentionChildren.aspx>.

<sup>249</sup> See Remote Interview of Naiyana Thanawattho, Executive Director, Asylum Access Thailand (2020).

<sup>250</sup> See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>251</sup> Choi, *supra* note 8, at 116.

<sup>252</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>253</sup> Remote Interview of Nicolás Espejo Yaksic, Visiting Fellow, Exeter College, University of Oxford and Researcher at the Centre for Constitutional Studies, Mexico (Oct. 2020).

<sup>254</sup> Choi, *supra* note 8, at 111.

<sup>255</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>256</sup> *End Child Detention Scorecard Thailand, Global NextGen Index*, NEXTGEN-INDEX, THE THAILAND NEXTGEN INDEX COMMITTEE 2 (Aug. 2018), <https://next-gen-index.org/wp-content/uploads/2018/08/NextGen-Index-Thailand-Scorecard-2018.pdf>.

<sup>257</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249 (discussing scorecard process). Cf. E-mail from Chawaratt Chawarangkul, *supra* note 94 (noting International Detention Coalition’s support for the CRSP

including: Develop a framework and launch detention scorecard; Organize the theory of change to develop ATD advocacy strategy and work plan; Organize MEL training and technical accompaniment; Provide technical knowledge and guidance in their advocacy papers; Regional ATD implementer meeting (CSOs) sharing good practices, strategic direction among CSOs; Regional roundtable on ATD – (GOV – CSO) from Thailand, Malaysia, Indonesia, Australia, New Zealand and motivate the Thai government to be a Champion country in ATD as a strategy to push Thailand to do better following to the international commitment and CSOs holding their accountability on the ground; Funding some CRSP activities at the early stage.).

<sup>258</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>259</sup> *Id.*

<sup>260</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>261</sup> See, e.g., Asylum Access, et al., Report on the Implementation of the International Covenant on Civil and Political Rights with Regard to the Rights of Refugees and Asylum Seekers in Thailand Submitted for the Second Periodic Report of Thailand (CCPR/C/THA/2) at the 119th Session of the UN Human Rights Comm. (Feb. 5, 2017), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT\\_CCPR\\_CSS\\_THA\\_26552\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_CSS_THA_26552_E.pdf).

<sup>262</sup> UN Comm. against Torture, Concluding observations on the initial report of Thailand, CAT/C/THA/CO/1, ¶¶21, 22 (June 20, 2014).

<sup>263</sup> UN Comm. on Economic, Social and Cultural Rights Concluding observations on the combined initial and second periodic reports of Thailand, E/C.12/THA/CO/1-2 ¶28(b) (July 7, 2015).

<sup>264</sup> UNHCR 2015 Thailand UPR Submission, *supra* note 42, at 13.

<sup>265</sup> UN Human Rights Comm., Concluding observations on the second periodic report of Thailand, CCPR/C/THA/CO/2 ¶30 (Apr. 25, 2017), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fTHA%2fCO%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fTHA%2fCO%2f2&Lang=en). See Joint NGO Statement: Thailand: Implement Commitments to Protect Refugee Rights, ASIA PACIFIC REFUGEE RIGHTS NETWORK, CSRP, HUMAN RIGHTS WATCH ET AL. (July 6, 2017), <https://www.hrw.org/news/2017/07/06/thailand-implement-commitments-protect-refugee-rights>. One source stressed the importance of the timing of the ICCPR review process on the development of the MOU-ATD since it came just after the Prime Minister's 2016 pledge. See E-mail from Chawaratt Chawarangkul, *supra* note 177.

<sup>266</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249 (noting role of UPR recommendations); Vivienne Chew, *How Change Happened in Thailand*, International Detention Coalition (March 29, 2019), <https://idcoalition.org/news/how-change-happened-in-thailand/>. Compare Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>267</sup> See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. Cf. Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>268</sup> Asylum Access Thailand – Where We Work, Asylum Access Thailand (2021), <https://asylumaccess.org/where-we-work/thailand/> (last visited Oct. 18, 2021) (“2014 – the Thai government agrees to release refugee children from detention without bail.”); cf. Thailand - Progress report: Global Strategy Beyond Detention, UNHCR 1 (2016), <https://www.unhcr.org/57b583e57>.

<sup>269</sup> Prime Minister Prayut Chan-o-cha pledged that the Government was committed to adhere to the non-detention of children in the IDCs, taking into consideration the best interests of the child. See, e.g., Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. See generally *Global Compact for Migration, Global Compact for Safe, Orderly, and Regular Migration*, A/CONF.231/3, July 30, 2018 [hereinafter GCM].

<sup>270</sup> Summary Overview Document, Leader's Summit on Refugees, UNHCR, Nov. 2016, <https://www.unhcr.org/58526bb24>.

<sup>271</sup> E-mail from Confidential Informant to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (2021) (on file with the author).

<sup>272</sup> GCM, *supra* note 269, at 20, 21. Under the Global Compact for Safe, Orderly and Regular Migration, states committed to “[p]rotect and respect the rights and best interests of the child at all times, regardless of their migration status, by ensuring availability and accessibility of a viable range of alternatives to detention in non-custodial contexts, favouring community-based care arrangements, that ensure access to education and healthcare, and respect their right to family life and family unity, and by working to end the practice of child detention in the context of international migration.” *Id.* at ¶29(h).

<sup>273</sup> Vincent Chetail, *The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law*, 16 INT'L J.L. IN CONTEXT 253-268 (2020) (internal quotations omitted).

<sup>274</sup> Press Release, UN, *General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants* (Dec. 19, 2018), <https://www.un.org/press/en/2018/ga12113.doc.htm>. Since the Thai Government has taken a number of steps to champion ATDs and access to healthcare in regional and international settings. See Letter from Nadhavathna Krishnamra, Director-General Dep't of Int'l Organizations, RTG Ministry of Foreign Affairs, to Gita Sabharwal, UN Resident Coordinator in Thailand (Aug. 28, 2020), [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/thailand\\_confirmation\\_letter\\_gcm\\_implementation\\_champion\\_country\\_dg\\_signed.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/thailand_confirmation_letter_gcm_implementation_champion_country_dg_signed.pdf). Thailand had attended as panelist in roundtable discussion and co-organized number of regional and international discussions around access to health care and ATD. For example, at the Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration in 2021, Thailand co-organized two side events one on access to education another one on ATD. See UN Economic and Social Commission for Asia and the Pacific Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration Bangkok, ESCAP/GCM/2021/3 (March 2021), [https://www.unescap.org/sites/default/d8files/event-documents/GCM%202021\\_3%20Report\\_ENG.pdf](https://www.unescap.org/sites/default/d8files/event-documents/GCM%202021_3%20Report_ENG.pdf) [hereinafter ESCAP/GCM/2021/3]; see also Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration (March 2021) [hereinafter *Asia-Pacific Regional Review of GCM*], <https://www.unescap.org/intergovernmental-meetings/asia-pacific-regional-review-implementation-global-compact-safe-orderly>. At the IMRF on May 19, 2022, Thailand announced in the plenary that the Government pledged to: 1. To enable birth registration for all migrant's children born in Thailand; 2. To make progress towards the achievement of universal health coverage, including for wider groups of migrants; 3. To effectively implement alternative to detention measures for migrant children; 4. To promote public perception regarding the positive contribution of migrants and to end discrimination and stigmatization against them. E-mail from Chawaratt Chawarangkul, *supra* note 123 (quotations omitted). Pledges no. 3 and no. 4 are particularly important for purposes of addressing many of the outstanding gaps identified. See *Id.*

<sup>275</sup> *Advancing refugee rights in non-signatory States: the role of civil society in Thailand*, *supra* note 47, at 62.

<sup>276</sup> Jittawadee Chotinukul, *Thailand and the National Screening Mechanism: A Step Forward for Refugee Protection?*, GLOBAL MIGRATION CENTRE, RESEARCH PAPER NO. 25, 9 (Sept. 2020), <https://www.graduateinstitute.ch/communications/news/new-publication-thailand-and-refugee-protection>.

