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A Legal Analysis of Selected ASEAN Declarations and Conventions from a Child Rights Perspective

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the Advanced L.L.M in International Children's
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Executive Summary

This thesis aims to provide a legal analysis of selected ASEAN instruments that are specifically related to or contain substantive provisions on children's rights. It examines the extent to which these instruments are consistent with ASEAN Member State's international legal obligations found in the CRC. It also looks into whether these instruments cover the common and existing child rights issues that the ASEAN Member States face. It assumes that ASEAN, similar to the African, European, and Inter-American human rights systems, will eventually have a court and that these instruments will be the basis of possible child rights violations. It further explores whether a comprehensive regional child rights treaty is needed (e.g., the African system) or whether the CRC and the current regional human rights instruments and bodies are enough (e.g., in the European or Inter-American system) to promote and protect children's rights in ASEAN.

Hopefully, this thesis will convince ASEAN human rights bodies to develop a binding comprehensive child rights treaty that will expand the scope of rights recognised by ASEAN and allow the full promotion and protection of children's rights.

Key Words

ASEAN; Southeast Asia; CRC; Children's Rights; Regional Instruments; Comprehensive Treaty

Overview of Main Findings

The general finding from the study is that the selected ASEAN instruments are incomplete in covering the legal obligations of ASEAN Members States in the CRC and in addressing the issues that ASEAN children are facing. The selected Convention and Declarations cover almost all rights found in the CRC except eight (8). The CRC rights that were left out are the best interests of the child in art. 3, parental guidance and evolving capacities in art. 5, identity in art. 8, non-separation from parents in art. 9, family reunification in art. 10, protection from abduction in art. 11, freedom of association in art. 15, and the review of treatment in art. 25. The provisions in the ASEAN instruments that contain CRC rights are not completely deviant from the CRC. Nevertheless, the lack of a key fundamental principle such as the best interests of the child, contributes to this incompleteness.

The ASEAN Convention against Trafficking in Persons in Particular Women and Children (ACTIP) is arguably the most important instrument on children's rights in the region because it is the only legally binding one and it deals with one of the most pressing regional issues that children face. Adopting the definitions of the Palermo Protocol on trafficking was sensible and went beyond the CRC which lacked a concrete definition of trafficking. However, there were provisions which may provide ways or excuses for AMS to renege on their obligations and this is worrisome.

The ASEAN Human Rights Declaration (AHRD), to some extent, contained most rights found in the CRC worded generally. Completely missing, however, are crucial provisions on definition of the child (art. 1), the best interests of the child (art. 3), parental responsibilities, guidance and state assistance to parents (art. 5, 18), non-separation of parents (art. 9), family reunification (art. 10), abductions (art. 11), association (art. 15), adoption (art. 21), drug abuse (art. 33), war and armed conflict (art. 38).

The EVAWC Declaration is more comprehensive than the CRC when it comes to policies concerning violence against children. It is also more progressive by inserting gender sensitive aspects to the approach toward the elimination of violence. The biggest setback of this Declaration on EVAWC is, like the others, non-binding. Neither does it set specific enforceable rights for the protection of children. Should ASEAN decide to adopt a more comprehensive legally-binding instrument on children's rights, they can incorporate provisions of this Declaration (in a rights format) and certain aspects of the regional plan.

The Ha Noi Declaration only mentions nine rights found in the CRC – less than one-fifths of the rights found in the international instrument. The Declaration merely contains general statements of commitments which are not exactly rights. This may cause a problem with regard to its enforceability unless broad interpretations are given and later enforced. It is also a regression from the Declaration on the Commitments for Children in ASEAN which was just passed almost a decade before in 2001.

The analysis of the Commitments Declaration shows that although it contains many of the rights found in the CRC, most are still generally and vaguely worded. This may cause a problem in claiming an enforceable right.

Should ASEAN have had a strong mechanism with the ability to interpret, investigate, adjudicate, and provide redress to child rights violations, then a comprehensive treaty may not be needed. However, because of the lack of a standard in addressing children's rights and the lack of a strong mechanism of enforcement points to the need of a comprehensive regional treaty on children's rights. Such treaty can contribute to standard-setting in terms of children's rights in the region, can strengthen the existing mechanisms such as the ACWC, and can further the protection and promotion of children's rights in ASEAN.

List of Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ACTIP	ASEAN Convention Against Trafficking in Persons Particularly Women and Children
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMS	ASEAN Member States
APSC	ASEAN Political Security Community
ASEAN	Association of Southeast Asian Nations
ASCC	ASEAN Socio-Cultural Community
AU	African Union
CEDAW	Convention on the Elimination of Discrimination against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Commitments Declaration	Declaration on the Commitments for Children in ASEAN
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EVAWC Declaration	Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN
EU	European Union
Ha Noi Declaration	Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
GDP	Gross Domestic Product
OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
OP	Optional Protocol
OPAC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
OAS	Organization of American States
UNICEF	United Nations Children's Fund
UNICEF EAPRO	UNICEF East Asia and Pacific Regional Office

1. Introduction

1.1. Brief Background

ASEAN is an intergovernmental organization that was formed fifty years ago through the 1967 ASEAN Declaration.¹ Today, it has ten members: : Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. The 1967 ASEAN Declaration had no mention of human rights, more so children's rights. Then, ASEAN, similar to other regional bodies such as the AU, EU, and OAS, was formed for political and economic cooperation and not as a human or children's rights organisation. One could almost not even mention human rights in the early days of ASEAN. Nonetheless, many common child rights issues plague the region despite its diversity.

Several years after, however, ASEAN passed several Declarations and a Convention (hereinafter to be collectively referred to as 'instruments') on children's rights. The CRC was ratified by all ten ASEAN Member States and domestically, children's rights were being more included in national laws. Regionally, however, there is no single comprehensive instrument containing the rights of the child in ASEAN.

