

Paper 2: Regional management of migrants at risk

Section 1: Global Compacts and the opportunities they provide for enhancing coordinated regional management of migrants at risk

The 2016 Bali Declaration, the New York Declaration of September 2016, the June 2018 Global Compact on Refugees (GCR) to be put before the UN General Assembly, the final text of the Global Compact on Migration (GCM) agreed in July 2018, and the December 2018 Intergovernmental Conference in Marrakech to adopt the GCM are historic political commitments. The Global Compacts provide the framework and open avenues for enhanced regional cooperation, including between the Bali Process, ASEAN, IOM, UNHCR and track two processes like the ADFM.

This paper suggests the Global Compacts are an ideal springboard for a strategic partnership between the Bali Process and ASEAN to pursue certain GCM objectives in the region, particularly those that are relevant to migrants at risk. These are objectives on which important Bali Process and ASEAN efforts are correlated but not connected, and where enhanced coordinated regional management would be beneficial. The relevant GCM objectives include:

- Objective 7: Address and reduce vulnerabilities in migration
- Objective 8: Save lives and establish coordinated international efforts on missing migrants
- Objective 9: Strengthen the transnational response to smuggling of migrants
- Objective 10: Prevent, combat and eradicate trafficking in persons in the context of international migration
- Objective 11: Manage borders in an integrated, secure and coordinated manner
- Objective 12: Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral
- Objective 13: Use immigration detention only as a measure of last resort and work towards alternatives
- Objective 21: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration
- Objective 23: Strengthen international cooperation and global partnerships for safe, orderly and regular migration

These objectives are associated with reforms and advice the ADFM has already devoted attention to:

- The 2016 Bali Declaration and Review of the Region's Response to the Andaman Sea Situation
- Development of the Bali Process Consultation Mechanism to respond to emergency irregular migration and a Task Force on Planning and Preparedness to support the Consultation Mechanism
- Ongoing policy advice to the Bali Process member countries on coordinated responses to mass displacement
- Recommendations to the ASEAN Ministers' Meeting on Transnational Crime (AMMTC) on the development of an implementation mechanism for the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) and collaboration between ASEAN and the Bali Process senior officials on these issues

There are important links between the GCM and the GCR. In essence, both compacts aim to strengthen responsibility-sharing in the region, and to support conditions for return and repatriation. Objectives 10 to 13 of the GCM, in particular, complement the GCR even further as people smuggling and trafficking are not a prime feature of the Comprehensive Refugee Response Framework (CRRF). Moving forward, components of an enhanced coordinated regional response to migrants at risk should also focus on the areas identified in the GCR as being in need of support, from reception and admission, to meeting needs and supporting communities, to solutions. These include:

- Immediate reception arrangements
- Regularisation of status and documentation
- Identifying international protection needs

- Entitlement to work
- Education for children
- Health services and food security
- Women and children
- Preparation and development of durable pathways such as voluntary repatriation, resettlement and admission into third countries
- Local host community development and integration

In addition to these substantive issues, the GCM and GCR offer guidance about modalities for enhanced regional coordination. For example, GCM implementation envisages:

- Involvement of a broad range of stakeholders
- Member States as the main implementers of the Compact's objectives, supported by regional/sub-regional centres for research, information dissemination, analysis and capacity building
- International cooperation as necessary for effective national responses
- Building on existing mechanisms, platforms and frameworks to address migration in all its dimensions.

Given that the Bali Process already has a framework for regional cooperation, facilitating the GCM's implementation in the Asia-Pacific would further contribute towards guidelines for responding to migrants in vulnerable situations. Similarly, for ASEAN, the GCM can be used to support ACTIP and, in so doing, enable ASEAN members to further the GCM's objectives. Here, there is a common cause that could form the basis for enhanced regional coordination.

Section 2: Critical situations in the Asia-Pacific requiring coordinated regional response

The objectives set by the GCM and GCR provide a roadmap for existing regional institutions to reach their potential in jointly addressing regional cross-boundary challenges alongside affected states. If the Compacts provide the springboard and roadmap, then the Rohingya displacement crisis provides the stimulus to be creative and expeditious when advancing regional coordination. Preventing and combatting trafficking in persons continues to be an important and overlapping objective from which more effective and coordinated responses to migrants at risk can be built.

The ADFM has made recommendations relevant to this objective in the past:

- Following its third meeting, the ADFM recommended that ASEAN develop a mechanism which would enable the coordinated discussion, at ministerial level, of the full range of migration issues.
- After its fifth meeting, the ADFM recommended the commencement of formal cooperation between ASEAN and the Bali Process on responding to mass displacement. It recommended this in the context of a joint table-top exercise between the Bali Process Task Force on Planning and Preparedness and the ASEAN Coordinating Centre for Humanitarian Assistance, which could result in a forward work agenda for collaboration.
- The sixth ADFM meeting resulted in further recommendations about the closer involvement of ASEAN members who are also members of the Bali Process Ad Hoc Group in the Bali Process Consultation Mechanism.
- The sixth ADFM meeting also recommended the Bali Process Working Group Co-Chairs and ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) TIP Working Group Chair convene an Initial Consultation in the first half of 2018, to discuss shared interests, priority activities and further opportunities for collaboration. This Initial Consultation was held in May 2018.