<sup>277</sup> See Interview of Confidential Informant No. 4, *supra* note 6. Advocates note that the NSM proposed framework itself has significant deficiencies, and it has yet to be implemented. See, e.g., *Analysis: Thailand's Record on Refugee Rights, 2016-2021*, FORTIFY RIGHTS (Nov. 8, 2021), <https://www.fortifyrights.org/downloads/UPR%20analysis.pdf> [hereinafter *Analysis: Thailand's Record on Refugee Rights, 2016-2021*]; Press Release, APRRN, *Thailand quietly delays implementation of refugee screening mechanism* (June 25, 2020), <https://reliefweb.int/report/thailand/press-release-thailand-quietly-delays-implementation-refugee-screening-mechanism>; see also Waritsara Rungthong and Caroline Stover, *Thailand's National Screening Mechanism: Key Issues*, OPINIO JURIS (Jan. 28, 2020), <http://opiniojuris.org/2020/01/28/thailands-national-screening-mechanism-key-issues/>.

<sup>278</sup> See UNHCR welcomes Thailand's pledges towards a new refugee screening mechanism, UNHCR (Sept. 26, 2016), [https://www.unhcr.or.th/en/news/UNHCR\\_welcomes\\_Thaipleddes](https://www.unhcr.or.th/en/news/UNHCR_welcomes_Thaipleddes); see generally UN Thematic Working Group 2019 Thailand Migration Report, *supra* note 24, at XI.

<sup>279</sup> Interview of Confidential Informant No. 4, *supra* note 6. Another source remarked that the "[R]esolution and its possible outcome may not be legally binding[,] but for the first time in Thai history, the status of refugees in its national legal and political settings is [being] recognized." Choi, *supra* note 8, at 11.

<sup>280</sup> See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>281</sup> Choi, *supra* note 8, at 101, 103. Cf. Vivienne Chew, *How Change Happened in Thailand*, International Detention Coalition (March 29, 2019), <https://idcoalition.org/news/how-change-happened-in-thailand/>. *Advancing refugee rights in non-signatory States: the role of civil society in Thailand*, *supra* note 47.

<sup>282</sup> Remote Interview of Waritsara Rungthong, *supra* note 82. See also Chew, *supra* note 281.

<sup>283</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. Cf. Chew, *supra* note 281.

<sup>284</sup> One example cited by an informant was the 2018 arrest and detention of approximately 180 UNHCR persons of concern from Cambodia and Vietnam, including at least 50 children, in a neighboring Thai province, wherein the



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CRSP told the Government that detaining those children because of their refugee status was unacceptable. Remote Interview of Waritsara Rungthong, *supra* note 82. See also Press Release, *Thailand: End Raids and Arbitrary Detention of Refugees*, Fortify Rights (Oct. 12, 2018), <https://www.fortifyrights.org/tha-inv-2018-10-12/>.

<sup>285</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>286</sup> For example, the Government has raised the age of children who will undergo the criminal procedure from seven to 10 years of age, which is closer to the international standard of 12 years of age. UN General Assembly, Human Rights Council, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21*, at 6 ¶ 39 (Feb. 23, 2016). In January 2018, the Thai Embassy in Washington, D.C., announced that Thailand was in the process of developing ten laws for purposes of increasing the level of child protection in Thailand, including laws on “dealing with drug abuse and teenage pregnancy in the face [of] changing circumstances in society and new technologies.” Press Release, Royal Thai Embassy, Washington, D.C., *Ten new child protection laws in the pipeline* (Jan. 22, 2018), <https://thaiembdc.org/2018/01/22/ten-new-child-protection-laws-in-the-pipeline/>. Though the laws do not purport to address ATD for children, the new laws indicate the Thai Government’s interest in addressing child-related policies and publicizing it internationally.

<sup>287</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>288</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16. See also Report on the Implementation of the International Covenant on Civil and Political Rights with Regard to the Rights of Refugees and Asylum Seekers in Thailand Submitted for the Second Periodic Report of Thailand (CCPR/C/THA/2) at the 119th Session of the UN Human Rights Comm. Bangkok (Feb. 5, 2017), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT\\_CCPR\\_CSS\\_THA\\_26552\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_CSS_THA_26552_E.pdf).

<sup>289</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>290</sup> E-mail from Chawaratt Chawarangkul, *supra* note 177. International Detention Coalition’s *There Are Alternatives* can be found at: <https://idcoalition.org/publication/there-are-alternatives-revised-edition/>.

<sup>291</sup> E-mail from Chawaratt Chawarangkul, *supra* note 177.

<sup>292</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>293</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>294</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>295</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59. See generally U.S. Embassy and Consulate in Thailand, *Refugee and Migration Affairs (RMA)*(2021), <https://th.usembassy.gov/embassy-consulate/bangkok/sections-offices/refugee-migration-affairs/>.

<sup>296</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>297</sup> Joint Statement, APRRN, CRSP, and Fortify Rights, *Thailand: Ensure Refugee Rights and Protections Through Refugee Regulation*, June 18, 2018, [https://www.fortifyrights.org/downloads/Joint\\_Statement\\_Thailand\\_Ensure\\_Refugee\\_Rights\\_and\\_Protections\\_Through\\_Refugee\\_Regulation\\_June\\_18\\_2018.pdf](https://www.fortifyrights.org/downloads/Joint_Statement_Thailand_Ensure_Refugee_Rights_and_Protections_Through_Refugee_Regulation_June_18_2018.pdf) (“[Cabinet Resolution 10/01] was a positive step towards providing domestic legal status and basic rights for refugee and asylum seekers as well as ensuring the right to asylum as guaranteed by Article 14 of the Universal Declaration of Human Rights. However, there has been little to no progress or consultation with civil society, including refugees, on implementing this resolution since the time of its enactment.”).

<sup>298</sup> *Id.* (recommending among other things that the Thai Government ensure detention of refugees only in “exceptional circumstances, following an individualized assessment, and after all less invasive alternatives to detention have been exhausted”).

<sup>299</sup> *Id.*

<sup>300</sup> See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>301</sup> See *Id.*

<sup>302</sup> *Id.* See generally Choi, *supra* note 8, at 101, 102 (“APRRN has become a member of the CRSP ..., which is a national coalition of Thai local NGOs and activists on refugee protection. Since the CRSP is also a member of APRRN, both transnational and national networks can mutually support each other and cooperate for interactions between local and regional networks. Since then, APRRN Secretariat is not only “tasked with coordinating the activities of the network as well as enabling the achievement of goals and objectives set by the membership” but has also stepped into the field of direct advocacy “to strengthen national ownership of refugee issues” as an entity rooted both in transnational and local contexts.” (internal citations omitted)).

<sup>303</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. Cf. Choi, *supra* note 8, at 116 (“CRSP and APRRN mutually empower each other by bringing voices from both local and international levels. CRSP can provide a more comprehensive local context to the international arena through APRRN and its members in both formal and informal channels. Especially after hiring Thai local staff in its Secretariat, APRRN has become a transnational network organization, which is also rooted in local levels. In this way, APRRN has become an intermediary organization to connect both levels. For instance, APRRN can directly engage the Thai government with concerns about international reputations and put pressure to deliver international standards in refugee protection and human rights in the local context.”).

<sup>304</sup> E-mail from of Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (Nov. 9, 2021) (on file with the author).

<sup>305</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>306</sup> Choi, *supra* note 8, at 118 (noting that CRSP organized a Public Seminar on World Refugee Day, wherein CSOs and the Royal Thai Police presented “drafts of their own versions of the [NSM] to compare and discuss concerns of both sides”).

<sup>307</sup> Choi, *supra* note 8, at 118 (internal quotations omitted).

<sup>308</sup> *Id.* (internal quotations omitted).

<sup>309</sup> E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (Dec. 17, 2021) (on file with the author).

<sup>310</sup> See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. Cf. Remote Interview of Nicolás Espejo Yaksic, *supra* note 253. Cf. also Choi, *supra* note 8, at 172 (“APRRN reframed refugee protection in Asia in the context of international human rights, rather than national security matter or humanitarian concerns.”).