1.2. Aim and Research Questions

This thesis aims to provide a legal analysis of selected ASEAN instruments that are specifically related to or contain substantive provisions on children's rights. It examines the extent to which these instruments are consistent with ASEAN Member State's international legal obligations found in the CRC. It also looks into whether these instruments cover the common and existing child rights issues that the ASEAN Member States face. It assumes that ASEAN will eventually have a court similar to the African, European, and Inter-American human rights systems and that these instruments will be the basis of possible child rights violations. It further explores whether a comprehensive regional child rights treaty is needed (i.e. in the African system) or whether the CRC and the current regional human rights bodies are enough (i.e. in the European or Inter-American system) to promote and protect children's rights in ASEAN.

The questions this thesis seek to answer are: to what extent are these selected ASEAN instruments consistent with ASEAN Member State's international legal obligations found in the CRC? Do these instruments address the real issues being faced by children in the region? In other words, if an ASEAN court is established, are these existing instruments enough to provide an effective remedy to the possible violations to children's rights in the region? If not, is there a need for a comprehensive regional child rights treaty (i.e. the ACRWC) or is the universal ratification of the CRC and the current regional human rights bodies enough (i.e. in the European or Inter-American system) to promote and protect children's rights in ASEAN?

1.3. Framework of Analysis and Methodology

The framework of analysis and methodology can be seen in the following diagram and is further explained below:

¹ Southeast Asia: A Historical Encyclopedia from Angkor Wat to East Timor 185 (Ooi Keat Gin, ed.) (2004) [hereinafter SEA Historical Encyclopedia].

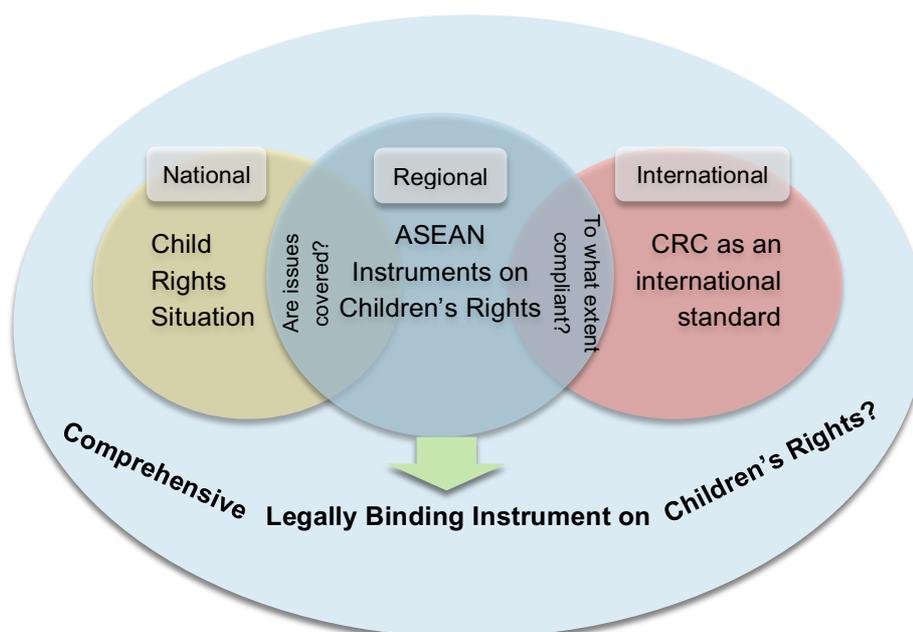


Figure 1. Framework of Analysis

The framework and methodology used is a combination of black letter approach and comparative legal analysis approach in which black letter laws consisting of the ASEAN Declarations and Convention are analysed using a comparison to CRC standards. These regional instruments are further analysed and grounded vis-à-vis its ability in scope to redress domestic or national issues. Finally, another, yet smaller, comparative analysis is made when examining the effect (or lack) of a comprehensive regional standard in other regions such as the EU, OAS, and AU and whether such standard is needed and will possibly be effective in ASEAN.

1.4. Scope and Limitations

The scope of this thesis is limited to select ASEAN regional declarations and conventions which are specifically related to or contain substantial provisions on children's rights. Specifically, these are the ASEAN Convention Against Trafficking in Persons Particularly Women and Children, the ASEAN Human Rights Declaration, the Declaration on the Elimination of Violence Against Women and the Elimination of Violence Against Children, the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, and the Declaration on the Commitments for Children in ASEAN. The following ASEAN Declarations and Convention were not the first instruments on children in the region. The Declaration of Principles to Strengthen ASEAN Collaboration of Youth was even passed before the CRC in 1983. Later on, ASEAN also passed the Kuala Lumpur Agenda on ASEAN Youth Development in 1997, the Yangon Declaration on Preparing ASEAN Youth for the Challenges of Globalisation in 2000, and the Manila Declaration on the Strengthening Participation in Sustainable Youth Employment in 2003. These are, however, excluded in the analysis for the scope of 'youth' in ASEAN is from the age of 15-35. Hence, they are not specifically on children since it technically only covers three ages which fall under the definition of the child in the CRC (ages 15-17). Also, they contain more of principles of recognition that youth have the capability to participate in ASEAN affairs than on rights of the child. However, it is worthy to mention them considering that these were the first ASEAN instruments on children, one way or the other.

The analysis is limited to a legal or policy analysis and how these policies are being implemented regionally is also beyond the scope. A specific theme (i.e. juvenile justice; child protection) has not

been selected as the existing instruments do not allow for such a focus.

1.5. Outline

This thesis consists of five (5) main parts. After this introductory chapter, the second chapter lays down the ASEAN context. It will provide a brief overview of ASEAN, its history and the regional situation of children through a rights framework. Next, the third chapter will show the existence or lack of legal commonality when it comes to children's rights standards in ASEAN. It will discuss the legal relationship of ASEAN to the CRC in terms of their reservations and whether the CRC is directly enforceable under their national systems. The fourth chapter will examine selected existing ASEAN declarations and conventions which are specifically related to or contain substantive provisions on children's rights. Specific provisions from the instruments particularly relevant will be mentioned and analysed vis-à-vis international standards set by the CRC and to what extent they are compliant or not compliant. Whether the critical domestic issues identified in the previous chapter were covered by these instruments will be answered. The fifth chapter will explore the need of a comprehensive regional instrument on children's rights learning from the context and operations of the child rights systems in the regions of Africa, the Americas, and Europe. It also explores whether ASEAN should aim to develop one. This thesis concludes with saying that the existing instruments, although not completely deviant from the CRC, are not yet internationally compliant for not containing fundamental rights of the child such as the child's best interests or the concept of evolving capacities. Neither are they enough to cover the current issues being faced by the children of ASEAN. Hence, a comprehensive binding regional children's rights treaty is needed to expand the scope of rights recognised by ASEAN and allow the full promotion and protection of children's rights.

