

# CHILD TRAFFICKING AND MIGRATION IN SOUTH EAST ASIA

Kathryn E. van Doore

The juxtaposition of domestic and regional responses to child trafficking and migration is clearly delineated in the context of South East Asia due to the proximity of countries and relative ease of access across the region. This ease of access has led to well established migration flows, or routes, leaving the region split between source countries and destination countries. It is well documented that migration occurs intra-regionally from less developed countries to more developed countries, and that a substantial number of children are making this move.<sup>1</sup> Based on this, this

---

<sup>1</sup> J Joudo-Larsen, J Lindley and J Putt, 'Trafficking in persons monitoring report July 2007 – December 2008' (2009) 6 *Australian Institute of Criminology Monitoring Reports* 14.

chapter examines how the Best Interests principle embodied in the *Convention on the Rights of the Child* intersects with the issue of child migration and trafficking in the Association of South East Asian Nations (ASEAN) region.

Through this contrasting examination in domestic and regional contexts, the chapter draws a conclusion regarding how the law may navigate the best interests of the child paradigm in relation to child migration and trafficking in South East Asia.

## 1. WHY ARE CHILDREN ON THE MOVE IN SOUTH EAST ASIA?

South East Asia incorporates the nations of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. Collectively, the nations joined together in 1967 as ASEAN to promote regional peace and stability, and to encourage collaboration and development between the countries. The region has long been regarded as a ‘hot spot’ for trafficking due to its ‘socio-economic and developmental disparities, historical intraregional migration patterns and existence of few legal migration alternatives’.<sup>2</sup> The migratory flow of children tends to be from less developed countries to more developed countries in the region.<sup>3</sup>

Children are on the move in, through and out of South East Asia for independent voluntary migration, or due to forced migration or trafficking. Independent child migration is on the increase in South East Asia and is occurring both within borders and transnationally,<sup>4</sup> for specific purposes (for example, labour or marriage) or for the general promise of better economic prospects.<sup>5</sup> Research has also shown that children are moving from East Asia to South East Asia to acquire cheaper education.<sup>6</sup>

Forced child migration is occurring within and to South East Asia as children flee war, persecution and armed conflicts. In the context of South East Asia, government development projects resulting in a loss of livelihood, poverty, or a deprivation of citizenship, such as the case of the Rohingya in Myanmar and the Hill Tribe people in northern Thailand, can also force people to migrate.<sup>7</sup> Research has shown that many of these forced migrants have not been recognised as refugees and have instead registered as migrant workers.<sup>8</sup> This means that children are not afforded

---

<sup>2</sup> UNICEF, *Reversing the Trend: Child Trafficking in East and South East Asia* (2009) 29.

<sup>3</sup> Ibid.

<sup>4</sup> H Beazley, ‘Multiple Identities, Multiple Realities: Children who Migrate Independently for Work in Southeast Asia’ (2015) 13(3) *Children's Geographies* 296, 296.

<sup>5</sup> J Joudo-Larsen, ‘The trafficking of Children in the Asia-Pacific.’ (2011) 415 *Trends and Issues in Crime and Criminal Justice* 2.

<sup>6</sup> K C Ho and O Yoshida, *Advancing the Regional Commons in the New East Asia* (Routledge, 2016) 54.

<sup>7</sup> S Petcharamesree, ‘ASEAN and its approach to forced migration issues’ (2016) 20(2) *The International Journal of Human Rights* 173, 176.

<sup>8</sup> Ibid.

the protection of refugee status and are often forced into various forms of exploitation, blurring the boundaries between forced and voluntary migration and trafficking. Thus, there is a strong link between irregular migration and human trafficking.

Within the region, Joudo-Larsen notes that children are trafficked from Cambodia to Thailand for begging; from Viet Nam and Myanmar to Cambodia and Thailand for sexual exploitation; and from Laos to Thailand for domestic or factory work. Girls travel from Viet Nam and Myanmar to China for forced marriage; and boys from Myanmar to Thailand to work in the fishing industry.<sup>9</sup> Children are also trafficked internally within countries throughout the region, for example girls from rural areas in Cambodia to urban centres for sexual exploitation.<sup>10</sup> The trafficking and migration flows follow the same pattern, as children often do not fall victim to trafficking until they arrive at their destination and are exploited.<sup>11</sup> In some instances, what may begin as voluntary migration may end as trafficking if the destination involves exploitation.<sup>12</sup> Conversely, what may begin as forced migration may transform once a child reaches their destination and does not claim refugee status. In this way, it might be said that the form of migration is as tenuous as the moment of its definition.