- The ADFM identified future opportunities for collaboration, specifically in relation to preventing and combatting trafficking in persons, which include:
 - supporting ASEAN Member States to implement ACTIP;
 - collaborating on joint periods of action to identify and prevent exploitation; and
 - building greater awareness across government and business in the region about the nature of forced labour, trafficking and slavery and effective legal and regulatory responses.

There are a number of critical situations in the region that would benefit from a coordinated response. These include the Rohingya on the Bangladesh-Myanmar border; refugees from northern Myanmar states; refugees and asylum seekers (both registered and unregistered) in Malaysia, Thailand and Indonesia; the stateless in Sabah, Malaysia, and southern Philippines; as well as ongoing people smuggling and trafficking (particularly women and children) in the region. These critical situations generate a number of implications for the region:

- First and foremost, the displacement of the Rohingya, with the latest IOM Situation Report (dated 19-25 October 2018) stating that there are 710,000 new arrivals since 25 August 2017, a total population of 923,000 Rohingya and 1.3 million people in need in Cox's Bazar. The ADFM's assessment of the risk of human trafficking, migrant smuggling and related exploitation arising from the situation in Cox's Bazar (see Paper 1 of these briefing papers) sets out the risk scenarios for the region over the next 6-24 months.
- With regards to refugees from the northern Myanmar states, the key question is: What happens to them when they no longer have refugee status? For instance, UNHCR Malaysia has stated that the Chin population will no longer be considered refugees on 1 January 2020 given a long period of peace and stability in northern Myanmar, and the fact that the peace process is underway. However, the ending of refugee protection for such groups mean that their options are limited – will they resettle elsewhere, will they remain as undocumented migrants or will they return to Myanmar? It is also not certain if the peace process will remain intact and if conflict in these areas will resume in the future.
- Malaysia, Thailand and Indonesia all continue to host a number of refugees. They are not signatories of the 1951 Refugee Convention or the 1967 Protocol but do have responsibilities over refugees, as evidenced, for example, by the 2016 Indonesian Presidential Decree on the subject. These countries will require support in responding to migrants at risk into the foreseeable future. According to UNHCR estimates:
 - 161,140 refugees and asylum-seekers are registered in Malaysia and the number of those unregistered is unknown;
 - 99,000 refugees from Myanmar are in the nine government-run Temporary Shelters on the Thailand-Myanmar border, in addition to 7,000 urban refugees and asylum seekers from over 45 countries and 490,000 persons registered by the Thai Government as stateless; and
 - 13,800 refugees are registered in Indonesia, of which 25 per cent are children.
- Estimates of stateless persons from the Philippines now in Sabah, Malaysia, range from 200,000 to 1.2 million. Despite ongoing risks in Mindanao, there has been progress with the establishment of a Bangsamoro Government and next steps that include re-building communities with the support of the national Government and a special development plan to rehabilitate Muslim-majority areas. Therefore, there is the possibility that some Philippines nationals would be interested in returning. This indicates a need to establish a voluntary return program between Sabah and the Philippines, encompassing registration and travel documents, screening, preparation, travel arrangements, reception and re-integration.
- Finally, there is steady momentum on the implementation of ACTIP. All but one ASEAN Member State (Brunei Darussalam) has ratified ACTIP. The ASEAN Intergovernmental Commission on Human Rights (AICHR) has just

announced a pilot project to curb human trafficking in East Nusa Tenggara, Indonesia. Discussions are ongoing with the Provincial Government on a range of issues such as skills training for migrants and legal education for police and anti-human trafficking campaigners. Nevertheless, there remains much room for improvement across ASEAN. The 2018 Trafficking in Persons (TIP) Report highlights that several ASEAN countries still do not meet the minimum standards for the elimination of trafficking. Malaysia has been downgraded to the Tier 2 Watch List, whereas Thailand was upgraded from Tier 2 Watch List to Tier 2. Indonesia, Cambodia and Singapore remain on Tier 2, while Myanmar is on Tier 3.

Section 3: Bali Process, ASEAN and responding to migrants at risk

Motivated in part by these critical situations, the Bali Process and ASEAN have undertaken a number of important reforms and initiatives in response to migrants at risk over the past decade, particularly with respect to sudden displacement and human trafficking. As noted earlier, these efforts have been correlated but have been not necessarily connected or coordinated. Highlights include:

Bali Process

- The Bali Process has used its broad membership (49 members including 45 states, UNHCR, IOM, UNODC and ILO, as well as 18 observer countries and organisations) to encourage coordinated responses to regional displacement challenges, particularly information sharing and capacity building to address these challenges. We have seen this most recently in the role the Bali Process has played in the region's response to the displacement in Myanmar and Bangladesh. The role was expressed more broadly in the 2016 Bali Declaration.
- At its 2009 Regional Ministerial Conference, the Bali Process 'activated' the Ad Hoc Group. The Ad Hoc Group brings together 16 most-affected countries (including six ASEAN Member States) and international organisations in order to address specific challenges in the region concerning people smuggling, trafficking in persons and irregular migration issues. The Ad Hoc Group focuses on implementing and operationalising the Regional Cooperation Framework (RCF), which was adopted at the Bali Process's Fourth Regional Ministerial Conference in March 2011. Implementation of the RCF is overseen by the Regional Support Office (RSO) in Bangkok. The RSO was created to facilitate information sharing, support capacity-building and offer logistical and administrative support for projects.
- The Ad Hoc Group convenes two different working groups: one on Trafficking in Persons (TIP Working Group) and another on Disruption of People Smuggling and Trafficking in Persons Criminal Networks (Disruption Working Group), which both bring together a small number of affected member countries. The TIP Working Group focuses on law and justice responses to combatting TIP, while the Disruption Working Group focuses on concrete, coordinated activities to disrupt and dismantle criminal networks.
- The Ad Hoc Group also convened the Technical Experts Group on Returns and Reintegration in April 2018. The conversation focussed on commonalities, differences and lessons learned around return and reintegration and how to build cooperative approaches. The working group agreed to further develop a policy guide on returns and reintegration and to reconvene in the first quarter of 2019 to finalise and endorse the guide.
- The Bali Declaration was adopted at the Sixth Bali Process Ministerial Conference in March 2016 and reaffirmed at the Seventh Bali Process Ministerial Conference in August 2018. On both occasions, Bali Process members committed to the principles of burden sharing and collective responsibility, as well as addressing root causes of irregular movement. There was a shared commitment to preventing displaced persons from becoming victims of people smuggling and trafficking in persons, and supporting their voluntary, sustainable and dignified return.

- The Sixth Ministerial Conference also approved the Consultation Mechanism to give the Bali Process a critical role in emergency responses to displacement crises. A Task Force on Planning and Preparedness (TFPP) was subsequently created to support the Consultation Mechanism by bringing together operational level government officials responsible for managing large-scale cross-border movements of migrants and refugees.
- The Bali Process Co-Chairs activated the Consultation Mechanism in September 2017 in response to the crisis in Myanmar and Bangladesh. On 13 October 2017 the first discussion was held under the new Consultation Mechanism in Jakarta, attended by the Steering Group, Myanmar and Bangladesh, in an effort to strengthen cooperation in response to the crisis. The ADFM reviewed the success of this action at its sixth meeting in March 2018 in Sydney.
- The Bali Process Strategy for Cooperation emphasises linking with other regional and multilateral fora to improve coordination of activities, and share relevant resources, expertise and lessons learned.
- The RSO Work Plan also emphasises cooperation, including with regional bodies (see number 6 below):
 1. Increasing cooperation and strengthening capability of Member States in countering people smuggling, trafficking in persons and related transnational crime, including current and emerging issues
 2. Encourage unified regional action on refugee protection and international migration, including human trafficking, smuggling and border management, through information sharing including the exchange of best practice and matching expertise between Bali Process Member States
 3. Enhance regional states' capacity to cooperate on returns
 4. Enhance the region's capacity to collaborate on large-scale irregular movements at sea
 5. Bolster Member States' capacity to transfer personal information securely
 6. Build and strengthen partnerships with existing regional organisations such as ASEAN, COMMIT and SAARC to ensure better alignment and minimise duplication of effort
 7. Build Member States' confidence in the RSO's usefulness as a regional coordination point on irregular migration issues by providing logistical, administrative, coordination and operational support to the Bali Process working groups and encourage greater understanding and awareness among Bali Process Member States to access RSO services
- The RSO has committed to giving special attention to ensuring its activities are complementary to those undertaken by the TIP and Disruption Working Groups.

ASEAN

- ASEAN has acted on several migration issues without a coordinated agenda on the subject. Its focus has largely been migrant workers, the internal free movement of labour and combatting trafficking in persons.
- ASEAN has been particularly successful on addressing trafficking in persons, with ACTIP's adoption and subsequent entry into force in 2017, followed by the finalisation of the Bohol Work Plan to assist with ACTIP's implementation. This provides a unique opportunity for the region, especially given the overlap between the respective ASEAN and Bali Process mandates on human trafficking.
- ASEAN's human rights mechanisms (AICHR, ACWC and ACMW) and the activities of the Ministers' and Senior Officials' Meetings on Transnational Crimes (AMMTC/SOMTC) are new avenues to advance protection of migrants at risk, especially children and women.

- The ASEAN Coordinating Centre for Humanitarian Assistance (AHA Centre) provides a common framework for disaster management and emergency response in the ASEAN region. Although focussed on natural disasters, the AHA Centre has twice deployed relief materials to displaced communities in Rakhine State, Myanmar.
- Historically, ASEAN has used its own mechanisms for dealing with challenges faced by the organization and its members. For instance, the “constructive engagement” method, initially proposed by Thailand in 1991, was adopted by ASEAN to foster democratisation and human rights development in Myanmar. This method has characterised ASEAN’s interaction in bilateral and multilateral relations with ASEAN States to discuss domestic matters, including with Myanmar in relation to the Rohingya. In respect of the current Rohingya crisis, however, ASEAN’s response has been limited. This is despite the crisis becoming transnational in nature and ASEAN members being among the most affected given the nature of onward movements and associated risks to migrants, countries and communities.

Section 4: The need for an integrated regional strategy on managing migrants at risk

Neither the Bali Process nor ASEAN can alone ensure the objectives of the GCM and GCR are realised in the region. At the same time, the work of both institutions is a necessary condition for better regional responses to migrants at risk. Both institutions are uniquely positioned to support the achievement of key GCM and GCR objectives in a mutually reinforcing way. The more these efforts are coordinated, the greater their impact.