1.6. The Story of Mai

In order to better understand the importance of the issues this thesis seeks to explore, the author presents the fictitious story of Mai, a twelve-year-old girl born in the Rakhine State of Myanmar who is of Rohingya descent. Violence and instability in her hometown added to the fact that her parents and the rest of her family were brutally killed led her to employ an illegal trafficker to take her across the Thai border. In Thailand, she was caught by the police and, being an illegal migrant according to Thai law, was placed in a reception center pending deportation. The deportation had horrid conditions where adults and children were placed together in extremely unsanitary conditions, locked up, and girls, including Mai, were being raped. She was able to escape and, with the help of an NGO, filed cases against the authorities at the reception center. However, all her cases were dismissed all the way up to the Supreme Court. ASEAN recently established a human rights court and is now accepting individual complaints. Mai, now 16, wants to file a case to the ASEAN human rights court. Which instruments can she use as basis to claim violations to her rights as a child? Are the existing regional instruments enough for Mai to be able to access an effective remedy? The story of Mai will be often referred to in the analysis of the selected instruments mainly in Chapter 4.

2. The ASEAN Context

2.1. Introduction

This chapter will provide the context of the thesis. It will provide a brief overview of ASEAN, its history, the emergence of children's rights in the region, and a general picture of the regional situation of children through a rights framework.

2.2. A Brief History of ASEAN

Fifty years ago, in 1967, five countries in Southeast Asia formed the ASEAN, an intergovernmental organization.² In August 8 of that year, the Foreign Ministers of Indonesia, Malaysia, the Philippines, Singapore, and Thailand formalized this association by signing a declaration commonly known as the Bangkok Declaration or the ASEAN Declaration.³ The aims and purposes as spelled out in the Declaration were "cooperation in the economic, social, cultural, technical, educational and other fields, and in the promotion of regional peace and stability through abiding respect for justice and the rule of law and adherence to the principles of the United Nations Charter."⁴ From the initial five members, today, there are ten ASEAN Member States: Brunei Darussalam (joined in 1984), Cambodia (joined in 1999), Indonesia, Lao PDR (joined in 1997), Malaysia, Myanmar (joined in 1997), Philippines, Singapore, Thailand, Vietnam (joined in 1995).

The original states comprising the ASEAN were not spared from conflict both externally and internally. All countries except Thailand have experienced long colonial rule and although most were independent states after World War II, there was still political, cultural, social, and economic instability in the region.⁵ For example, the Philippines and Malaysia and Indonesia and Malaysia had disputes over territory.⁶ Post-colonial threats to democracy such as communism and insurgency in Cambodia, Vietnam, Lao PDR, Malaysia, Myanmar, and Thailand contributed to the instability.⁷

Previous sub-regional associations in the region such as the Association of Southeast Asia (ASA) comprising of Malaysia, Philippines, and Thailand in 1961 or MAPHILINDO (Malaya, Philippines, and Indonesia) in 1963 were unable to manage the conflict between its members.⁸ Hence, part of the purpose of ASEAN was to "promote regional cooperation in Southeast Asia and in so doing contribute to peace, development, and prosperity in the region."⁹ Keeping peace in the region and communism at bay is hailed as ASEAN's many successes. For example, it is said that ASEAN's role was vital in stopping the Vietnamese invasion of Cambodia when the association served as mediator in the late 1970s to early 1990s.¹⁰ This was even before Vietnam became officially part of ASEAN.

² *Id.*

³ *Id.*

⁴ ASEAN Secretariat, History: The Founding of ASEAN, available at <http://asean.org/asean/about-asean/history/> (last accessed 9 May 2017).

⁵ Naparat Kranrattanasuit, ASEAN and Human Trafficking: Case Studies of Cambodia, Thailand and Vietnam 11 (2014).

⁶ SEA Historical Encyclopedia, *supra* note 1, at 186.

⁷ Kranrattanasuit, *supra* note 5, at 11 (citing Bernard Gordon, *Problems of Regional Cooperation in Southeast Asia*, 16 *World Pol.* 222, 222-35 (1964)).

⁸ SEA Historical Encyclopedia, *supra* note 1, at 186.

⁹ *Id.*

¹⁰ Kranrattanasuit, *supra* note 5, at 14 (citing Amitav Acharya, *Arguing about ASEAN: What Do We Disagree About?*, 22 *Cambridge Rev. of Int'l Aff.* 493, 497 (2009)).

Today, ASEAN, despite its extremely diverse members in terms of being a group of developed and underdeveloped countries, is regarded as one of the most sustainable regional organizations in the world.¹¹

2.3. The Emergence of Children's Rights in ASEAN

The 1967 ASEAN Declaration had no mention of human rights more so children's rights. Then, human rights were not seen as a topic for consideration and cooperation.¹² It is important to note that, in the first place, ASEAN was, similar to other regional bodies such as the European Union, was formed for political and economic cooperation and not as a human rights organization. In fact, it was almost taboo to talk about human rights in ASEAN in its early days.¹³

As early as 1983, a non-binding instrument on ASEAN youth was passed: the ASEAN Declaration of Principles to Strengthen ASEAN Collaboration on Youth. This declaration had little to no impact on the emergence of children's rights in ASEAN as it was not used to generate any standard. Even the scope of 'youth' in ASEAN is problematic as the parameters are unclear and not all children (those below 18) are part of youth.