<sup>311</sup> The conclusion of the MOU-ATD is the outcome from the participation by the Thai Prime Minister H.E. General Prayut Chan-o-cha at the Leaders’ Summit on Refugees on September 20, 2016 in New York wherein he pledged to adhere to non-detention of children in IDCs on the basis of the best interests of the child and obligations under the CRC; the signing ceremony was also witnessed by 14 foreign ambassadors to Thailand, heads of international organizations in Thailand (ICRC, UNHCR, UNICEF, and IOM), members of civil society organizations and media. See *Thai Ministry of Foreign Affairs MOU-ATD Press Release*, *supra* note 2. The key Government agencies involved in the mandate are the MSDH’s Department of Children and Youth and the Immigration Bureau. Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>312</sup> The components of the MOU-ATD include: 1. Preamble; 2. Objectives; 3. Definition of children who shall be assisted; 4. Principles; 5. Operations; 6. Child Protection Process on Individual Basis; 7. Cooperation with international organizations, the private sector, and civil society; 8. Follow-Up and Assessment; 9. Revision and Termination; and 10. Enforcement. MOU-ATD, *supra* note 3.

<sup>313</sup> See CRC, *supra* note 148, art. (37)(b) (“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”). Compare UN Global Study of Children Deprived of Liberty, A/74/136, ¶¶20, 56 (July 2019), <https://digitallibrary.un.org/record/3813850?ln=en> (“Research for the study recognizes that migration-related detention of children cannot be considered as a measure of last resort and is never in the best interests of the child and, therefore, should always be prohibited.”).

<sup>314</sup> *Thai Ministry of Foreign Affairs MOU-ATD Press Release*, *supra* note 2 (noting Thailand’s Ministry of Foreign Affairs had been actively involved in the drafting of the MOU-ATD and moving forward the Ministry is supposed to coordinate with UNHCR, IOM, and UNICEF in ensuring the effective implementation of the MOU-ATD).

<sup>315</sup> See, e.g., *Thailand: Joint Statement on MOU-ATD to End Immigration Detention of Children*, *supra* note 13; Press Release, UNHCR, *UNHCR welcomes Royal Thai Government's commitment to release of detained children in Thailand* (Jan. 19, 2019), <https://www.unhcr.org/th/en/16809-unhcr-welcomes-royal-thai-governments-commitment-to-release-of-detained-children-in-thailand.html>.

<sup>316</sup> *Thai Ministry of Foreign Affairs MOU-ATD Press Release*, *supra* note 2 (noting that Ministry of Foreign Affairs was actively involved in the drafting of MOU-ATD since its initial phase, and will coordinate with UNHCR, IOM, and UNICEF in ensuring its effective implementation).

<sup>317</sup> MOU-ATD, *supra* note 3, at §4.1 (“Children shall not be detained, except in necessary and unavoidable circumstances, whereby they may be detained at the Immigration Detention Centres, as the last resort and for the shortest possible duration.”).

<sup>318</sup> Remote Interview of Waritsara Rungthong, *supra* note 82; see also IMMIGRATION ACT, *supra* note 112, at §§19, 20.

<sup>319</sup> See Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>320</sup> See *id.*

<sup>321</sup> MOU-ATD, *supra* note 3, at §6. See Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>322</sup> Remote Interview of Waritsara Rungthong, *supra* note 82. “Unaccompanied minors” (also referred to as “unaccompanied children”) are children under the age of 18 years “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 to do so.” See UNHCR – Glossary, UNHCR (defining “unaccompanied child”), <https://www.unhcr.org/glossary/#u>.

<sup>323</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>324</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>325</sup> MOU-ATD §4.4 states: “In determining ways to provide care for children, family-based care shall be given first priority. Reception centers of the Ministry of Social Development and Human Security, or privately-run reception centers registered under relevant laws shall be the last resort and used for the shortest possible duration.” MOU-ATD, *supra* note 3, at §4.4. The Government’s alternatives focus on family-based care in the community. See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>326</sup> See *Best Practices ATDs for Migrant and Refugee Children*, Draft for UN SRSG-VAC by Dr. Nicolás Espejo Yaksic 34 (July 2019) (unpublished working paper, on file with the author).

<sup>327</sup> See *Id.*

<sup>328</sup> See MOU-ATD, *supra* note 3, at §6 (“Child Protection Process on Individual Basis”), §8 (“Follow-up and Assessment”).

<sup>329</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>330</sup> MOU-ATD, *supra* note 3, at §6.

<sup>331</sup> According to the Government, UN organizations are assigned the following supportive roles as part of the MOU-ATD:

- UNHCR is “to support background information of migrant children, give relevant advice, provide protection and search for durable solution (e.g. resettlement, etc.) for the migrant children and their families, especially for the most vulnerable ones.”
- IOM is “to support the Immigration Bureau and Department of Children and Youth in identifying the needs of migrant children and their families, collecting relevant information, training the case managers, providing comprehensive health check-up and organizing educational, recreational and mental care activities for migrants, and funding travel expense for those migrants who have been granted resettlement opportunity or voluntarily wish to return to their country of origin.”
- UNICEF is “to support knowledge and budget in the development of policies and their implementation and skills development for officers in the field, such as interpreters and protection officers.”

*Thailand’s response to Questionnaire of the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them*, ROYAL THAI GOVERNMENT (July 2020),

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<https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/CallEndingImmigrationDetentionChildren.aspx> [hereinafter *RTG SRHRM Submission*] (emphasis omitted).

<sup>332</sup> *Id.*

<sup>333</sup> Standard Operating Procedure – SOP Under MOU-ATD on The Determination of Measures and Approaches Alternative to Detention of Children in Immigration Detention Centers B.E.2562 at 8 – 11 [hereinafter *SOP-ATD*]. The unofficial English translation of the SOP is available at: [shorturl.at/yGQ78](http://shorturl.at/yGQ78).

<sup>334</sup> *RTG SRHRM Submission*, *supra* note 331.

<sup>335</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>336</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207.

<sup>337</sup> *Id.*

<sup>338</sup> For UAMs, the solution has been to identify the right foster care placement; if they are not able to find foster care, the child will return to Government shelters. Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>339</sup> MOU-ATD, *supra* note 3, at §4.4 (“In determining ways to provide care for children, family-based care shall be given first priority. Reception centers of the Ministry of Social Development and Human Security, or privately-run reception centers registered under relevant laws shall be the last resort and used for the shortest possible duration.”).

<sup>340</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>341</sup> *See id.*; *see also* Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>342</sup> *See* Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. According to advocates, although these centers are meant to be used as short-term placement facilities, as of November 2020, they have become more like long-term closed facilities, prompting some to label them as essentially detention centers by another name. Interview of Confidential Informant No. 4, *supra* note 6. Advocates plan to further address this concern with the Government, solidifying a definition of detention that extends beyond moving children from place to place. One informant also recommended this be an issue to be addressed by the SRSG-VAC with the Royal Thai Government. *See* Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>343</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>344</sup> MOU-ATD, *supra* note 3, at §4.4; *but see* UN Global Study of Children Deprived of Liberty, A/74/136, ¶¶20, 56 (July 2019), <https://digitallibrary.un.org/record/3813850?ln=en> (“Research for the study recognizes that migration-related detention of children cannot be considered as a measure of last resort and is never in the best interests of the child and, therefore, should always be prohibited.”).

<sup>345</sup> MOU-ATD, *supra* note 3, Preamble. In addition to these two core principles, the CRC Committee had held that “[i]n all actions concerning children, States should be guided by the overarching principles of ... the right to life, survival and development (art. 6); and the right of the child to express his or her views in all matters affecting him or her, and to have those views taken into account (art. 12).” Comm. on Migrant Workers & CRC, Joint Gen. Comment No. 4/23, ¶19, U.N. Doc. CMW/C/GC/4- CRC/C/GC/23 (Nov. 16, 2017).

<sup>346</sup> *Two Years With No Moon*, *supra* note 2, at 19.

<sup>347</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>348</sup> The Coalition for the Rights of Refugees and Stateless Persons (CRSP)’s Submission to the Special Rapporteur on the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them (July 2020),

<https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/CallEndingImmigrationDetentionChildren.aspx> [hereinafter *CRSP’s Submission to SRHRM*].

<sup>349</sup> *Refugee Rights Network Joint Submission 2021 Thailand UPR*, *supra* note 41, ¶12. *Compare 2022 Thailand Gov’t DCY IMRF Presentation*, *supra* note 12 (“More than three hundred children and their families have been released from immigration detention and received assistance and social support in the community, as well as Government’s shelters”).

<sup>350</sup> *CRSP’s Submission to SRHRM*, *supra* note 348.