The objectives of the GCM and GCR provide an opportune platform for strategic partnership and collaboration between the Bali Process and ASEAN to address the shared regional challenges of responding to migrants at risk. The Rohingya displacement provides the impetus to move forward with creativity and resolve. In a sense, this is case of "joining up the dots" of work already commenced rather than reinventing the wheel.

Below are an initial set of ideas that could inform an integrated regional strategy, starting with aligning effort on overlapping objectives of the Bali Process and ASEAN, namely: preventing and combatting trafficking in persons; emergency response to mass displacement; and ensuring voluntary, safe and sustainable return and reintegration of displaced persons when conditions are conducive. The purpose of these recommendations is to prompt discussion on the right balance, tempo and points of interaction.

Recommendation 1. The Bali Process Co-Chairs could appoint a special rapporteur (or senior official) to be the formal point of contact with the ASEAN Chair on shared issues of concern with respect to migrants at risk.

Recommendation 2. The Regional Support Office for the Bali Process could, subject to available resources, work with relevant ASEAN bodies, such as the SOMTC, to dovetail support and focal points for overlapping plans of action.

Recommendation 3. The RSO could be invited to attend SOMTC-TIPWG Consultations, along with Bali Process Working Groups on TIP and Disruption of Criminal Networks, to assist in the implementation of the Bohol Work Plan for ACTIP.

Recommendation 4. The Bali Process Government and Business Forum and the ASEAN Responsible Business Forum could combine efforts on the issue of private sector involvement in countering and preventing trafficking in persons, forced labour and slavery, including by expanding employment opportunities for vulnerable populations.

Recommendation 5. The Bali Process Taskforce on Planning and Preparedness (TFPP) could focus in the medium-term on the largest displacement crises in the region, including the situation in Myanmar and Bangladesh. Thailand, as 2019 ASEAN Chair and a member of the Bali Process AD Hoc Group, could convene the TFPP throughout 2019 to ensure closer alignment between Bali Process and ASEAN responses to migrants at risk in those crises.

Recommendation 6. The Bali Process Co-Chairs could invite senior representatives from the current and incoming ASEAN Chair on the next ‘good offices’ visits to Myanmar and Bangladesh. This would allow for an update on the progress of the repatriation agreement and building capacity on safe, voluntary and sustainable repatriation.

Recommendation 7. Return and reintegration is one area where further collaboration between the Bali Process and ASEAN would benefit all concerned. A joint assessment of common challenges and the prospect of harmonising policies and processes for return and reintegration among members of the Bali Process and ASEAN could also be effective. Temporary work schemes, made possible by agreed travel documentation, should be compatible with eventual return and reintegration. The policy guide on returns and reintegration being developed by the Bali Process Technical Experts Group, once completed, could be converted into a practical framework for current displacement situations in the region.

Recommendation 8. ASEAN could update the mandate of the ASEAN Coordinating Centre for Humanitarian Assistance (AHA Centre) to include human-induced displacement emergencies.

Recommendation 9. All ASEAN member states could aim to become IOM members by 2020-2021, when the Philippines will Chair the IOM Council, in order to facilitate a coordinated approach within the UN migration agency. As of June 2018, only six ASEAN member states are members of IOM. As part of this, ASEAN could consult across its three pillars on a mechanism that would enable coordinated discussion, at ministerial level, of the full range of GCM objectives.

Recommendation 10. The ADFM could hold its eighth meeting in Jakarta in 2019 and invite the Permanent Representatives of ASEAN to attend for a special session on enhanced regional management of migrants at risk.

Paper 3: Developing community care and placement options for children in the context of international migration in the Asia Pacific Region

Section 1: Overview

Every year, thousands of children in the Asia-Pacific region are subject to immigration detention.¹⁶⁸ Such detention, even for short periods of time, can cause significant harm to a child’s physical, mental, and psychosocial well-being. With increasing awareness of the negative impact of detention on children, there has been growing momentum at the international, regional and national levels to end child immigration detention and implement community-based alternatives (“alternatives”, or “ATD”) that provide appropriate care, protection and support to children.

Although the immigration detention of children remains an issue in several countries represented at the ADFM, there have been a number of positive developments at the national level. Such developments provide important opportunities for the implementation and/or expansion of ATD programs that rely on more sustainable models of care (e.g. foster family, kinship or network placements and independent living arrangements versus long-term shelter placements); they also present as a significant opportunity to test and expand care and placement models for refugee, asylum seeking, migrant and stateless children and their families.

In the Asia-Pacific, there has been a noticeable lack of discussion or guidance at the regional level on the issue of child immigration detention and the need for alternatives. Guidance and capacity building from regional bodies such as the Bali Process or ASEAN could be important in encouraging and supporting governments to develop and strengthen national systems for the care and protection of children in the context of international migration. As such, recommendations are made in this paper for ways in which the ADFM and its members could encourage greater engagement at the regional, as well as national level.

Section 2: The Issue

Like adults, children who cross borders are subject to migration rules and regulations. However, in line with international human rights standards, particularly the Convention on the Rights of the Child to which all countries in the Asia-Pacific are party, the best interests of the child must always be a primary consideration, and special measures must be used to ensure that a child is properly cared for and protected while any migration matters are resolved. The detention of children for immigration-related purposes is widely considered to be contrary to the rights and best interests of the child.