In 1993, the Vienna World Conference on Human Rights took place and sparked a discussion on human rights in the region.¹⁴ It is often seen as the starting point of human rights discourse in ASEAN.¹⁵ This conference called countries to adopt regional human rights systems.¹⁶ In the same year, during the twenty-sixth ASEAN Ministerial Meeting, ASEAN's foreign ministers adopted "ASEAN's commitment to and respect for human rights and fundamental freedoms."¹⁷ The Joint Communique of said meeting stated that the foreign ministers stressed that "human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights...of equal importance"¹⁸ and "ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights."¹⁹ The approach toward human rights, however, was cautious. The Joint Communique added that the principles of non-interference, national sovereignty, and territorial integrity as well as cultural, economic, social, and political circumstances be kept in mind in addressing human rights.²⁰ The final sentence ended with saying that ASEAN "should also consider the establishment of an appropriate regional mechanism on human rights."²¹ A few years after, a civil society group called the Working Group for an ASEAN Human Rights Mechanism was formed to engage with national governments to continue the initiative on the establishment of such mechanism.²²

¹¹ Kranrattanasuit, *supra* note 5, at 10.

¹² Tae-Ung Baik, *Emerging Regional Human Rights Systems in Asia* 142 (2012).

¹³ Vitit Muntarbhorn, *Unity in Connectivity?: Evolving Human Rights Mechanisms in the ASEAN Region* 112 (2013) [hereinafter, *Unity in Connectivity*].

¹⁴ Baik, *supra* note 12, at 142.

¹⁵ Attilio Pisanò, *Towards an ASEAN human rights mechanism: the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children*, *Int'l J. Hum. Rts.* 20 (3), at 322 (2016).

¹⁶ Muntarbhorn, *supra* note 13, at 17 (citing *Human Rights: A Compilation of UN Human Rights Instruments*, Vol. 1 (Second Part) Universal Instruments, at 43-68 (New York/Geneva: UN, 2002)).

¹⁷ ASEAN, Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting, July 23-24, 1993, para. 16, available at http://asean.org/?static_post=joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993 (last accessed 11 May 2017).

¹⁸ *Id.*

¹⁹ *Id.* para. 17.

²⁰ *Id.*

²¹ *Id.*

²² Muntarbhorn, *supra* note 13, at 108.

Even before such mechanism was established, however, several instruments related to youth and children were passed by ASEAN. In 1993, the ASEAN Plan of Action for Children was adopted and the first one which dealt directly with children's issues. Curiously, the words 'rights of the child' are not found in the document.²³ In 1997, both the ASEAN Vision 2020 ('a community of caring societies') and the Kuala Lumpur Agenda on ASEAN Youth Development were passed. A year after, in 1998, the Hanoi Plan of Action was passed which states that ASEAN should "work towards the full implementation of the CRC and the CEDAW and other International Instruments Concerning women and children."²⁴ Later on, in 2000 and 2001 respectively, the Yangon Declaration on Preparing ASEAN Youth for the Challenges of Globalization and the Declaration on the Commitments for Children in ASEAN. More on the content of these instruments will be discussed in the next chapter.

In 2003, in order to further strengthen prosperity and peace, the three-pillar ASEAN Community was formed at ASEAN's 9th Summit²⁵ with the goal of establishing them by 2015.²⁶ These three pillars are the ASEAN Political-Security Community ("APSC"), ASEAN Economic Community ("AEC"), and ASEAN Socio-Cultural Community ("ASCC"). Each of these pillars have a set of blueprints in which their operations and programs should be based on. It is through these three pillars and their blueprints that human rights, including children's rights, were to be approached.

The ASEAN Summit in Vientiane in 2004 was another momentous event for regional human rights – in particular for children's rights – for it called for the establishment of a commission on the promotion and protection of the rights of women and children.²⁷ In that Summit, ASEAN adopted the Vientiane Action Plan (hereinafter VAP) which laid down specific programme areas on human and children's rights per community. Under the APSC, the establishment of a commission on the promotion and protection of the rights of women and children was laid down.²⁸ The VAP also contained a provision, under the ASCC, stating that programs on survival, development, and protection consistent with the CRC should be implemented.²⁹ Interestingly, there is no mention of participation nor the best interests of the child. 2004 was an eventful year for it was also when the Declaration against Trafficking in Persons Particularly Women and Children was adopted by ASEAN.³⁰

However, it was not until 2008, when the ASEAN Charter came into force, that human rights were finally encapsulated in a legally binding regional instrument. Before that, ASEAN had no legal basis and no legally binding instrument. The Charter, although not meant to be a human rights instrument, had several references to human rights. More importantly, it called for, in Article 14, an establishment

²³ Institute of Human Rights and Peace Studies Mahidol Univeristy and Save the Children, Child Rights Situation Analysis Within the ASEAN Region 2016, at 9, *available at* http://crcasia.org/wp-content/uploads/2016/11/Child-Rights-Situation-Analysis-Within-the-ASEAN-Region_Mahidol-University-2016.pdf (last accessed 15 June 2017) [hereinafter Child Rights Situation Analysis].

²⁴ Hanoi Plan of Action, § 4.9, *available at* <http://www.asean.org/news/item/hanoi-plan-of-action> (last accessed 12 May 2017).

²⁵ Declaration of ASEAN Concord II (Bali Concord II), 7 October 2003, *available at* http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii (last accessed 12 May 2017).

²⁶ The Cebu Declaration on the Blueprint of ASEAN Charter, 13 January 2007, *available at* http://asean.org/?static_post=cebu-declaration-on-the-blueprint-of-the-asean-charter-cebu-philippines-13-january-2007 (last accessed 12 May 2017).

²⁷ Muntarhorn, *supra* note 13, at 113.

²⁸ Vientiane Action Programme, 29 November 29, 2004, Annex 1, Action 1.1.4.7, *available at* <http://www.asean.org/storage/images/archive/VAP-10th%20ASEAN%20Summit.pdf> (last accessed 15 June 2017).