Children frequently move to take advantage of labour opportunities. 'Child labour' is usually defined as work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development.<sup>13</sup> Across South East Asia, child labour is commonly tolerated and the International Labour Organization (ILO) estimates that there are almost 78 million children working in the Asia Pacific accounting for 9.3% of the child population.<sup>14</sup> This represents the largest number of children working in any region globally. Beazley notes that the child migration flow in the South East Asia region is particularly labour-driven, including 'rural to urban migration to work in factories or informal sectors, migration to the streets, migration to work on fishing platforms, migration as child domestic servants and migration into the commercial sex industry'.<sup>15</sup> This is of little surprise as labour migration is generally the dominant form of transnational migration in the region.<sup>16</sup> In South East Asia, children work in the agricultural, fishing and seafood industries, and as forced and bonded labourers in textiles and manufacturing.<sup>17</sup> They are also often employed as domestic workers, which is considered 'safe and non-stigmatizing'.<sup>18</sup>

---

<sup>9</sup> Joudo-Larsen, above n 5, 3.

<sup>10</sup> Ibid.

<sup>11</sup> UNICEF, above n 2, 63.

<sup>12</sup> Y Rafferty, 'Child Trafficking and Commercial Sexual Exploitation: A Review of Promising Prevention Policies and Programs' (2013) 83(4) *American Journal of Orthopsychiatry* 559, 560.

<sup>13</sup> ASEAN Services Employees Trade Unions Council, *Labour Laws and Practices in ASEAN* (2013, Volume II) 111 ('Labour Laws and Practices in ASEAN').

<sup>14</sup> International Labour Organisation, 'Marking progress against child labour' (2013) *Global estimates and trends 2000-2012*, 17.

<sup>15</sup> Beazley, above n 4, 296-297.

<sup>16</sup> G Hugo, 'International Labour Migration and Migration Policies in Southeast Asia' (2012) 40(4) *Asian Journal of Social Science* 392, 392.

<sup>17</sup> United States Department of Labour Bureau of International Labour Affairs, *2014 Findings on the Worst Forms of Child Labor* (Bureau of International Labour Affairs, 2015) xxviii.

<sup>18</sup> A Matsuno and J Blagbrough, *Child domestic labour in South East and East Asia: Emerging good practices to combat it* (ILO, 2006) 2.

The demand for domestic workers has increased due to rapid urbanization and the rise of the middle class in urban areas.<sup>19</sup> This work is often not considered ‘labour’ and research has previously shown that both employers and members of the general public in countries such as Cambodia<sup>20</sup> and Indonesia<sup>21</sup> do not regard the employment of children as domestic workers as hazardous or exploitative.<sup>22</sup> However, children who are recruited as domestic workers either within a country, or cross-border, often find themselves in very abusive and exploitative domestic situations, or even commercial sexual exploitation.<sup>23</sup>

Children in South East Asia live with a unique set of pressures which make them vulnerable in the migration process. Of major concern is the prevalence of lack of birth registration resulting in children having limited access to health care, education, travel, employment or political representation and being largely excluded from obtaining both government benefits and protections.<sup>24</sup> This means that children are often on the move without official documentation. Other factors that lead to vulnerability and susceptibility to exploitation in migration include lack of education within a family, birth order, the influence of social networks and expectations regarding a child’s education.<sup>25</sup> Children in South East Asia also often have a responsibility to generate income for their families that may lead them to seek labour opportunities within and across borders.<sup>26</sup>

Economic issues, including indebtedness, are often a driver for parents choosing to send their children away to work, but it is also the rationale for many children choosing to migrate independently within the region.<sup>27</sup> The promise of better economic opportunities often encourages children to migrate from countries such as Indonesia or Cambodia. Both have low rates of development and are source countries for trafficking. Voluntary migration occurs to countries like Thailand, which is at an intermediate level of development and has a moderate rate of growth.<sup>28</sup> Higher wages in better-developed countries that are easily accessible make migration an attractive option. The prospect of remittances being sent back by the child further enhances the migratory decision.<sup>29</sup> Children are often recruited into these positions by relatives or introduced to work by an acquaintance.