Unfortunately, many countries have not introduced the appropriate standards to safeguard children during the application of migration rules and regulations, including rules which would safeguard children from being subjected to immigration related detention. As a result, millions of children globally are believed to be affected by immigration detention every year,¹⁶⁹ though exact figures are unavailable given that many governments do not keep or release disaggregated data about child immigration detention.

In practice, States detain children for a number of reasons, including for health and security screening, to verify identity, and to facilitate removal from the territory. Sometimes, children are detained because States do not have proper age

¹⁶⁸ Although complete data on the numbers of children in immigration detention in the region are not available, we know that in Indonesia, Malaysia and Thailand alone, more than 2,000 children were held in immigration detention facilities during the course of 2016. See page [5] for further details.

¹⁶⁹ For more details on how this figure was derived, please see <https://endchilddetention.org/from-fences-to-freedom/how-many-children-are-in-immigration-detention-right-now/>

determination procedures in place to effectively screen children out of detention. Children can be detained alongside family members or detained on their own when unaccompanied or separated from family members. Sometimes States choose to detain children together with their parents or guardians to preserve family unity, rather than releasing the entire family to a safe, child appropriate alternative.

Children are particularly vulnerable to abuse and neglect in immigration detention facilities, especially if unaccompanied or separated from their parents or guardians. Immigration detention has “undeniable immediate and long-term mental health impacts on asylum seeking children and families.”¹⁷⁰ The effects on children include heightened rates of suicide, suicide attempts and self-harm, mental disorder, and developmental problems, including severe attachment disorder. Symptoms include insomnia, nightmares, mutism and bed-wetting. Further, detention impacts on the independence and health of parents, affecting their ability to fulfil their parental duties.¹⁷¹ Due to the fact that children are still growing and developing, even very short periods of detention can compromise a child’s lifelong mental and physical well-being and affect them for extended periods after release.¹⁷² The fear of arrest and detention among irregular migrant populations in and of itself has many negative ramifications. This fear is known to deter children and families from reporting when they are victims of crime or abuse (such as trafficking, domestic violence or other crimes), as well as attending school and seeking basic healthcare or other forms of assistance.¹⁷³

Governments may also use immigration detention for broader political and social purposes, such as deterrence, to provide a sense of control over borders for citizens, and to respond to political pressure. The use of detention for these reasons is counterproductive: research shows that detention is, in addition to being harmful to health and well-being, not an effective deterrent and does not support resolution of an individual’s case, whether it be return, resettlement, local integration or some other durable solution.¹⁷⁴ The costs of establishing and running a detention center are also extremely high, in addition to costs related to the litigation of unlawful or arbitrary detention and litigation.¹⁷⁵

Section 3: The Move Away from Child Immigration Detention

Given the concerns associated with the use of immigration detention, particularly for children and their families, it is unsurprising that there has been a growing shift at the international, regional and national levels towards limiting and ending this practice.

At the **international** level, numerous UN bodies and experts have spoken out against the practice, including the following:

- The UN Committee on the Rights of the Child and the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families have “repeatedly affirmed that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden

¹⁷⁰ Dudley, M., et al. (2012) "Children and Young People in Immigration Detention." *Current Opinion in Psychiatry*, 25(4): 285-292.

¹⁷¹ Hamilton, C., K. Anderson, R. Barnes, and K. Dorling (2011) *Administrative Detention of Children: A Global Report*. New York: UNICEF. pp. 95-96

¹⁷² No Child in Detention Coalition (2014), *Dad, have we done something wrong? Children and parents in immigration detention*. No Child in Detention Coalition. See also Cleveland, J. and C. Rousseau (2013) "Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada." *Can J Psychiatry* 58(7): 409-416

¹⁷³ Save the Children and the Asia Pacific Refugee Rights Network, “Unlocking Childhood: Current Immigration Detention Practices and Alternatives for Child Asylum Seekers and Refugees in the Asia and the Pacific”, May 2016, page 1, available at <https://resourcecentre.savethechildren.net/library/unlocking-childhood-current-immigration-detention-practices-and-alternatives-child-asylum>, p. 25

¹⁷⁴ See International Detention Coalition, “Reframing Immigration Detention in Response to Irregular Migration: Does Detention Deter?” April 2015, No. 1, available at https://idcoalition.org/wp-content/uploads/2015/04/Briefing-Paper_Does-Detention-Deter_April-2015-A4_web.pdf

¹⁷⁵ For more on the concerns regarding the use of immigration detention, see Sampson, Robyn, Vivienne Chew, Grant Mitchell, and Lucy Bowring. 2015. *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)*. Melbourne: International Detention Coalition. idcoalition.org/publication/there-are-alternatives-revised-edition, pages 3-6; see also UNHCR, Second Global Roundtable on Reception and Alternatives to Detention: Summary of deliberations, August 2015, available at: <http://www.refworld.org/docid/55e8079f4.html>

by law and such prohibition should be fully implemented in practice.”¹⁷⁶ The Committees also called for States to “adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children’s best interests are assessed”.¹⁷⁷