²⁹ *Id.* Annex 1, Action 3.1.3.1.

³⁰ ASEAN, Declaration Against Trafficking in Persons Particularly Women and Children, 29 November 2014.

of an ASEAN human rights body, stating: “[i]n conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.”³¹

Note that more than a decade had already passed since the 1993 the Vienna World Conference on Human Rights and the Joint Communique of ASEAN established that a human rights mechanism should be out in place. However, it was only after the passage of the ASEAN Charter in 2008 that these human rights bodies came to be. The ASEAN Intergovernmental Commission on Human Rights (hereinafter AICHR) was established in 2009 and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (hereinafter ACWC) in 2010.

The AICHR is “an inter-governmental body and an integral part of the ASEAN organizational structure.”³² Part of its fourteen official mandates and functions as spelled out in its Terms of Reference is “[t]o develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community”³³ and “[t]o promote the full implementation of ASEAN instruments related to human rights”³⁴ including children’s rights. Proof of the inclusion of children’s rights in their functions is that topics in the thematic studies in their first five-year work plan (2010-2015) included trafficking in persons particularly women and children, women and children in conflict and disasters, juvenile justice, the right to education, and child soldiers – all clearly child rights issues.³⁵ It was also the AICHR which led the drafting of the ASEAN Human Rights Declaration which was later passed in 2012.

The ACWC, similar to the AICHR, is officially defined as “an intergovernmental consultative body part of the ASEAN organizational structure.”³⁶ Its official mandates and functions are different in the sense that the ACWC is a specialized body focused on the promotion and implementation of women and children’s rights, with specific reference to the CEDAW and the CRC.³⁷ It has been compared to the OAS’s Office of the Rapporteur on the Rights of the Child and the Office of the Rapporteur on the Rights of Women or the AU’s Special Rapporteur on the Rights of Women Africa.³⁸ Its first five-year work plan (2012-2016) include research, campaigns, and compilation on best practices on: the elimination of violence against women and children, child participation, trafficking, early childhood and quality education, gender equality and mainstreaming, adolescent’s physical and mental health, and HIV/AIDs.³⁹ The ACWC has been known for living up to its being a consultative body as opposed to the AICHR and has recently been instrumental in the drafting and passing of the Regional Action Plan on the Elimination of Violence against Children in 2016.⁴⁰

³¹ Charter of the Association of Southeast Asian Nations, 20 November 2007, art. 14, *available at* <http://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf> (last accessed 15 June 2017) [hereinafter ASEAN Charter].

³² Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, § 3, *available at* <http://aichr.org/documents/> (last accessed 15 June 2017) [hereinafter AICHR TOR].

³³ *Id.* § 4.1

³⁴ *Id.* § 4.6

³⁵ About AICHR, *available at* <http://aichr.org/about/> (last accessed 15 June 2017).

³⁶ Terms of Reference of ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, § 4, *available at* http://www.asean.org/wp-content/uploads/images/2012/Social_cultural/ACW/TOR-ACWC.pdf (last accessed 15 June 2017) [hereinafter ACWC TOR].

³⁷ *Id.* §§ 3 & 4.

³⁸ Pisanò, *supra* note 15, at 337.

³⁹ The ACWC Work Plan (2012-2016), *available at* http://asean.org/wp-content/uploads/images/2013/socio_cultural/acwc/acwc%20work%20plan%202012-2016_final%20published.pdf (last accessed 15 June 2017).

⁴⁰ ASEAN Regional Plan of Action on the Elimination of Violence against Children, *available at*

It is noteworthy at this point to mention the “ASEAN Way” as an approach to resolving conflicts in the region including those related to human rights. The Treaty of Amity and Cooperation (TAC) in Southeast Asia 1976 spells out the five principles of the ASEAN Way.⁴¹ The most important to this study is the ones of non-interference and consensus decision making. Hence, when any instrument or document is passed or adhered to, all ten states have to agree to it and one abstention will mean the non-passage of said instrument. Hence, in the fictional case of Mai as told in the introduction, an ASEAN state such as Thailand cannot interfere and send its troops to help the Rohingya fight against the Myanmar army nor can Myanmar force the Thai government to change its citizenship laws. Also, should 5 ASEAN States move for the establishment of an ASEAN Children’s Charter but 5 decide against it, it will not pass. Criticisms against the ASEAN Way include that it is not an effective way in dealing with human rights issues because it is insufficient in protecting the victims of human rights, including children’s rights.⁴² This is because it allows state sovereignty to prevail over human rights violations which should not be the case.

<https://acwc.asean.org/resources/other-documents/asean-regional-plan-of-action-on-the-elimination-of-violence-against-children-asean-rpa-on-evac/> (last accessed 15 June 2017).

⁴¹ Treaty of Amity and Cooperation in Southeast Asia, 24 February 1976, 1025 U.N.T.S. 316, *available at* <http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/> (last accessed 15 June 2017).

⁴² Kranrattanasuit, *supra* note 5, at 26.

3. ASEAN and the CRC

3.1. Introduction

This chapter will show the existence or lack of legal commonality when it comes to children's rights standards in ASEAN. It will discuss the legal relationship of ASEAN to the CRC in terms of their reservations and whether the CRC is directly enforceable under their national systems.

3.2. The ratification of the CRC and ASEAN Member States' reservations

The CRC has been ratified by all ten (10) the ASEAN Member States. The ratifications and accessions came within six years from the enforcement of the CRC. All ten states participate in the treaty-body process and nine out of ten are up to date in their reports to the CRC Committee. Five of the ten are due to report this 2017.