<sup>351</sup> *RTG 2021 UPR Submission*, *supra* note 9, ¶59.

<sup>352</sup> *Id.* (quotations omitted).

<sup>353</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>354</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

- <sup>355</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. Although these centers are meant to serve as an ATD, many advocates do not consider them as true alternatives due to their closed nature. Interview of Confidential Informant No. 4, *supra* note 6.
- <sup>356</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.
- <sup>357</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.
- <sup>358</sup> See SOP-ATD, *supra* note 333, at 3-8.
- <sup>359</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.
- <sup>360</sup> Remote Interview of Nicolás Espejo Yaksic, *supra* note 253.
- <sup>361</sup> SOP-ATD, *supra* note 333 (“Together with number of migrant children has increased and situation is more complicated due to various causes and factors, this requires a comprehensive and integrate cooperation among agencies.”).
- <sup>362</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207.
- <sup>363</sup> Since the MOU-ATD, the coalition has started to collaborate more closely with Government agencies themselves. Remote Interview of Waritsara Rungthong, *supra* note 82.
- <sup>364</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.
- <sup>365</sup> *Report on Regional Expert Roundtable on Alternatives to Immigration Detention for Children*, *supra* note 106, at 1. Whereas during the Coalition’s regional roundtable held in Bangkok in 2015, only representatives from the Immigration Bureau and Department of Justice were present for discussions, representatives from MSDHS, the National Security Council, the Immigration Bureau, the Ministry of Education, the Ministry of the Interior, and the Ministry of Justice were also set to attend. The list of government representatives is based on the provisional roster of participants for the 2019 regional roundtable.
- <sup>366</sup> E-mail from Chawaratt Chawarangkul, *supra* note 177. See, e.g., Letter from Nadhavathna Krishnamra, Director-General Dep’t of Int’l Organizations, RTG Ministry of Foreign Affairs, to Gita Sabharwal, UN Resident Coordinator in Thailand (Aug. 28, 2020), [https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/thailand\\_confirmation\\_letter\\_gcm\\_implementation\\_champion\\_country\\_dg\\_signed.pdf](https://migrationnetwork.un.org/sites/g/files/tmzbd1416/files/docs/thailand_confirmation_letter_gcm_implementation_champion_country_dg_signed.pdf); Press Release, *Regional Roundtable on Alternatives to Child Detention, Bangkok*, CENTRE FOR POLICY DEVELOPMENT (Nov. 2019), <https://cpd.org.au/2019/11/atd/>; Asia Dialogue on Forced Migration, CENTRE FOR POLICY DEVELOPMENT WEBSITE, <https://cpd.org.au/intergenerational-wellbeing/asia-dialogue-on-forced-migration/>.
- <sup>367</sup> For example, at the Asia-Pacific Regional Review of Implementation of the Global Compact for Safe, Orderly and Regular Migration in 2021, Thailand co-organized two side events one on access to education another one on ATD. ESCAP/GCM/2021/3, *supra* note 274; see also *Asia-Pacific Regional Review of GCM*, *supra* note 274. At the global level engagement, Thailand was involved in a side event organized by the UN Task Force on Children Deprived of Liberty in collaboration with the Permanent Missions of Colombia, Morocco, Portugal, Thailand, and Turkey. E-mail from Chawaratt Chawarangkul, *supra* note 177. At the IMRF, the Government of Thailand pledged to effectively implement ATDs for migrant children. See *2022 Thailand Gov’t DCY IMRF Presentation*, *supra* note 12.
- <sup>368</sup> E-mail from Chawaratt Chawarangkul, *supra* note 177.
- <sup>369</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94. Remote Interview of Chawaratt Chawarangkul, *supra* note 16. One informant noted that an immigration officer indicated that “[officers] would like to release children, but that [they] cannot because if [they] do [they] will be [violating] the law. The MOU is not a law and does not close some of these gaps in law yet. If the Immigration Act [itself] included ATD measures or prohibit[ed the] detention of children, [they] could just release the child.” E-mail from confidential informant no. 24, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (May 2022) (on file with the author).
- <sup>370</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94. Remote Interview of Chawaratt Chawarangkul, *supra* note 16.
- <sup>371</sup> MOU-ATD, *supra* note 3, at §4.1.
- <sup>372</sup> *UN Global Study*, *supra* note 1, at 448 (after surveying recent international commentaries from 2005 to today, the UN Global Study concludes that “the detention of children for purely migration-related reasons, whether with their families or as unaccompanied or separated children, can never meet these standards”).
- <sup>373</sup> CRC, *supra* note 148, arts. 3, 37 (b). CHILD PROTECTION ACT, *supra* note 133, §22.
- <sup>374</sup> It has been stressed that immigration detention of children also potentially violates various fundamental rights enumerated in the CRC, including the rights to education, health, and family unity, among others. CRC, *supra* note



148, arts. 19, 24, 27, 39, 31, 37(a). *UN Global Study*, *supra* note 1, §3.3. See *CRSP's Submission to SRHRM*, *supra* note 348, ¶25. For overview of CRC obligations, see *supra* Part II.B.2.

<sup>375</sup> 'Closed file Refugees' refers to asylum seekers who have had their applications denied by UNHCR both at first instance interview and on appeal. As a result, their files with UNHCR have been closed and they are no longer considered 'persons of concern' to UNHCR. See UNHCR, *Procedural Standards for Refugee Status Determinations*, Section 9.1 (2020), <https://www.refworld.org/pdfid/42d66dd84.pdf>.

<sup>376</sup> *Refugee Rights Network Joint Submission 2021 UPR Thailand*, *supra* note 41, ¶12. Cf. E-mail from Confidential Informant No. 20, *supra* note 54; cf. also E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (Nov. 2021) (on file with the author) (noting that there are some cases of Rohingya in the community, but the majority will be placed in government shelters; while before Covid-19 non-POCs were mostly held in Government shelters, more recently, they are also in the community).

<sup>377</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 131; E-mail from Confidential Informant No. 20, *supra* note 54.

<sup>378</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 131.

<sup>379</sup> ICCPR, *supra* note 148, arts. 9, 24.

<sup>380</sup> CMW/CRC Joint General Comment No. 4/23, *supra* note 155, ¶19.

<sup>381</sup> States party to the ICCPR are obliged under Article 2(1) to ensure that ICCPR rights are enjoyed by all without discrimination and Article 26 enshrines the right to equality and non-discrimination as "an autonomous right." UN Human Rights Comm., General Comment No. 18: Non-discrimination, 10/11/1989. All other major international human rights treaties also have strong equality and non-discrimination provisions, as does the ASEAN Human Rights Declaration. AHRD, *supra* note 192, arts. 1, 2, 3.

<sup>382</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>383</sup> MOU-ATD, *supra* note 3.

<sup>384</sup> See generally *Life in the Shadows: Thailand's Urban Refugees*, NEW HUMANITARIAN (Sept. 11, 2019) (According to UNHCR sponsor, Caroline Gluck, it therefore provides a "framework for the release of all children detained in [detention centers] in Thailand.") (quotations omitted).

<sup>385</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>386</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16. *CRSP's Submission to SRHRM*, *supra* note 348. See also *Refugee Rights Network Joint 2021 UPR Thailand Submission*, *supra* note 41, ¶40, 12.

<sup>387</sup> *CRSP's Submission to SRHRM*, *supra* note 348 ("No more children in Suan Plu IDC which is the main IDC in Bangkok but children are still living in a detention-like environment, with no freedom of movement and limited access to basic services.").

<sup>388</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>389</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>390</sup> *CRSP's Submission to SRHRM*, *supra* note 348.

<sup>391</sup> According to some informants as well as other sources, the Government has no plans to accede to the Refugee Conventions. See, e.g., *Advancing refugee rights in non-signatory States: the role of civil society in Thailand*, *supra* note 47, at 63 (noting the Government has refused to sign the Refugee Conventions and that doing so "has virtually no support within the Government"). Cf. *Two Years with No Moon Report Appendices*, *supra* note 2, at 5-6 (Thailand's correspondence with HRW from 2014 indicated that perhaps the country could join in the future.). In relation to stateless individuals in Thailand, one informant noted that there is a different way the state 'manages' them, and that they seem to be rarely detained in immigration detention. E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>392</sup> See Interview of Confidential Informant No. 2 (2020); see generally UNHCR Thailand Website, UNHCR (Sept. 30, 2021), <https://www.unhcr.org/th/en>.