- The UN Special Rapporteur on Torture has found that immigration detention is not only contrary to the best interests of the child but may even constitute a particular form of torture or ill-treatment of children.¹⁷⁸
- Numerous other UN and regional human rights experts have reinforced this categorical prohibition on child immigration detention, including the Office of the High Commissioner for Human Rights (OHCHR), the UN Special Rapporteur on the Human Rights of Migrants, the UN Working Group on Arbitrary Detention, UNICEF and UNHCR.
- Further, in recognition of the significant harms caused by detention and the lack of comprehensive data on the magnitude of the phenomena of child detention, the UN General Assembly initiated the Global Study on Children Deprived of Liberty in 2014. Professor Manfred Nowak was appointed as Independent Expert to lead the Study, and is expected to deliver his final report on the Study in September 2019. In addition to capturing data on children deprived of liberty, the Study will also provide recommendations for changes in law, policy and practice to significantly reduce the number of children in detention through the use of non-custodial alternatives.¹⁷⁹

In July 2018, the leaders of 192 United Nations member states agreed to the final text of the Global Compact on Safe, Orderly and Regular Migration (GCM) which establishes a common agenda for managing migration and protecting the human rights of all migrants. Under the Vision and Guiding Principles of the text, States have reasserted the need to fully protect child rights and to give primary consideration to the best interests of the child. Significantly, Objective 13, paragraph 29(h) states that in order to realize the commitment to take a human-rights based approach to any detention of migrants, States will:

“Protect 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, favoring 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.”¹⁸⁰

We have also seen various **regional** intergovernmental bodies speak out on the need for ending child immigration detention, including the Council of Europe, the Ministerial Dialogue on Migration in Southern Africa (MIDSA), as well as the Inter-American Court of Human Rights. Similar guidance however, has yet to emerge from the Asia-Pacific region (see further below).

¹⁷⁶ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para 5

¹⁷⁷ *Ibid*, para 11

¹⁷⁸ He stated that “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 and degrading treatment of migrant children”, see See A/HRC/28/68, para. 80

¹⁷⁹ See <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx> for more information on the Global Study. In February 2018, a questionnaire was distributed to member states and other relevant stakeholders, “primarily aimed at collecting and providing quantitative statistical data about the number of children deprived of liberty [...]. In addition, Governments are encouraged to provide examples of promising practices and innovative alternative approaches aimed at reducing the number of children deprived of liberty according to the child rights principles.” The questionnaire can be found here <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Questionnaire.aspx>

¹⁸⁰ Global Compact for Safe, Orderly and Regular Migration, Final Draft, 11 July 2018. Accessed at <https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf>

At the **national** level, a number of countries have introduced legislation that prohibits or limits the use of immigration detention for all or certain groups of children (e.g. children who are unaccompanied or separated, asylum-seeking children or children below a certain age). A noticeable example is that of Ecuador, which introduced a Human Mobility Law in January 2017 to directly prohibit the immigration detention of children. Article 2 of the Law also mandates that ‘when the best interests of the child require that family unity be maintained, the obligation to protect personal freedom should be extended to the child’s parents or caregiver’.¹⁸¹ In addition to such legal safeguards, many countries have also begun to implement community-based care and placement models that ensure children are not detained in the first instance, or are released promptly if detained.¹⁸²

This commitment has emerged from a growing understanding of the negative impact of immigration detention on children’s wellbeing and the availability of more humane, cheaper, more effective alternatives that do not compromise border security. Research shows that properly implemented ATD that respect human rights of migrants; they lead to high rates of compliance with migration-related decisions, high rates of voluntary return, and are on average more cost effective than traditional detention models. Building trust, respecting and valuing the dignity of the migrant, and providing fair, transparent process are fundamental.¹⁸³

Community-based alternatives for children and their families can take different forms. For unaccompanied children, ATD that prioritize family-based care, whether kinship, network or foster care, is preferable to placement in shelters, homes and other institutions. There are several foundational elements that underpin robust community-based care arrangements for children, including: upholding the best interests of the child; mainstreaming of asylum seeker, refugee and migrant children into national child care systems; screening, identification and assessment of children; the appointment of a guardian and a case manager; and fair, efficient processes for resolving their migration status.

Section 4: The Regional Context

In 2016, there were 31 million children living outside their country of birth; of these, nearly 12 million live in Asia, representing almost 40% of all migrant children in the world.¹⁸⁴ A further 670,000 reside in Oceania, representing approximately 2% of child migrants globally.¹⁸⁵ Despite the large numbers of children on the move, there remain significant gaps in the child protection frameworks of many countries in the region. Such gaps include a lack of protection from immigration detention, a lack of access to robust reception and care arrangements for refugee, asylum seeking and migrant children, and a lack of fair and efficient asylum systems.