Country ⁴³	CRC ⁴⁴	OPAC ⁴⁵	OPSC ⁴⁶	OP3 ⁴⁷	Declarations/Reservations ⁴⁸
Brunei Darussalam	27 Dec 1995	✓	✓	X	Art. 14, 20.3, 21b,c,d,e
Cambodia	15 Oct 1992	✓	✓	X	None
Indonesia	5 Sept 1990	✓	✓	X	None
Lao PDR	8 May 1991	✓	✓	X	None
Malaysia	17 Feb 1995	✓	✓	X	Art. 2, 7, 14, 28.1a, 37
Myanmar	15 July 1991	✓	✓	X	None
Philippines	21 Aug 1990	✓	✓	X	None
Singapore	5 Oct 1995	✓	X	X	Art. 3, 5, 7, 9, 10, 12-17, 19, 22, 28.1a, 32, 37
Thailand	27 Mar 1992	✓	✓	✓	Art. 22
Vietnam	28 Feb 1990	✓	✓	X	None

Figure 4. ASEAN Ratifications, Declarations, and Reservations

When it comes to ratification of the first two Optional Protocols, there is almost universal ratification. Myanmar has recently signed in 2015, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC).⁴⁹ Notably, Myanmar was said to have the most child soldiers in the world.⁵⁰ Only Singapore has not signed nor ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC).⁵¹ The ratification of the Optional Protocol to the Convention on the Rights of the

⁴³ Ratification status can be viewed at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx.

⁴⁴ *Id.*

⁴⁵ Ratification status of the OPAC can be viewed at

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en.

⁴⁶ Ratification status of the OPSC can be viewed at

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=_en.

⁴⁷ Ratification status of the OP3 can be viewed at

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en.

⁴⁸ *Id.*

⁴⁹ Ratification status of the OPAC can be viewed at

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en.

⁵⁰ Human Rights Watch, Burma: World's Highest Number of Child Soldiers, *available at*

<https://www.hrw.org/news/2002/10/16/burma-worlds-highest-number-child-soldiers> (last accessed 5 June 2017)

⁵¹ Ratification status of the OPSC can be viewed at

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=_en.

Child on a communications procedure (OPCP) is dismal with only Thailand having ratified.

Despite the universal ratification of the CRC, there remains several declarations and reservations to the fundamental rights of the child, including the general principles. Brunei Darussalam has made reservations to provisions to the CRC “which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State religion, and without prejudice to the generality of the said reservations.”⁵² It specifically mentions the articles on freedom of religion, adoption and kafalah, and inter-country adoption. Malaysia’s reservations expresses reservations with respect to the articles on non-discrimination, name, nationality, and registration, freedom of religion, making primary education free and compulsory to all, and on detention and punishment. Their reservations mention that these articles “shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.”⁵³ Singapore has the most reservations specifically mentioning that subscribing to the CRC “does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.”⁵⁴ With regard to nationality, they state that they reserve the right to determine citizenship and residence.⁵⁵ With regard to the education, they state that making primary education compulsory is not needed because “virtually all children attend primary school”⁵⁶ and, similar to Malaysia, also reserves the right to make it free for this is only accorded to their citizens. Singapore also made reservations to the general principles, specifically the best interests of the child and the right of the child to be heard.

As can be seen, the countries with the most reservations, Brunei, Singapore, Malaysia, are those considered the most developed as being in the top 3 in terms of GDP. In terms of the KRI, however, Singapore, the ASEAN country with the most reservations falls in the bottom five. This further shows that development does not always translate to commitment to and fulfilment of children’s rights.

Unfortunately, the CRC contains no provision limiting the allowed declarations or reservations to the treaty. However, it can be said that a reservation to a key tenement of a treaty, such as the non-discrimination principle – considered customary law – almost invalidates the ratification of the treaty in the first place. In fact, it is a recognised principle of international law that “reservations cannot be incompatible with the object and purpose of the treaty.”⁵⁷ Also, it has been opined that widespread derogation couched in declarations and reservations, “retards the ability of the treaty system to provide oversight.”⁵⁸ After all, how can one commit to respecting children’s rights when it merely wants to choose the children to accord these to. These reservations are telling in whether there truly is an ASEAN standard on children’s rights and the level of commitment the AMS are to respecting them.

3.3. The enforceability of the CRC in ASEAN Members States

The CRC is one of the three treaties that has been ratified by all AMS, the others are the CEDAW and CRPD. Art. 4 of the CRC states that all measures should be taken to implement the rights in the

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Ryan Goodman, *Human rights treaties, invalid reservations, and state consent*, Am. J. Int’l L. 96 (3), at 531 (2002).

⁵⁸ Mathew Davies, *States of Compliance?: Global Human Rights Treaties and ASEAN Member States*, J. Hum. Rts. 13 (4), at 414-433 (2014).

treaty. However, as seen in the previous sections, there remain several reservations to obligations found under the CRC. The theme of the reservations lies on the supremacy of national law over the CRC. Hence, this section seeks to provide a brief general picture of the scope of the legal enforceability of the CRC and whether the CRC is considered an enforceable source of law in the different AMS.

State sovereignty, a principle highly accorded by AMS, determines how international law, such as the CRC, is enforceable within the domestic system.⁵⁹ A state can either be monist or dualist when it comes to applying international law norms to its national systems. On one hand, a monist state, upon formal ratification of an international treaty, can directly enforce it in their national system.⁶⁰ In other words, the treaty has automatically been incorporated into their system by mere formal ratification and has domestic effect. Hence, such states can directly use the CRC in courts to enforce children's rights. On the other hand, a dualist state, after formal ratification, needs to incorporate these international agreements into domestic law (usually through a law) for it to be enforceable.⁶¹

In ASEAN, it is not very clear whether the states are monist or dualist. There is lack of academic research and constitutional and policy clarity on this subject.⁶² However, what is usual is that the common law systems are generally dualist in nature. It may be assumed that Malaysia, Singapore, Brunei, and Myanmar as former British colonies with a common law system are thus dualist countries.⁶³

Cambodia is also a dualist state where ratification of treaties signed by the head of the government need a Royal Kram or a law by the legislative to make it effective.⁶⁴ There are several opinions on the status of international law and national law.⁶⁵ One is that they are equal in rank since international law is recognized in the constitution; another is that the constitutional is always higher; and lastly, that the international law can fill gaps in national law.⁶⁶

Indonesia is formally a monist system but a dualist one in practice.⁶⁷ Courts in Indonesia, including the Supreme Court, has used international law in their decisions but primarily as an interpretative aid and not to override domestic law.⁶⁸ One case on children's rights reached the Indonesian Constitutional Court – the Children's Court Law Case, which dealt with the validity of a low (eight years old) minimum age of criminal responsibility.⁶⁹ In that case, applicants raised several CRC arguments. And although the ruling lifted the age to 12, the Court emphasised that the basis of the ruling was not because of the

⁵⁹ Antonio Cassese, *International Law in a Divided World* 15 (1986).