---

<sup>19</sup> Ibid xii.

<sup>20</sup> Cambodian Ministry of Planning, *Survey Report: Child Domestic Worker Survey* (National Institute of Statistics, 2004) 8.

<sup>21</sup> J Blagbrough, *Child Domestic Work in Indonesia: A Preliminary Situation Analysis* (Anti-Slavery International, 1995) 20.

<sup>22</sup> Matsuno and Blagbrough, above n 18, 2.

<sup>23</sup> Ibid xii.

<sup>24</sup> Joudo-Larsen, above n 5, 2.

<sup>25</sup> A Blackburn, R Taylor and J E Davis, ‘Understanding the Complexities of Human Trafficking and Child Sexual Exploitation: The Case of Southeast Asia’ (2010) 20(1-2) *Women & Criminal Justice* 105, 107.

<sup>26</sup> E Goździak, E, ‘On Challenges, Dilemmas, and Opportunities in Studying Trafficked Children’ (2008) 81(4) *Anthropological Quarterly* 903, 919.

<sup>27</sup> Blackburn, Taylor and Davis, above n 25, 108.

<sup>28</sup> UNICEF, above n 2, 32.

<sup>29</sup> Goździak, above n 26, 919.

The problem is that child traffickers use the same methods across the region. Children are ‘deceived by an acquaintance or relative, taken by use of force, abduction or kidnapping or taken with the consent of parents or guardians, which has been secured through a payment or benefit to the adult’.<sup>30</sup> The purpose of this trafficking is overwhelmingly exploitative labour, however also includes trafficking for sexual exploitation, illegal adoption and begging.<sup>31</sup>

The complexity of the irregular and mixed migration flows within the region makes it difficult to formulate effective legislative responses at domestic and regional levels to ensure that children are protected.

## 2. LEGAL FRAMEWORKS FOR CHILD MIGRATION AND TRAFFICKING IN SOUTH EAST ASIA

Turning to examine the legal frameworks relevant to child migration and trafficking in South East Asia, the initial focus is on the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP). I then examine individual responses to child trafficking of Singapore, Cambodia and Thailand, as the first three signatories to the ACTIP.

### 2.1. ASEAN’s Response

South East Asia has long struggled with the issue of human trafficking and migration. Although reliable data is scarce, it is estimated that around one third of the global trafficking in women and children occurs within or from South-East Asia.<sup>32</sup> Despite a regional mandate, ASEAN countries have long valued sovereignty and national autonomy over cross-border cooperation and external intervention. In turn, this has had significant impact on individual nations’ and the region’s ability to respond to transnational trafficking. Despite this, ASEAN has attempted to legally respond to the issue through counter-human trafficking strategies in a variety of ways.

In 2004, the heads of ASEAN declared that they would make concerted efforts to address the regional issue of human trafficking through a declaration to reaffirm the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000* (UN Trafficking Protocol). The declaration outlined commitments to share information, to improve the protection of identity documents, to criminalise actions by perpetrators, and to protect victims.<sup>33</sup> However, these

---

<sup>30</sup> UNICEF, above n 2, 28.

<sup>31</sup> Ibid 32.

<sup>32</sup> Seventh East Asia and Pacific Ministerial Consultation on Children 23-25th March 2005, ‘Key Regional Facts on Child Protection’, cited in UNICEF, *A Region Where Every Child Counts: Child Protection* (UNICEF EAPRO, 2005) 1.