Complete data on the total number of children currently held in detention in the region, or who have experienced it in the past, are not available. Either this data was not collected in each country, or it was not made publicly available. We do know however, that in Indonesia, Malaysia and Thailand alone, more than 2,000 children were held in immigration detention facilities during the course of 2016.¹⁸⁶ These countries apply blanket detention policies, rather than using

¹⁸¹ Ley Orgánica de Movilidad Humana Ecuador, Suplemento – Registro Oficial Nº 938. Accessed at: www.refworld.org/pdfid/58a41f864.pdf. Other examples include Costa Rica’s immigration law Decree No. 36831-G on the Regulation of Refugees, which states “Under no circumstances shall minors be detained, be they accompanied, unaccompanied or separated”, see Unofficial translation. Reglamento de Personas Refugiadas, 209 La Gaceta Nº 36831-G (Sept. 28, 2011) (Costa Rica) at Article 47. Available at: www.refworld.org/docid/4fffe64d2.html. For further examples, see International Detention Coalition, “Never in a Child’s Best Interests: A Review of Laws that Prohibit Child Immigration Detention”, June 2017, No. 2, available at https://idcoalition.org/wp-content/uploads/2017/06/Briefing-Paper_Never-in-a-childs-best-interests_June-2017.pdf

¹⁸² For further information, see International Detention Coalition, “Keeping Children Safe: Ensuring Unaccompanied Children Avoid the Harms of Immigration Detention”, October 2018, No. 3 available at <https://idcoalition.org/wp-content/uploads/2018/10/Keeping-Children-Safe-IDC-Briefing-Paper-Oct-2018.pdf>

¹⁸³ For more information on the benefits of alternatives and the key elements of successful alternatives, see Sampson, Robyn, Vivienne Chew, Grant Mitchell, and Lucy Bowring. 2015. *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)*. Melbourne: International Detention Coalition. idcoalition.org/publication/there-are-alternatives-revised-edition, see pages 7-15

¹⁸⁴ UNICEF (2016) Uprooted: The growing crisis for refugee and migrant children. UNICEF: New York

¹⁸⁵ Ibid

¹⁸⁶ In 2016, a total of 1602 asylum seeking and refugee children known to UNHCR were detained in Indonesia, and 647 in Malaysia. Total year figures for 2016 are not available for Thailand, but as of 31 December, there were 43 children in detention. These figures do not however, include migrant children and children not registered with UNHCR. As such, the total number of children in detention in 2016 is likely to be much higher. See Save the

detention as a last resort. There is also a general lack of judicial oversight and access to legal representation for detained persons. Conditions in immigration detention facilities are generally far below minimum international standards, with significant overcrowding, poor hygiene, inadequate access to healthcare and nutrition, and lack of access to education, recreational and outdoor spaces.¹⁸⁷ Unaccompanied and separated children may be detained with unrelated adults and guards, making them vulnerable to physical, sexual and psychological abuse.

There has been a noticeable lack of guidance on child immigration detention and alternatives from regional bodies or mechanisms such as the Bali Process or ASEAN, including the ASEAN Intergovernmental Commission on Human Rights (AICHR) or the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). Although the ACWC's Regional Plan of Action on Elimination of Violence against Children references the need to strengthen alternatives to detention for children in conflict with the law, these have been interpreted to focus on children in criminal, rather than administrative proceedings like immigration detention.¹⁸⁸

Despite these challenges, there have been positive developments in many countries represented at the ADFM, including those with large mixed migratory flows. Such positive developments include:

- A decrease in the number of children detained for immigration reasons in Indonesia, Thailand, Malaysia and Australia in recent years.¹⁸⁹
- The development of civil-society led initiatives in Malaysia, Indonesia and Thailand through which local NGOs provide family or community-based placement and care for unaccompanied and separated refugee and asylum-seeking children, as well as children with families; such initiatives are a move away from institutional care models, with a particular emphasis on case management support for each child.
- In Indonesia, the Presidential Decree of 2016¹⁹⁰ defines a refugee in line with the international legal definition contained in the 1951 Refugee Convention. This is the first time such a definition has been included in Indonesia's national legal framework. The Presidential Decree also contemplates the placement of children outside of detention into community housing. Although questions remain over how local government authorities will implement the Presidential Decree, these provisions present a concrete opportunity to further engage the Indonesian governments at the national and local level on expanding community-based reception and care arrangements for refugee and asylum-seeking children in Indonesia.
- In September 2016 at the United Nations Summit on Refugees and Migration, Thailand's Prime Minister Prayuth Chan-ocha, promised to end the practice of child detention for asylum-seekers and refugees. He also committed to creating an effective screening mechanism to identify refugees and economic migrants. Since then, the Thai government has drafted an intergovernmental Memorandum of Understanding (MOU) to release children and their families from immigration detention, and implement community-based care arrangements for them. The

Children and the Asia Pacific Refugee Rights Network, "Unlocking Childhood: Current Immigration Detention Practices and Alternatives for Child Asylum Seekers and Refugees in the Asia and the Pacific", May 2016, page 1, available at

<https://resourcecentre.savethechildren.net/library/unlocking-childhood-current-immigration-detention-practices-and-alternatives-child-asylum>.