⁶⁰ Michael Ewing-Chow, *Translating the Design into a Bloc: The Domestic Implementation of the ASEAN Charter, in ASEAN Life After the Charter 70* (S. Tiwari ed., 2010). See also Laura Lundy, Ursula Kil Kelly, & Bronagh Byrne, *Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review*, *Int'l J. Children's Rts.* 21 (3), at 446.

⁶¹ Ewing-Chow, *supra* note 111, at 70 and Lundy, *et al.*, *supra* note 111, at 446.

⁶² Ewing-Chow, *supra* note 111, at 73.

⁶³ *Id.* at 71.

⁶⁴ Human Rights Resource Centre, *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study 57* (David Cohen, et al., eds., 2011) (citing Tep Darong, *Cambodia and the Rule of Law*, in Konrad Adenauer Stiftung, *5 Democratic Development: Occasional Paper 21, 23-24* (Jan. 2009)).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Simon Butt, *The Position of International Law Within the Indonesian Legal System*, *Emory Int'l L. Rev.* 28 (1), at 16.

⁶⁸ *Id.*

⁶⁹ *Id.* (citing Decision, Reviewing Law No. 3 of 1997 on Children's Courts (Children's Court Law Case) (Constitutional Court 1/PUU-VIII/2010)).

CRC or international law.⁷⁰

In the Philippines, the Constitution adopts generally accepted principles of international as part of the laws of the land. However, in practice, the Philippines follows a dualist system and needs implementing legislation in order to enforce international treaties locally.

Generally, ASEAN Member States are dualist in practice and the CRC needs to be in a domestic law for it to be enforceable in courts. Also, despite the irregularity of knowledge on whether ASEAN states are monist or dualist in nature, all ASEAN states have used the CRC in one way or another in their national laws on children. Most have national plans of action for children in which the CRC was used as a framework or at least mentioned as a guide. These will be discussed further in chapter 5.

3.4. The Regional Child Rights Situation in ASEAN

3.4.1. Kids Rights Index and GDP Rankings

According to the ASEAN Secretariat's latest count of the ASEAN Community in Figures 2016, persons 19 and below⁷¹ comprise of 35.4% of the total population.⁷² There is no available aggregated data on how many of these are male or female.

In terms of implementation of the CRC, according to Kids Rights Index (hereinafter KRI)⁷³, below are the rankings of ASEAN countries:

Country	Overall Rank	Life	Health	Education	Protection	Child Rights Environment
Brunei	65 (0.759)	37 (0.932)	81 (0.875)	64 (0.696)	-	79-84 (0.583)
Cambodia	117 (0.617)	109 (0.761)	138 (0.543)	42 (0.729)	107(0.691)	116-125 (0.429)
Indonesia	101 (0.682)	103 (0.775)	125 (0.623)	14 (0.787)	90 (0.778)	96-115 (0.5)
Lao PDR	112 (0.63)	122 (0.649)	122 (0.635)	117 (0.597)	101(0.708)	85-95 (0.571)
Malaysia	46 (0.789)	55 (0.896)	75 (0.892)	123 (0.583)	-	8-16 (0.833)
Myanmar	116 (0.618)	118 (0.685)	115 (0.695)	97 (0.647)	83 (0.821)	133-141 (0.357)
Philippines	54 (0.776)	104 (0.769)	112 (0.725)	24 (0.751)	86 (0.807)	8-16 (0.833)

⁷⁰ *Id.* (citing Decision, Reviewing Law No. 3 of 1997 on Children's Courts (Children's Court Law Case), at 151 (Constitutional Court 1/PUU-VIII/2010).

⁷¹ Official ASEAN statistics disaggregates age groups by 0-4, 5-19, 20-54, and >65.

⁷² ASEAN Secretariat, ASEAN Community in Figures (ACIF) 2016, Table 43, available at http://asean.org/?static_post=asean-community-figures-acif-2016 (last accessed 15 June 2017).

⁷³ "The KidsRights Index is the annual global index which ranks how countries adhere to and are equipped to improve children's rights. The KidsRights Index is an initiative of the KidsRights Foundation, in cooperation with Erasmus University Rotterdam: Erasmus School of Economics and the International Institute of Social Studies. It comprises a ranking for all UN member states that have ratified the UN Convention on the Rights of the Child and for which sufficient data is available, a total of 165 countries." More information is available at www.kidsrightsindex.org.

Singapore	76 (0.737)	3 (0.992)	26 (0.969)	-	-	126-132 (0.417)
Thailand	8 (0.867)	65 (0.886)	64 (0.992)	22 (0.762)	74 (0.858)	2-3 (0.917)
Vietnam	40 (0.798)	73 (0.87)	91 (0.857)	31 (0.74)	81 (0.823)	41-53 (0.714)

Figure 2. KRI rankings of ASEAN countries

Thailand ranked the highest, landing itself in the top 10 in the world or from a total of 165 countries. It is followed by Vietnam, Malaysia, the Philippines, Brunei, Singapore, and Indonesia. At the bottom spectrum are Lao PDR, Myanmar, and Cambodia. Thailand ranked 2-3 in the world when it comes to the category of child rights environment, which measures how countries “operationalized the general principles of the CRC”⁷⁴ and how they provide a “basic infrastructure for child rights policy.”⁷⁵ The indicators of which consist of non-discrimination, best interest of the child, respect for the views of the child, enabling legislation, best available budget, collection and analysis of disaggregate data, and state-civil society cooperation for child rights.⁷⁶ Notably high in the criteria domain of ‘Life’ is Singapore which ranked number 3. The indicators of which are under five mortality, life expectancy at birth, and maternal mortality rate.⁷⁷

The significance of these rankings show the diversity of ASEAN countries when it comes to the implementation of the CRC at least according to the Kids Rights Index. There is one country in the top ten, five countries in the middle range, and the rest of the four countries in the bottom range.