<sup>393</sup> *Thailand: Regulation of the Office of the Prime Minister on the Screening of Aliens Who Enter into the Kingdom and Are Unable to Return to the Country of Origin* B.E. 2562, Thailand, available at [www.refworld.org/publisher,NATLEGBOD,THA,5e675a774,0.html](http://www.refworld.org/publisher/NATLEGBOD,THA,5e675a774,0.html).

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<sup>394</sup> Chotinukul, *supra* note 276, at 10.

<sup>395</sup> *Id.*

<sup>396</sup> Press Release, APRRN, *Thailand quietly delays implementation of refugee screening mechanism* (June 25, 2020), <https://reliefweb.int/report/thailand/press-release-thailand-quietly-delays-implementation-refugee-screening-mechanism>.

<sup>397</sup> RTG 2021 UPR Submission, *supra* note 9, at 15.

<sup>398</sup> For more on the NSM, see, e.g., *Analysis: Thailand's Record on Refugee Rights, 2016-2021*, *supra* note 277.

<sup>399</sup> Chotinukul, *supra* note 276, at 21-22.

<sup>400</sup> Clause 3 under the Regulation defines a “protected person” as “any alien who enters into or resides in the Kingdom and is unable or unwilling to return to his/her country of origin due to a reasonable ground that they would suffer danger due to persecution as determined by the Committee . . .” Thailand: Regulation of the Office of the Prime Minister on the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562 (Dec. 25, 2019), <https://www.refworld.org/docid/5e675a774.html>.

<sup>401</sup> Chotinukul, *supra* note 276, at 11.

<sup>402</sup> *Refugee Rights Network Joint Submission 2021 UPR Thailand*, *supra* note 41, at ¶ 3.

<sup>403</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>404</sup> Interview of Confidential Informant No. 4, *supra* note 6.

<sup>405</sup> Joint Submission Universal Periodic Review of Thailand Cycle 3, 39<sup>th</sup> Sessions, Asia Pacific Refugee Rights Network, Asylum Access Thailand, People Empowerment Foundation, Refugee Rights Litigation Project, ¶¶16,17 (June 15, 2021), <https://asylumaccess.org/wp-content/uploads/2021/06/Refugee-Rights-Network-in-Thailand-en.pdf>.

<sup>406</sup> See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>407</sup> See CRSP's Submission to SRHRM, *supra* note 348. The Criminal Procedure Code of Thailand stipulates the Provisional Release from §106 to §119. An unofficial English translation of the Thai Criminal Procedure Code, B.E., 2477, as amended to Act No. 28 of 2551 (2008) is available at: [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=93536&p\\_country=THA&p\\_count=441&p\\_classification=01.04&p\\_classcount=17](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93536&p_country=THA&p_count=441&p_classification=01.04&p_classcount=17) (last visited Oct. 19, 2021) [hereinafter Criminal Procedure Code].

<sup>408</sup> This means that when parents of children are released on bail, it is not due to the MOU-ATD, but rather this discretionary process. E-mail from Chawaratt Chawarangkul, *supra* note 177. This means that some parents are able to be released and some parents with other backgrounds may not be able to access bail. *Id.*

<sup>409</sup> Unofficial and unpublished translation of Immigration Order No.53/2559 (on file with the author).

<sup>410</sup> *Joint Statement on MoU to End Immigration Detention of Children*, *supra* note 13. On January 26, 2021, a Cabinet Resolution was passed allowing migrant workers from Myanmar, Laos, and Cambodia, who are in immigration detention awaiting to return to their original country but cannot return due to COVID-19 situation, to be released and to work.” Joint Submission Universal Periodic Review of Thailand Thailand Cycle 3, 39<sup>th</sup> Sessions, Asia Pacific Refugee Rights Network, Asylum Access Thailand, People Empowerment Foundation, Refugee Rights Litigation Project, ¶40 (June 2021).

<sup>411</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>412</sup> See CRSP's Submission to SRHRM, *supra* note 348.

<sup>413</sup> E-mail from Chawaratt Chawarangkul, *supra* note 123. *But cf.* E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer, Fletcher School of Law and Diplomacy (Nov. 11, 2021) (on file with the author).

<sup>414</sup> E-mail from Confidential Informant No. 23, to Christine Bustany, Senior Lecturer in International Law, the Fletcher School of Law and Diplomacy, Tufts University (2022) (on file with the author).

<sup>415</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>416</sup> *Id.*

<sup>417</sup> See Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>418</sup> *UNHCR 2015 Thailand UPR Submission*, *supra* note 42, at 11.

<sup>419</sup> See Criminal Procedure Code, *supra* note 407, §90. *Cf.* *UNHCR 2015 Thailand UPR Submission*, *supra* note 42, at 11-12.

<sup>420</sup> See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202. Compare CRSP's Submission to SRHRM, *supra* note 348.

<sup>421</sup> *Joint Statement on MoU to End Immigration Detention of Children*, *supra* note 13. See generally *Global Study*, *supra* note 1, at 476 (“When detained, children are sometimes separated from their parents and placed in child specific centres. In others, they may be separated from their fathers as they are housed in different detention facilities for male adults or for women and children. This may amount to a violation of the right to family unity (Article 9 CRC), family life (Article 16 CRC), and family development (Article 18 CRC).”).

<sup>422</sup> *UN Global Study*, *supra* note 1, at 485.

<sup>423</sup> See Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>424</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>425</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>426</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249. Compare Interview of Confidential Informant No. 4, *supra* note 6. CRSP’s Submission to SRHRM, *supra* note 348.

<sup>427</sup> See *supra* V.A.3.

<sup>428</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>429</sup> *Joint Statement on MoU to End Immigration Detention of Children*, *supra* note 13. See generally *Global Study*, *supra* note 1, at 476 (“When detained, children are sometimes separated from their parents and placed in child specific centres. In others, they may be separated from their fathers as they are housed in different detention facilities for male adults or for women and children. This may amount to a violation of the right to family unity (Article 9 CRC), family life (Article 16 CRC), and family development (Article 18 CRC).”).

<sup>430</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>431</sup> See Remote Interview of Naiyana Thanawattho, *supra* note 249. Compare generally United Nations High Commission on Refugees, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2019*, at 11, 71 (2014) (“Thailand has no specific domestic legal framework for protection of urban refugees and asylum seekers. As such, urban refugees and asylum seekers may be treated as illegal aliens unless they have a valid visa issued pursuant to the Thai Immigration Act. Absent a valid visa, they may be subject to arrest, prosecution, and detention on immigration charges, irrespective of their status with UNHCR”); *Unlocking Childhood*, *supra* note 2, at 5 (“Lack of legal status [in Thailand] renders individuals vulnerable to arrest and detention and inclined to live in a way that decreases their visibility in their host community”).

<sup>432</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>433</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>434</sup> See Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>435</sup> SOP-ATD, *supra* note 333, at ¶2.2.

<sup>436</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>437</sup> The authors of this Reports have not obtained a copy of the associated manual translated into English, but public statements of the Government in November 2020 indicate that the MOU-ATD associated guidelines were completed. See, e.g., Statement by the Delegation of Thailand H.E. Mr. Sek Wannamethee Ambassador and Permanent Representative Agenda Item 11: General Debate at the 111th Session of the IOM Council 24 – 27 (Nov. 2020), [https://governingbodies.iom.int/system/files/en/council/111/General\\_debate/Thailand%20-%20Statement%20by%20the%20Delegation%20of%20Thailand%20-%2011th%20IOM%20Council%20General%20Debate%20%28November%202020%29.pdf](https://governingbodies.iom.int/system/files/en/council/111/General_debate/Thailand%20-%20Statement%20by%20the%20Delegation%20of%20Thailand%20-%2011th%20IOM%20Council%20General%20Debate%20%28November%202020%29.pdf). All relevant NGOs have since received the manual. E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>438</sup> *Id.*; cf. Interview of Confidential Informant No. 7, *supra* note 207.