<sup>33</sup> Joudo-Larsen, Lindley and Putt, above n 1, 14.

commitments only required states parties to take action ‘to the extent permitted by their respective domestic laws’. Due to the limited implementation they were largely ineffective.<sup>34</sup>

In recognition that the trafficking of children was most serious in the Greater Mekong Sub-region, the governments of Lao PDR, Myanmar, Thailand, Viet Nam and China signed the first Regional Memorandum of Understanding (MoU) on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region in 2004. This MoU addressed prevention, repatriation, reintegration, child sensitive investigation techniques, and the extradition and prosecution of traffickers and solicitors of trafficked children.<sup>35</sup> Since then, the counter-trafficking mechanisms have included structural responses such as the Roadmap for an ASEAN Community, agreements listing trafficking as a transnational crime, and the designation of two human rights bodies to the issue.<sup>36</sup> However, these measures have also largely been considered ineffective due to failures in implementation and cooperation.<sup>37</sup>

One of the issues with addressing human trafficking in the ASEAN region has been the traditional separation of labour migration and human trafficking at law, when in reality they are closely intertwined. Of most promise in this respect was the establishment of the three-pillar community that aimed to promote and protect people’s rights including protection from human trafficking by 2015. However, the completely separate treatment of protection from human trafficking and labour migration meant that the opportunity was missed.<sup>38</sup> In 2016, this issue was partially solved when children in South East Asia became specifically protected by the ASEAN Regional Plan of Action on Elimination of Violence against Children which recognises child migrants and child labourers separately. The Regional Plan advocates for a child rights based approach with respect to policies of member states, and requires them to safeguard a child’s best interests in accordance with the provisions in the *Convention of the Rights of the Child*. However, with the focus on child migrants and labourers, the impact on child trafficking victims has been negligible.

The most promising protection introduced against child trafficking in the region is the recently introduced ASEAN *Convention and Plan of Action Against Trafficking in Persons Especially in Women and Children* (ACTIP). The ACTIP was introduced on 15 November 2015 and requires six signatories to come into force. It represents a united effort by ASEAN to face the increasing issue of human trafficking and to enable the region as a whole to implement a series of measures designed to be far more powerful than the 2004 Declaration. In contrast to the 2004 Declaration, which was non-binding and unenforceable, the ACTIP is legally binding. It aims to

---

<sup>34</sup> Petcharamesree, above n 7, 182.

<sup>35</sup> UNICEF, *ASEAN Situation Review of Children: A report by UNICEF to the Association of Southeast Asian Nations* (2007) 24.

<sup>36</sup> N Kranrattanasuit, *ASEAN and Human Trafficking: Case Studies of Cambodia, Thailand and Vietnam* (Brill Nijhoff, 2014) 52.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

provide ASEAN members with the ability to facilitate cross-border co-operation on anti-trafficking, to strengthen the rule of law and border control, and to place a greater emphasis on prosecution.

The ACTIP was slow to gain momentum and only came into force in early 2017 with six signatory states: Cambodia, Singapore, Thailand, Viet Nam, Myanmar and the Phillipines. Since then, Lao PDR and Malaysia have also ratified it. Indonesia has also indicated that it will ratify, however has not yet done so. Given that Singapore only ratified the UN Trafficking Protocol in November 2015, its early signatory status to the ACTIP appeared to signal a promising turning point in the seriousness with which combatting trafficking is regarded in the region. Indeed, the introduction of ACTIP signalled that there was strong political will for the region to work together on the issue of trafficking. However, even with this promising beginning, ACTIP has since faltered. The hesitancy to ratify appears to lie in the extensive legal obligations that states will be required to assume.

While the hope is that ACTIP will successfully enable states across the region to cooperate on transnational trafficking, the issue of internal domestic trafficking still remains for each state to address independently. To this end, I turn to examining three of the ASEAN states that are representative of the region: Cambodia which experiences a high level of domestic trafficking; Singapore which is typically a transit or destination state for transnational trafficking, and Thailand which experiences both internal trafficking and is both a source and destination state for child trafficking within the region. I examine how each of these states has responded domestically to child trafficking and how the regional operation of ACTIP may assist their efforts.

## 2.2.Cambodia

Cambodia has long struggled with internal domestic trafficking and trafficking within the Greater Mekong subregion. In 1996, Cambodia adopted the *Law on Suppression of the Kidnapping, Trafficking, and Exploitation of Human Beings*, and in doing so was one of the first countries in the region to adopt anti-trafficking legislation. However, while the law prohibited the kidnapping of persons for trafficking, sale or prostitution, it failed to define what was meant by ‘trafficking’. This caused immense issues with implementation and prosecution under the law.<sup>39</sup>

Despite their early adoption of anti-trafficking measures, Cambodia remains at Tier 2 on the United States (US) Department of State *Trafficking in Persons Report*.<sup>40</sup> This means that they are assessed by the US State Department as a country whose government does not fully meet anti-trafficking minimum standards, but are making significant efforts to meet those standards. The 2016 Report particularly notes that children from impoverished families are often forced into labour such as domestic servitude or street vending in Thailand and Vietnam, often with complicit approval

---

<sup>39</sup> International Organization for Migration, *ASEAN and Trafficking in Persons: Using Data as a Tool to Combat Trafficking in Persons* (2007) 32.