¹⁸⁷ Ibid, page 20; Human Rights Watch, "Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia", 23 June 2013, available at <https://www.hrw.org/report/2013/06/23/barely-surviving/detention-abuse-and-neglect-migrant-children-indonesia>; Human Rights Watch, "Two Years with No Moon: Immigration Detention of Children in Thailand", 1 September 2014, available at <https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand>; Global Detention Project: <https://www.globaldetentionproject.org/regions-subregions/asia-pacific>

¹⁸⁸ The 'Regional Guidelines for Responding to the Rights and Needs of Unaccompanied and Separated Children', co-authored by the Institute of Human Rights and Peace Studies, Mahidol University; ECPAT International; The Research and Education for Peace, University Sains Malaysia, and The Centre for Southeast Asia Social Studies, Gadjah Mada University, Indonesia, are perhaps the closest we have seen to regional guidance on the care and protection of children on the move. These Guidelines and the research conducted in Indonesia, Malaysia and Thailand to inform the content of the Guidelines, were commissioned by UNHCR and funded in the 2012-2013 financial year by the Australian Government's then Department of Immigration and Citizenship. Despite the widely consultative process in drafting the Guidelines, including with government representatives from each of the research countries, they have been under-utilized. Their content could however, be an important tool for governments in the region as they seek to move away from child immigration detention and develop robust child-centered care and placement options for children on the move.

¹⁸⁹ Save the Children and the Asia Pacific Refugee Rights Network, "Unlocking Childhood: Current Immigration Detention Practices and Alternatives for Child Asylum Seekers and Refugees in the Asia and the Pacific", page 1

¹⁹⁰ The Presidential Decree signed on 31 December 2016, which confirms Article 28G of the Indonesian Constitution and Article 25 – 27 of Law No. 37 of 1999 on Foreign Relations

MOU will be followed by standard operating procedures between government agencies, international organizations and non-governmental organizations. As of August 2018, the MOU has been finalized and is awaiting signature by the Prime Minister and the Permanent Secretary of related Ministries. Further, in January 2017, the Thai Cabinet passed a resolution approving the development and implementation of a screening mechanism for undocumented immigrants and refugees. It is hoped that the development of such a mechanism would allow for better identification and ultimately protection of refugees and asylum seekers in Thailand. The Thai Government is continuing a dialogue with civil society and UN agencies on piloting community-based care arrangements for children and families who are released from immigration detention.

- In Malaysia, the government continues to engage with civil society, SUHAKAM (Malaysia’s national human rights commission) and UNHCR on piloting alternatives for unaccompanied and separated children.
- Although not a recent development, good practice also exists in the Philippines where undocumented children located at the border are generally not detained, or if so, are promptly released as a matter of course. They are screened and referred to the Department of Social Welfare and Development, who are delegated as the responsible guardians and provide social work, shelter, and health care.

Such positive developments indicate a general desire of the governments to work towards ending child immigration detention and to develop viable alternatives. The growing interest in piloting alternatives that rely on more sustainable models of care (e.g. foster family, kinship or network placements and independent living arrangements versus institutional placements) present as a significant opportunity to test and expand care and placement models for refugee and asylum-seeking children and their families.

Section 5: Recommendations

The growing momentum on ending child immigration detention and developing community-based ATD means now is the time to improve the protection of refugee and asylum-seeking children in the Asia-Pacific region.

The GCM and the Global Compact on Refugees present as a unique opportunity to engage governments in the region as the text of both Global Compacts includes commitments and specific actions to protect and respect the rights and best interests of the child by developing and implementing non-custodial ATD and community-based care arrangements.¹⁹¹ The GCM in particular, places clear emphasis on implementation: the draft text encourages States to develop ‘ambitious national responses for the implementation of the Global Compact, and to conduct regular and inclusive reviews of progress at the national level, such as through the voluntary elaboration and use of a national implementation plan’. The GCM also foresees the creation of a capacity-building mechanism and trust fund, which can provide important structures for implementation.

More can be done at the regional level to capitalize on these developments, and support states towards ending child immigration detention and expanding community-based alternatives. As noted, regional bodies have given little attention to the issue; they however, they have an important role to play in encouraging and supporting governments in the region to develop and strengthen national systems for the care and protection of children in the context of international migration.

In this respect, we recommend that the ADFM:

1. Continue to discuss ending child immigration detention and expanding the use of community-based alternatives
2. Identify and engage regional entities/bodies such as the Regional Support Office of the Bali Process, AICHR and ACWC on building state capacity to end child immigration detention and implement alternatives. This could include encouraging workshops on:

¹⁹¹ Final Draft Global Compact on Refugees, Advance version, 20 July 2018, para 60: “The development of non-custodial and community-based alternatives to detention, particularly for children, will also be supported.”

- a. Sharing of good practice country examples/learnings
 - b. Implementing robust screening, assessment and referral mechanisms and tools for children and their families, in line with international standards
 - c. Training for government and other front-line officers on how to conduct child-friendly screening and assessing, including age assessments.
3. Explore ways in which the GCM and the Global Compact on Refugees could be leveraged in the region, particularly Objective 13 of the GCM.
 4. Ensure regional bodies are aware of the need to support their member States with respect to meeting the obligations set out in the SDG 16 indicators on child immigration detention.
 5. Review and highlight existing regional guidelines or plans of action on vulnerability screening, reception, care and placement, and case resolution arrangements for children and their families in the context of international migration
 6. Encourage regional governments to:
 - a. make publicly available data on the numbers of children in detention, disaggregated by age group, gender, country of origin, length of detention and if they have filed claims for international protection;
 - b. support and play an active role in the UN Global Study on Children Deprived of Liberty
 7. Encourage regional governments to adopt a whole of society approach and work in partnership with civil society actors in responding to children and their families in the context of international migration
 8. Encourage regional investments in community models, particularly in community-based case management models, through which durable solutions are actively sought for children and their families.