<sup>439</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>440</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>441</sup> Interview of Confidential Informant No. 7, *supra* note 207. Compare *Suggested recommendations to States under review in the 39th session of the UPR Working Group, 1-12 November 2021*, AMNESTY INT’L 30 (2021), <https://www.amnesty.org/en/wp-content/uploads/2021/10/IOR4048362021ENGLISH.pdf> (“Amend the Immigration Act to prevent indefinite detention of undocumented refugees and migrants and implement alternatives to detention”).



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<sup>442</sup> *End Child Detention Scorecard Thailand, Global NextGen Index*, NEXTGEN-INDEX, THE THAILAND NEXTGEN INDEX COMMITTEE 2 (Aug. 2018), <https://next-gen-index.org/wp-content/uploads/2018/08/NextGen-Index-Thailand-Scorecard-2018.pdf>.

<sup>443</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 16. For overview of governing legislation, see *supra* Part II.B.

<sup>444</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>445</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>446</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>447</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>448</sup> *Id.*

<sup>449</sup> See Remote Interview of Chawaratt Chawarangkul, *supra* note 131. One source noted that Government authorities have admitted that some Rohingya children remained in detention. The purported issue is that this group of children do not fit the “human trafficking scheme and the [Government’s] security policy do not allow [them to be] bailed out, while DCY shelter is overstretch[ed] and lack of coordination made them held and lost in the system.” E-mail from confidential informant, to Christine Bustany, Senior Lecturer in International Law, The Fletcher School of Law and Diplomacy (May 25, 2022) (on file with the author).

<sup>450</sup> Interview of Confidential Informant No. 7, *supra* note 207.

<sup>451</sup> *Id.*; cf. *Refugee Rights Network Joint Submission 2021 UPR Thailand*, *supra* note 41, at ¶12. (“the use of ‘Day Care Centre’ inside the Immigration facility for children and their family members as one of the states ATD placement options should not be considered an alternative to detention.”). “Alternatives to detention should not be used as alternative forms of detention, nor should alternatives to detention become alternatives to release.” Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention, UNHCR, 6 (2012) [hereinafter UNHCR Detention Guidelines], <http://www.unhcr.org/505b10ee9.html>.

<sup>452</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>453</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>454</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>455</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 131.

<sup>456</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 16. See also E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer in International Law, The Fletcher School of Law and Diplomacy (March 22, 2022) (on file with the author).

<sup>460</sup> E-mail from Chawaratt Chawarangkul, Southeast Asia Programme Manager, International Detention Coalition, to Christine Bustany, Senior Lecturer in International Law, The Fletcher School of Law and Diplomacy (March 22, 2022) (on file with the author).

<sup>461</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> Remote Interview of Confidential Informant No. 6 (2020) (“Thailand does not have the protection under foster care, but government is working on that as well.”).

<sup>466</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>467</sup> *Id.* See also *Forgotten Futures*, *supra* note 43, at 20-21 (noting foster care has been limited in Thailand, serving nine children in 2017, due to a number of factors).

<sup>468</sup> *Forgotten Futures*, *supra* note 43, at 20.

<sup>469</sup> *Compare RTG SRHRM Submission*, *supra* note 331.

<sup>470</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>471</sup> Vivienne Chew, *How Change Happened in Thailand*, International Detention Coalition (March 20, 2019), <https://idcoalition.org/news/how-change-happened-in-thailand/>.

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<sup>472</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207. See also *Forgotten Futures*, *supra* note 43, at 18-19.

<sup>473</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.* RTG SRHRM Submission, *supra* note 331 (“A high number of migrant children, particularly unaccompanied children and separated children, are not registered with the authorities or do not have legal identification documents. Many of them have adult-like physical appearance and, therefore, are mistakenly treated as adults. For age assessment procedures, it is important to note that bone x-rays or dental evaluation are at times considered to be intrusive, unethical, and inaccurate methods, with a significant potential for error, as they do not take into account factors such as nutritional status, disease, or developmental history. Thus, more accurate and internationally accepted procedures are desirable. Hence, the authorities concern are in the process of considering a more universally accepted procedure.”).

<sup>476</sup> RTG SRHRM Submission, *supra* note 331.

<sup>477</sup> UN Global Study, *supra* note 1, at 479.

<sup>478</sup> *Id.* Age assessments “are never to be used as a matter of routine.” UNHCR, Guidelines on International Protection: Child Asylum Claims, ¶75. UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, ¶5.11(b); UN Comm. on the Rights of the Child, General Comment No. 6, ¶31(i). Age assessments should be “multidisciplinary” and “if there is a possibility that the individual is a child, s/he should be treated as such.” UN Global Study, *supra* note 1, at 479-80.

<sup>479</sup> RTG SRHRM Submission, *supra* note 331.

<sup>480</sup> *Id.*

<sup>481</sup> Refugee Rights Network Joint Submission 2021 UPR Thailand, *supra* note 41, at ¶11.

<sup>482</sup> Remote Interview of Parinya Boonridrerthaikul, (former) Coordinator, Coalition for the Rights of Refugees and Stateless Persons (CSRP) (2020). Compare Remote Interview of Waritsara Rungthong, *supra* note 82. Compare also Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>483</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>484</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>485</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>486</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>487</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>488</sup> *Id.*

<sup>489</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207.

<sup>490</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>491</sup> See Remote Interview of Confidential Informant Interview of Confidential Informant No. 7 (2020).

<sup>492</sup> *Id.*

<sup>493</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>494</sup> *Id.*

<sup>495</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>496</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>500</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>501</sup> See *id.*

<sup>502</sup> *Id.*

<sup>503</sup> *Id.*

<sup>504</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207.

<sup>505</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>506</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>507</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207.

<sup>508</sup> MOU-ATD, *supra* note 3, at §6 (“Child Protection Process on Individual Basis: After the date of signing of this Memorandum of Understanding, concerned agencies shall establish the Standard Operating Procedures within 30 days.”).

<sup>509</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>510</sup> *Id.*

<sup>511</sup> Remote Interview of Waritsara Rungthong, *supra* note 82 (noting that they or their organization held consultations with Thai Government to give recommendations on the development of the MOU-ATD associated manual); Remote Interview of Naiyana Thanawattho, *supra* note 249 (same); Remote Interview of Confidential Informant No. 7, *supra* note 207 (same).

<sup>512</sup> Interview of Confidential Informant No. 7, *supra* note 207.

<sup>513</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>514</sup> See Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>515</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>516</sup> E-mail from of Chawaratt Chawarangkul, *supra* note 304.

<sup>517</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>518</sup> The concern is due to the nature of the Thai Immigration Bureau as one of the main implementing agencies of the MOU-ATD, whose personnel are essentially trained as police officers and lack the specialized training to care for vulnerable children. See Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>519</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>520</sup> *Id.*

<sup>521</sup> *Analysis: Thailand’s Record on Refugee Rights, 2016-2021*, *supra* note 277. Cf. E-mail from of Chawaratt Chawarangkul, *supra* note 304. Cf. also Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>522</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>523</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>524</sup> See Remote Interview of Confidential Informant No. 2 (2020). See also Press Release, APRRN, *Thailand quietly delays implementation of refugee screening mechanism* (June 25, 2020), <http://aprrn.info/press-release-thailand-quietly-delays-implementation-of-refugee-screening-mechanism/>.

<sup>525</sup> See Remote Interview of Confidential Informant No. 7, *supra* note 207 (noting that the Government may be implementing certain policies but CSOs are often not made aware of it).

<sup>526</sup> *Id.* See MOU-ATD, *supra* note 3, at §8.

<sup>527</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16. Cf. Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>528</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>529</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>530</sup> See Remote Interview of Chawaratt Chawarangkul, *supra* note 16; Remote Interview of Chawaratt Chawarangkul, *supra* note 16. See generally 2022 Thailand Gov’t DCY IMRF Presentation, *supra* note 12.

<sup>531</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 131.

<sup>532</sup> E-mail from Chawaratt Chawarangkul, *supra* note 410.

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 131.

<sup>536</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>537</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>538</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 131.

<sup>539</sup> E-mail from of Chawaratt Chawarangkul, *supra* note 410.

<sup>540</sup> U.S. DEP’T OF STATE, 2020 Country Reports on Human Rights Practices: Thailand 5 (MARCH 2021), <https://www.state.gov/wp-content/uploads/2021/03/THAILAND-2020-HUMAN-RIGHTS-REPORT-2.pdf>.