<sup>40</sup> The annual Trafficking in Persons Report is considered a comprehensive resource of anti-human trafficking efforts internationally and the de facto treaty monitoring body of the international Trafficking Protocol. Countries are assessed against the requirements of the *Trafficking Victims Protection Act 2000* (USA). Countries that are the most compliant are listed as Tier 1; with the least compliant listed as Tier 3.

from their parents.<sup>41</sup> Cambodia has made significant inroads into the prevention of children being trafficked to work in commercial sex establishments with children making up 2.2% of the total population working in this industry in 2016, a significant improvement from 8.2% in 2013.<sup>42</sup>

Another major issue for Cambodia has been the prevalence of children being trafficked into residential care centres, or orphanages.<sup>43</sup> In 2016 there were 11,788 children residing in these facilities.<sup>44</sup> It was estimated that 80% of them had family that they could be residing with if the family was supported.<sup>45</sup> Despite the number of true orphans decreasing, the number of residential care facilities doubled in the five years before 2016. This reflects an increase in foreign-run orphanages and the growing popularity of orphanage volunteering in the country.<sup>46</sup> These factors have led to an increase of children being removed from their families under fraudulent conditions. They are effectively trafficked into orphanages for the purpose of profit garnered from international volunteers and donors.<sup>47</sup> Further, there is a technicality present in the domestic legislation that results in parents being able to sell their child to a trafficker for the purpose of inter-country adoption without it being legally regarded as trafficking.<sup>48</sup>

While Cambodia has not enjoyed particular success in implementing domestic legislation against child trafficking, as an early signatory to ACTIP, it has recognised the potential of the first regionally binding instrument addressing trafficking in ASEAN. For Cambodia, it is hoped that this regional solution will add strength to the previously poor outcomes for victims of trafficking.

### 2.3. Singapore

Singapore has taken a firm stance on trafficking both domestically and regionally with the establishment of the Inter-Agency Taskforce on Trafficking in Persons and the adoption of a National Plan of Action 2012-2015. The Inter-Agency Taskforce is a representative body of cross-governmental ministries and agencies, including the Singapore Police Force, established in 2010 to combat human trafficking in Singapore. It has worked strategically through establishing legal frameworks at all levels under the '4P' framework of Prevention, Prosecution, Protection and Partnership. This culminated in the introduction of the *Prevention of Human Trafficking Act* in March 2015 at the domestic level; acceding to the UN Trafficking Protocol in September 2015 at the international level; and the ratification of the ACTIP in January 2016 at the regional level.

---

<sup>41</sup> US Department of State, *Trafficking in Persons Report 2016* (2016) 119.

<sup>42</sup> Ibid.

<sup>43</sup> K E van Doore, 'Paper Orphans: Exploring Child Trafficking for the Purpose of Orphanages' (2016) 24(2) *International Journal of Children's Rights* 378, 403.

<sup>44</sup> Ministry of Social Affairs, Veterans and Youth Rehabilitation, *Preliminary Data Compilation and Findings: Mapping of Residential Care Institutions* (2016) 7.

<sup>45</sup> UNICEF, *With the Best Intentions: A Study of Attitudes Towards Residential Care in Cambodia* (2011) 12.

<sup>46</sup> Ibid.

<sup>47</sup> van Doore, above n 43, 403; also see T Winkler and L Delacey, *How (not) to start an orphanage...by a woman who did* (Allen & Unwin, 2016).

<sup>48</sup> Kranrattanasuit, above n 36, 114.

Singapore is regarded widely as an economic powerhouse within the ASEAN region and is largely a destination country for labour trafficking and migration due to its strategic location.<sup>49</sup> Recruitment agencies are known to travel to villages to seek women and children to work in Singapore as domestic help. Where a worker is found to be underage, legal documents are created to falsify a child's real age and thus facilitate labour trafficking. The US Department of State Trafficking in Persons Report 2016 also noted that child sex trafficking of both foreign and Singaporean children is an issue for Singapore.<sup>50</sup> In this respect, girls were ostensibly covered under Article 141 of the *Women's Charter* which prohibits their movement for trafficking. However, the Charter failed to define the meaning of 'trafficking' and boys were not included at all.<sup>51</sup>

This has been corrected with the introduction of the *Prevention of Human Trafficking Act 2015* which is gender neutral. However, despite investigating over 50 cases of sex trafficking since the introduction of the Act, Singapore has been successful in securing only one prosecution in relation to child sex trafficking.<sup>52</sup> Children are also afforded special protection under the *Prevention of Human Trafficking Act 2015*. Under this Act, a first-time offender convicted of child trafficking attracts an aggravated sentence including the potential of up to ten years' imprisonment, a maximum fine of \$100,000, and up to six strokes of the cane. Repeat offenders have harsher penalties with the potential of fifteen years' imprisonment, a fine of up to \$150,000 and a mandatory nine strokes of the cane. Child victims must be given shelter as well as access to translation, legal assistance and counselling.<sup>53</sup>

For Singapore, the ACTIP plays a critical role in the government's anti-trafficking mission. Whilst the *Prevention of Human Trafficking Act 2015* is transnational in operation, the ACTIP will provide the legally binding mandate necessary for other countries in the region to co-operate with Singapore's efforts towards enforcement.

## 2.4. Thailand

Thailand is recognised as both a source and destination country for significant levels of child migration and trafficking.<sup>54</sup> In 2016 the US Department of State found that children from 'Thailand, Burma, Laos, and Cambodia are victims of sex trafficking in brothels, massage parlours, bars, karaoke lounges, hotel rooms, and private residences' within Thailand and that children were often being recruited using social media.<sup>55</sup> Thailand has the highest number of refugees and asylum seekers in the ASEAN region, however very few are recognised as such and afforded protection.<sup>56</sup>

---

<sup>49</sup> N Piper, 'A Problem by a Different Name? A Review of Research on Trafficking on South East Asia and Oceania' (2005) 43(1-2) *International Migration* 203, 204.

<sup>50</sup> United States Department of State, above n 41, 334.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> R M Pink, 'Child Trafficking in Thailand: Prevention and Prosecution Challenges' (2013) 40(4) *Asian Affairs: An American Review* 163, 163.

<sup>55</sup> US Department of State, above n 41, 364.

<sup>56</sup> Petcharamesree, above n 7, 176.

Child trafficking in Thailand has come under heavy scrutiny due to slow implementation and weak enforcement of its domestic laws, namely the *Prevention and Suppression of Human Trafficking Act* (B.E. 2551) 2008. Many factors were to blame for this, including a low skilled and lowly remunerated police force that struggled with corruption, subsequently weakening the enforcement system.<sup>57</sup> There is also a concentration on prosecuting the victims of child trafficking under solicitation and begging laws, rather than a focus on securing prosecutions of traffickers, brothel and factory owners.

Although the Thai government is a signatory to the *Convention on the Rights of the Child*, they have not instituted any effective enforcement regime that will begin to ameliorate the child trafficking situation.<sup>58</sup> As a result, Thailand was ranked at the lowest Tier 3 in the US Department of State Trafficking in Persons Report in 2014 and 2015. However the ratification of the UN Trafficking Protocol in 2013 and the introduction of the *Anti-Human Trafficking Amendment No.2* in 2015 saw the promise of stronger penalties for trafficking, enhanced protection for victims and a reduction in the threat of whistle blowers being intimidated.<sup>59</sup> In a promising move, Thailand was also one of the few early signatories to the ACTIP, lodging their ratification approximately seven months after its introduction. For child trafficking victims in Thailand, ACTIP will reinforce the national legislative amendments and provide further regional support to Thailand's national efforts.