<sup>541</sup> See *id.*; *Migrants infected with Covid-19 at Thai detention centers*, UCA NEWS (March 19, 2021), <https://www.ucanews.com/news/migrants-infected-with-covid-19-at-thai-detention-centers/91818#> (noting that in March 2021 most of the 77 migrants held in Bangkok IDC had COVID-19); *Thailand Should Free Detained Migrants Amid Pandemic Covid-19 Infections Spread Like Wildfire in Squalid Lockup*, HUMAN RIGHTS WATCH (May 8, 2020) (noting “[a]t least 65 detainees in Thailand’s Songkhla immigration detention center – including 18 ethnic

Rohingya women and children – tested positive for Covid-19”) <https://www.hrw.org/news/2020/05/08/thailand-should-free-detained-migrants-amid-pandemic>; Thailand: Release Detained Refugees and Migrants, Prevent Further Detentions Amid COVID-19 Pandemic, Fortify Rights (May 1, 2020), <https://www.fortifyrights.org/thailand-inv-2020-05-01/>; Kira Leadholm, *COVID-19 Destroyed Thailand’s Economy, and the Livelihoods of Migrant Workers*, Pulitzer Center (Oct. 12, 2020),

<https://pulitzercenter.org/stories/covid-19-destroyed-thailands-economy-and-livelihoods-migrant-workers>

(noting that in April 2020, over half of the 115 detainees in the Sadao Immigration Office in Songkha contracted COVID-19, among whom were migrants, Rohingya refugees, and children).

<sup>542</sup> U.S. DEP’T OF STATE, *2020 Country Reports on Human Rights Practices: Thailand*, *supra* note 540.

<sup>543</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>544</sup> See Government of Thailand Public Relations, *Revision of Guidance for Foreign Worker Management during the COVID-19 Situation* (Jan. 29, 2021), [https://thailand.prd.go.th/mobile\\_detail.php?cid=4&nid=10724](https://thailand.prd.go.th/mobile_detail.php?cid=4&nid=10724).

<sup>545</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 131.

<sup>546</sup> Analysis: Thailand’s Record on Refugee Rights, 2016-2021, *supra* note 277.

<sup>547</sup> *Id.*

<sup>548</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>549</sup> Choi, *supra* note 8, at 119. *Cf. Advancing refugee rights in non-signatory States: the role of civil society in Thailand*, *supra* note 47.

<sup>550</sup> *Refugee Rights Network Joint Submission 2021 UPR Thailand*, *supra* note 41. *Compare RTG 2021 UPR Submission*, *supra* note 9, ¶59 (stating that “from October 2018 to June 2021, 304 children and their families have received assistance while awaiting repatriation or travel to a third country”) (emphasis added). *Compare also 2022 Thailand Gov’t DCY IMRF Presentation*, *supra* note 12 (“More than three hundred children and their families have been released from immigration detention and received assistance and social support in the community, as well as Government’s shelters.”)

<sup>551</sup> Some informants have noted that the implementation has been delayed in part due to Covid. See Remote Interview of Confidential Informant No. 2, *supra* note 524.

<sup>552</sup> The conclusions and recommendations in this Report are based off of the Fletcher ILP’s interviews conducted primarily in 2019-2020, along with some follow up interviews and correspondence in late 2021 to mid-2022, in addition to desk research. They are not meant to be exhaustive but rather representative of the main recommendations put forward by various stakeholders at the time.

<sup>553</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6. *Compare RTG SRHRM Submission*, *supra* note 331 (“The Immigration Act B.E. 2522 (1979) allows the competent official to give permission to the alien to reside at any place, with the condition to report to the official on the date, time and place as prescribed. But in practice, the Immigration Bureau will only allow mothers/guardians to be bailed out from detention with a fee of 50,000 baht (approx. 1,550 USD) per adult, which may pose a burden for them or for the NGOs/CSOs that intend to assist them. The authorities concerned are working on reviewing the criteria on setting the bail.”).

<sup>554</sup> *Suggested recommendations to States under review in the 39th session of the UPR Working Group, 1-12 November 2021*, AMNESTY INT’L 30 (2021), <https://www.amnesty.org/en/wp-content/uploads/2021/10/IOR4048362021ENGLISH.pdf>. In the middle-long term, it has also been recommended that the Government also adopt legislation specific to ATDs. See *infra* VI.C.

<sup>555</sup> See Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>556</sup> *Thailand: Implement Commitments to Protect Refugee Rights*, HUMAN RIGHTS WATCH ET AL. (July 6, 2017), <https://www.hrw.org/news/2017/07/06/thailand-implement-commitments-protect-refugee-rights>.

<sup>557</sup> E-mail from of Chawaratt Chawarangkul, *supra* note 304.

<sup>558</sup> *Cf. Chawaratt Chawarangkul, Stakeholder Meeting in Bangkok: Thai ATD MOU & National Screening Mechanism*, INTERNATIONAL DETENTION COALITION (March 4, 2021), <https://idcoalition.org/news/stakeholder-meeting-in-bangkok-priorities-on-the-thai-atd-mou-national-screening-mechanism/> [hereinafter *Stakeholder Meeting in Bangkok*] (quoting Vitit Muntarbhorn, former UN Special Rapporteur, UN Independent Expert, and Member of the UN Commission of Inquiry on Human Rights); *cf. also* Human Rights Council Working Group on the UPR, *Compilation on Thailand Report of the Office of the United Nations High Commissioner for Human*

Rights, A/HRC/WG.6/39/THA/2 ¶ 2 (Aug. 19, 2021), <https://undocs.org/A/HRC/WG.6/39/THA/2> (noting UN country team et al. recommends that Thailand ratify these as well as other human rights conventions).

<sup>559</sup> UNICEF *Working Paper: Family Unity in the Context of Migration*, UNICEF 3 (2018).

<sup>560</sup> *Joint Statement on MoU to End Immigration Detention of Children*, *supra* note 13.

<sup>561</sup> See Remote Interview of Confidential Informant No. 4, *supra* note 6; compare Remote Interview of Parinya Boonridrerthaikul, *supra* note 202 (noting that bail for fathers is already being considered on a case by case basis if the mother is unable to take care of the children).

<sup>562</sup> See, e.g., Remote Interview of Confidential Informant No. 4, *supra* note 6; *Stakeholder Meeting in Bangkok*, *supra* note 558.

<sup>563</sup> See CRSP's *Submission to SRHRM*, *supra* note 348 ("Fathers are not considered for release under the MOU, resulting in separation of family members. Mothers are put in a difficult situation where they have to raise the children and earn a living on their own.").

<sup>564</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>565</sup> *Stakeholder Meeting in Bangkok*, *supra* note 558 (quoting Ms. Kornkanok Wathanaboom, CRSP Secretariat, Asylum Access Thailand Policy and Communications Coordinator).

<sup>566</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>567</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94; Remote Interview of Chawaratt Chawarangkul, *supra* note 16. Compare E-mail from Chawaratt Chawarangkul, *supra* note 123.

<sup>568</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207.

<sup>569</sup> *Id.* Compare CRSP's *Submission to SRHRM*, *supra* note 348 ("Immigration Bureau staff should be supported with capacity building around child rights. DCY should be supported to have more resources both in term of personnel and funding to be able to work closely in a partnership with the Immigration Bureau, the relevant UN agencies and NGOs.").

<sup>570</sup> Remote Interview of Nicolás Espejo Yaksic, *supra* note 253.

<sup>571</sup> *Stakeholder Meeting in Bangkok*, *supra* note 558.

<sup>572</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>573</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>574</sup> See Remote Interview of Confidential Informant No. 2, *supra* note 524. The Government has noted the "lack of awareness on the ATD and SOP among agencies at local levels as well as insufficient capacity to implement it" and is said to be trying to address this with the assistance of IOM, UNICEF and UNHCR. See 2022 *Thailand Gov't DCY IMRF Presentation*, *supra* note 12 ("We also need to continuously strengthen the capacity of social workers and law enforcement officers to protect children affected by migration and to implement the MOU-ATD in collaboration with UNICEF, UNHCR and IOM. We have already undertaken capacity-building activities this year. As a result, 121 Government officials from 17 targeted provinces have a better understanding of the MOU-ATD and standardized the ATD policy in these locations.").