### **3. STRIKING A BALANCE: THE BEST INTERESTS OF THE CHILD**

Thus far, I have examined the reasons that children are on the move through South East Asia and the legal frameworks that seek to protect them at domestic and regional levels. I now turn to explore how child migration can become child trafficking at law and the ramifications for children of this characterization. Regardless of whether force, threats, or coercion are involved, moving or receiving child labour migrants for the purpose of exploitation is trafficking.<sup>60</sup> Huijsmans notes that most child labour migrants will experience some degree of exploitation and that this has the effect of systemically conflating child labour migration with child trafficking.<sup>61</sup> O'Connell identifies that most of the research focuses on the vulnerabilities that make children susceptible to trafficking, however these factors are identical to the drivers for child migration. This crystallises the issues when attempting to differentiate between child migrants for labour and trafficked children.<sup>62</sup>

The economic disparities that drive irregular migration between ASEAN countries are also drivers of trafficking. Although irregular, the majority of this migration by children begins as voluntary. However, when exploitation occurs, the legal characterisation shifts from irregular child

---

<sup>57</sup> Pink, above n 54, 168.

<sup>58</sup> Ibid 168.

<sup>59</sup> United States Department of State, above n 41, 376.

<sup>60</sup> Joudo-Larsen, above n 5, 3.

<sup>61</sup> R Huijsmans and S Baker, 'Child Trafficking: 'Worst Form' of Child Labour, or Worst Approach to Young Migrants? Trafficked Children or Young Migrants?' (2012) 43(4) *Development and Change* 919, 923.

<sup>62</sup> J O'Connell Davidson and C Farrow, *Child Migration and the Construction of Vulnerability* (Save the Children, 2007) 35.

migration to child trafficking.<sup>63</sup> The differentiation becomes difficult when considering the ‘extremely blurred line between disadvantaged children’s labour migration as a strategy for improving difficult life conditions, and “child trafficking”’.<sup>64</sup> The conflation of child labour migration and child trafficking results in criminal justice responses within the region, and anti-trafficking measures that limit migration between countries, which in turn heighten children’s vulnerability to exploitation.<sup>65</sup>

The ACTIP facilitates this conflation through rendering ‘children’s consent to any form of facilitated migration leading to exploitation irrelevant in qualifying as a case of human trafficking’.<sup>66</sup> However, whether children possess sufficient agency to consent to voluntary migration for labour is a question that finds contradictory answers. At law, the assumption is that children do not possess agency and are thus vulnerable to exploitation.<sup>67</sup> The balance between the measure of a child’s agency to engage in voluntary migration and the potential of such a decision to result in human trafficking and child exploitation is difficult to conceptualise in a legal framework. For this reason, we turn to the best interests of the child found in the *Convention on the Rights of the Child* in order to establish how best to approach the protection of the migrant and trafficking child.

### **The best interests of the migrant or trafficked child in South East Asia?**

Unlike most other international agreements, all ASEAN members are signatories to the *Convention on the Rights of the Child* (CRC).<sup>68</sup> Article 3 of the CRC outlines that ‘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>69</sup> This is reflected in Guideline 8 of the UN Trafficking Principles and Guidelines which states that ‘the best interests of the child must be a primary consideration in all actions concerning trafficking children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies.’<sup>70</sup>

As previously stated, the migratory flows throughout South East Asia suggest that many children undertake the migration process to access better opportunities than they can in their home countries. However, incorporation of the best interests of the child is hardly evident in the anti-trafficking policies that actively discourage child migration for labour. This often results in a policing of the migrant child rather than protection. A balance must be struck between determining

---

<sup>63</sup> Joudo-Larsen, above n 5, 3.

<sup>64</sup> O’Connell Davidson and Farrow, above n 62, 10.

<sup>65</sup> Ibid 10.

<sup>66</sup> Huijsmans and Baker, above n 61, 923.

<sup>67</sup> A Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010), 323.

<sup>68</sup> ASEAN Services Employees Trade Unions Council, above n 13, 115.

<sup>69</sup> *Convention on the Rights of the Child*, adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘CRC’).

<sup>70</sup> United Nations High Commissioner for Human Rights, (2002) *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add.1), 348-349.

when a child has migrated to access these opportunities versus those that end up in exploitative situations. In both situations, children must be protected and their best interests upheld.