<sup>575</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>576</sup> CRSP's *Submission to SRHRM*, *supra* note 348.

<sup>577</sup> *Id.* Cf. Remote Interview of Confidential Informant No. 5 (2020).

<sup>578</sup> Remote Interview of Chawaratt Chawarangkul, *supra* note 16.

<sup>579</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>580</sup> See CRSP's *Submission to SRHRM*, *supra* note 348 ("The government needs regular support from the UN agencies to monitor the implementation of the MOU to meet the international standards especially the CRC and Best Interest of the Child. Immigration Bureau staff should be supported with capacity building around child rights. DCY should be supported to have more resources both in term of personnel and funding to be able to work closely in a partnership with the Immigration Bureau, the relevant UN agencies and NGOs.").

<sup>581</sup> Remote Interview of Parinya Boonridrerthaikul, *supra* note 202.

<sup>582</sup> Remote Interview of Confidential Informant No. 2, *supra* note 524.

<sup>583</sup> *Id.*

<sup>584</sup> E-mail from Confidential Informant No. 23, *supra* note 414.

<sup>585</sup> CRSP's *Submission to SRHRM*, *supra* note 348.

<sup>586</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.



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<sup>587</sup> Remote Interview of Confidential Informant No. 7, *supra* note 207.

<sup>588</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>589</sup> *Id.* Cf. Remote Interview of Confidential Informant No. 7, *supra* note 207.

<sup>590</sup> MOU-ATD, *supra* note 3, at §8.2:

Reporting: The reporting period should be at least once a year as follows: (1) Implementation in the first 6 months of the year should be reported within 30 days from 30 June of each year. (2) Implementation during the 12 month-period should be reported within 30 days from 31 December of each year. (3) The Police Strategy Bureau, the Royal Thai Police, and the Ministry of Social Development and Human Security shall furnish the reports as specified in 8.2 in coordination with and with information from relevant government and private agencies that have collaborated in the implementation of this Memorandum of Understanding. The reports shall also be submitted to the Office of the National Security Council.

<sup>591</sup> E-mail from from Chawaratt Chawarangkul, *supra* note 94.

<sup>592</sup> *Id.* See also RTG SRHRM Submission, *supra* note 331; RTG 2021 UPR Submission, *supra* note 9.

<sup>593</sup> E-mail from Chawaratt Chawarangkul, *supra* note 59.

<sup>594</sup> Remote Interview of Waritsara Rungthong, *supra* note 82.

<sup>595</sup> The Government at various points has welcomed this position, noting that “migration problems should not be shouldered by any one country alone. It must be the shared responsibility of all concerned.” See, e.g., *Two Years With No Moon, Appendices*, *supra* note 2, at 6-7.

<sup>596</sup> E-mail from Chawaratt Chawarangkul, *supra* note 94.

<sup>597</sup> See Opening remarks via a pre-recorded video statement H.E. Mrs. Suphatra Srimaitreephithak, Ambassador and Permanent Representative, “Working to end child immigration detention through peer learning,” An online side-event at the International Migration Review Forum (May 19, 2022) (on file with the author) (“I am delighted to inform you that the Thai Cabinet just approved Thailand’s pledge to ‘effectively implement alternative / to detention measures for migrant children’. In line with Objective 13 of the Global Compact for safe, orderly and regular Migration, the pledge underscores our commitment to further our work on alternative to detention beyond what has been discussed at the International Migration Review Forum.”); compare 2022 Thailand Gov’t DCY IMRF Presentation, *supra* note 12 (noting some challenges remain following the MOU-ATD including “1. lack of awareness on the ATD and SOP among agencies at local levels as well as insufficient capacity to implement it[;] 2. Long-term care may need, and for refugees, 3rd country resettlement is very limited [and ;] 3. COVID-19 has caused delays in the assistance process.”).

<sup>598</sup> See E-mail from Chawaratt Chawarangkul, *supra* note 123.

<sup>599</sup> See *It’s Been 3 Years Since the Signing of the ATD-MOU in Thailand: Where Are We Now?*, International Detention Coalition (March 31, 2022), <https://idcoalition.org/news/its-been-3-years-since-the-signing-of-the-atd-mou-in-thailand-where-are-we-now/>. Compare 2022 Thailand Gov’t DCY IMRF Presentation, *supra* note 12.o

<sup>600</sup> Remote Interview of Naiyana Thanawattho, *supra* note 249.

<sup>601</sup> See *Thai & Malaysian Networks Refine Strategies to End Child Immigration Detention*, INTERNATIONAL DETENTION COALITION (Nov. 20, 2020), <https://idcoalition.org/news/thai-malaysian-networks-refine-strategies-to-end-child-immigration-detention/> (“CRSP aims that by 2023 Thailand will prohibit the immigration detention of all children and their caregivers in both practice and law, while at the same time ensuring that community-based alternatives to detention are available for them.”) (emphasis added).

<sup>602</sup> *What are ATD?*, INTERNATIONAL DETENTION COALITION WEBSITE, <https://idcoalition.org/alternatives-to-detention/> (last visited Oct. 1, 2021).

<sup>603</sup> *How IDC Defines ‘Alternatives to Detention’*, INTERNATIONAL DETENTION COALITION (July 18, 2019), <https://idcoalition.org/news/how-idc-defines-alternatives-to-detention/>.

<sup>604</sup> *UNICEF Working Paper Alternatives to Immigration Detention of Children* UNICEF 1 (Feb. 2019), [https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20\(ENG\).pdf](https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20(ENG).pdf).

<sup>605</sup> INTERNATIONAL RECOMMENDATIONS ON REFUGEE STATISTICS, *SUPRA* note 20, at 1, 22.

<sup>606</sup> *Forgotten Futures*, *supra* note 43, at 2.

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<sup>607</sup> CRSP's Submission to SRHRM, *supra* note 348.

<sup>608</sup> UNHCR – Glossary, UNHCR (defining “durable solutions”), <https://www.unhcr.org/449267670.pdf>.

<sup>609</sup> See *Between a Rock and a Hard Place*, *supra* note 180, at 6.

<sup>610</sup> RTG SRHRM Submission, *supra* note 331. Compare CRSP's Submission to SRHRM, *supra* note 348 (noting that Immigration Act §54 “gives the power to the competent official to permit the alien, including children, to reside at a place other than the detention”).

<sup>611</sup> Global Detention Project, Thailand: Overview (May 2020), <https://www.globaldetentionproject.org/countries/asia-pacific/thailand>. See also 2020 Country Reports on Human Rights Practices: Thailand, US DEP'T OF STATE (2020), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/thailand/>.

<sup>612</sup> International Organization for Migration, IOM Definition of “Migrant,” <https://www.iom.int/who-is-a-migrant>.

<sup>613</sup> RTG SRHRM Submission, *supra* note 331.

<sup>614</sup> *Id.*

<sup>615</sup> Press Release, APRRN, *Thailand quietly delays implementation of refugee screening mechanism* (June 20, 2020), <https://reliefweb.int/report/thailand/press-release-thailand-quietly-delays-implementation-refugee-screening-mechanism>.

<sup>616</sup> Waritsara Rungthong and Caroline Stover, *supra* note 277.

<sup>617</sup> Remote Interview of Confidential Informant No. 4, *supra* note 6.

<sup>618</sup> UNHCR – Glossary, UNHCR (defining “persons of concern”), <https://reporting.unhcr.org/glossary#:~:text=Person%20of%20concern%20to%20UNHCR,internally%20displaced%20people%20and%20returnees>.

<sup>619</sup> Refugee Convention, *supra* note 20, art. 1A(2).

<sup>620</sup> *Forgotten Futures*, *supra* note 43, at 8.

<sup>621</sup> RTG SRHRM Submission, *supra* note 331.

<sup>622</sup> Statelessness Convention, *supra* note 20, art. 1. This definition of stateless persons is widely considered to be international customary law. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, 58th session, at 49 (2006), [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf).

<sup>623</sup> See UNHCR – Glossary, UNHCR (defining “unaccompanied child”), <https://www.unhcr.org/glossary/#u>.

<sup>624</sup> *Detention of Refugee Children in Malaysia and Thailand*, *supra* note 45, at 70.