Where children migrate for labour, research suggests that a shift from imposing limitations through immigration policies and the resulting policing responses towards a ‘more evidence-driven, rights-based approach’ to all labour migration would create a model of governance in South East Asia.<sup>71</sup> In this vein, O’Connell argues for policy frameworks that recognise that migration is ‘not inherently bad for children’ and have a clear focus ‘on the role of government preventing, allowing or creating migratory conditions under which children are vulnerable to abuse or exploitation, while at the same time fully acknowledging children’s capacity (including disadvantaged children’s) for migratory agency’.<sup>72</sup>

It may be that South East Asia through ASEAN is in a unique position to enable policies with this focus. ASEAN has already established the Children’s Forum to ‘serve as the regional voice for children in ASEAN and a channel where children can express their views on urgent regional issues and how these can be resolved by governments with children and young people’s participation’.<sup>73</sup> This initiative exemplifies a willingness to engage with, and recognise children’s agency on policy issues, however whether that engagement extends to firm legislative outcomes is yet to be seen.

Of course, this discussion of agency does not translate to protection of the trafficked child, whose agency has been removed. Achieving a child rights-based approach protecting the agency of child migrants while at the same time offering protection to the trafficked child from exploitation is a very difficult task indeed. In this respect, child migration exists on a spectrum with a child capable of exerting agency and voluntarily migrating at one end, and a child whose rights and agency has been exploited and is trafficked at the other end. At any point in time, a child who believes they are migrating independently may slip into the legal category of trafficked when they find themselves in engaged in exploitative labour or sexual exploitation at their destination.

With this in mind, a framework for creating policies with a child rights based approach should:

- Defend the rights of all children throughout the migratory process, whether they are exploited or at risk of exploitation, and despite how, and by whom, the migration was organised.
- Promote rights protection through the CRC in both of origin and destination countries especially in relation to the rights that children are attempting to access in making the migratory decision.

---

<sup>71</sup> G Hugo, ‘International Labour Migration and Migration Policies in Southeast Asia’ (2012) 40(4) *Asian Journal of Social Science* 392.

<sup>72</sup> O’Connell Davidson and Farrow, above n 62, 56.

<sup>73</sup> ASEAN Services Employees Trade Unions Council, *Labour Laws and Practices in ASEAN* (Volume II, 2013) 114.

- Build capacity and expertise in advocating and enshrining children's rights in the migration policy-making processes at regional and national levels.<sup>74</sup>

Building upon the impetus of ACTIP, an ASEAN regional agreement on child migration encapsulating a child rights based approach would be consistent with the evidence base which calls for a recognition of children's voices and opinions in child migration matters. The incorporation of the best interests of the child principle into a legally binding regional agreement on child migration would be consistent with ASEAN's renewed focus on regional co-operation in relation to trafficking. It would further embed the rights of the child into the forefront of the region's legal framework and serve as a protection mechanism for the ever expanding number of children engaging in the migration process, whether forcibly or voluntarily.

#### 4. CONCLUSION

In conclusion, child migration and trafficking in South East Asia poses a series of complex policy issues for ASEAN and the countries in the region. The increasing movement of children through the region, particularly to access perceived better opportunities or to escape atrocities in their home countries, shows no sign of subsiding. The region needs to therefore meet the challenge of responding in a way that places the best interests of the child at the forefront.

While the region has attempted to deal with the issue of trafficking many times in the last decade, the most promising tool introduced in this fight is the ACTIP. However, until it is formally enacted through the ratification of at least six member nations, countries in the region are left to their domestic legislation. Cambodia, Singapore and Thailand are countries with differing legislative approaches to the complex issue of child trafficking both domestically and intra-regionally. Of key importance for all three countries is that the ACTIP is enacted to provide further support to the domestic efforts that are increasingly being undertaken.

This chapter has argued that South East Asia is in a unique position to adopt a child rights-based approach to child trafficking and migration policy regionally with the best interests of the child as the paramount consideration. As all member states of ASEAN are signatories to the CRC, as opposed to other international and regional conventions, the best interests of the child paradigm should already be at the forefront of domestic policy and legislation. As there are many areas of policy and law where child rights have not been placed as the primary consideration, South East Asia has the potential to lead the way in embracing a child rights based approach with respect to child migration and trafficking throughout the region.

---

<sup>74</sup> O'Connell Davidson and Farrow, above n 62, 56.