It is also noteworthy to see how ASEAN countries rank in terms of Gross Domestic Product (GDP) per capita to see their level of economic development.

Rank (GDP)		Rank (KRI)	
1	Brunei	1	Thailand
2	Singapore	2	Vietnam
3	Malaysia	3	Malaysia
4	Thailand	4	Philippines
5	Indonesia	5	Brunei
6	Philippines	6	Singapore
7	Vietnam	7	Indonesia
8	Lao PDR	8	Lao PDR
9	Myanmar	9	Myanmar
10	Cambodia	10	Cambodia

Figure 3. ASEAN Ranks in terms of GDP and KRI

As seen in the tables above, interestingly, but not surprisingly, the higher in rank in terms of GDP did not guarantee a higher rating in child rights compliance. However, it is importantly noteworthy that the bottom three countries in terms of KRI ranking remain the same bottom three in terms of GDP per capita. These are Lao PDR, Myanmar, and Cambodia.

Seeing these rankings provide part of the context surrounding ASEAN's main areas of concern when it comes to the implementation of children's rights nationally and regionally.

⁷⁴ Kidsrights Index, Methodology, available at <http://www.kidsrightsindex.org/Methodology/Methodology> (last accessed 15 June 2017).

⁷⁵ *Id.*

⁷⁶ KidsrightsIndex, Child Rights Environment, available at <http://www.kidsrightsindex.org/Child-Rights-Environment> (last accessed 15 June 2017).

⁷⁷ Kidsrights Index, *supra* note 46.

3.4.2. Issues on Children's Rights in ASEAN

This sub-section outlines the important issues on children's rights in ASEAN. These are based on each country's latest concluding observations, UNICEF EAPRO studies, and a recent regional child rights situation analysis done by academics and civil society.⁷⁸ The issues as discussed below are based on the clusters followed by the concluding observations namely: general measures of implementation, general principles (non-discrimination, best interests of the child, right to life, survival, and development, respect for views of the child), civil rights and freedoms, family environment and alternative care, basic health and welfare, education, leisure, and cultural activities, and special protection measures. The purpose of outlining these issues is to give an overall snapshot on the most critical issues in ASEAN and later on relate them to whether the existing instruments sufficiently cover all these issues.

3.4.2.1. General measures of Implementation

All ten countries received recommendations from the CRC Committee in their latest concluding observations to fully incorporate the CRC in their domestic law.⁷⁹ All ten countries had, one way or another, mentioned the CRC in at least one of their laws concerning children but provisions of the CRC are hardly or not used nor invoked in administrative or judicial tribunals.⁸⁰ Only six out of the ten ASEAN Member States have comprehensive 5 to 20 year national plans of action on children: Indonesia, the Philippines, Thailand, Malaysia, Myanmar, and Vietnam.⁸¹ The rest have national plans

⁷⁸ See Child Rights Situation Analysis, *supra* note 23.

⁷⁹ UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Brunei, 24 February 2016, CRC/C/BRN/CO/2-3, para. 12 [hereinafter Latest Concluding Observations: Brunei]; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Cambodia, 3 August 2011, CRC/C/KHM/CO/2-3, para. 9 [hereinafter Latest Concluding Observations: Cambodia]; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Indonesia, 10 July 2014, CRC/C/IDN/CO/3-4, para. 12 [hereinafter Latest Concluding Observations: Indonesia]; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Lao PDR, 8 April 2011, CRC/C/LAO/CO/2, para. 9 [hereinafter Latest Concluding Observations: Lao PDR]; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Malaysia, 25 June 2007, CRC/C/MYS/CO/1, para. 18 [hereinafter Latest Concluding Observations: Malaysia]; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Myanmar, 14 March 2012, CRC/C/MMR/CO/3-4, para. 10 [hereinafter Latest Concluding Observations: Myanmar]; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Philippines, 22 October 2009, CRC/C/PHL/CO/3-4, para. 11 [hereinafter Latest Concluding Observations: Philippines]; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Singapore, 4 May 2011, CRC/C/SGP/CO/2-3, para. 8 [hereinafter Latest Concluding Observations: Singapore]; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Thailand, 17 February 2012, CRC/C/THA/CO/3-4, para. 11 [hereinafter Latest Concluding Observations: Thailand]; UN Committee on the Rights of the Child: Concluding Observations, Vietnam, 22 August 2012, CRC/C/VNM/CO/3-4, para. 9 [hereinafter Latest Concluding Observations: Vietnam] [collectively hereinafter Latest Concluding Observations: ASEAN].

⁸⁰ Latest Concluding Observations: ASEAN, *supra* note 51.

⁸¹ The Philippines has a National Strategic Framework for Plan on Children: (2000-2025) or CHILD 21; Thailand has the Child and Youth Development Plan (2012-2016); Malaysia has the National Policy on Children and the National Child Protection Policy together with related Action Plans; Myanmar had the National Plan of Action for Children (2006 – 2015); and Vietnam has the National Plan of Action for Children for 2012-2020. Child Rights Situation Analysis, *supra* note 23, at 37 & Latest Concluding Observations: ASEAN, *supra* note 51.

on specific themes of children's rights such as child labour, violence against children,⁸² or sexual exploitation of children.⁸³ For the countries without a national plan on children, the CRC Committee specifically recommended adopting one that encompasses all aspects of the Convention.⁸⁴ For those with national plans of action, recommendations focused on mainstreaming it⁸⁵, making it coherent with other laws and plans on children⁸⁶, and working toward full implementation.⁸⁷

Another common issue shared by all ten AMS is the lack of proper disaggregated data collection. In addition, all AMS shared the lack of knowledge of the CRC and the need for more dissemination not only toward children but also their families, teachers, professionals working with them, among others.

3.4.2.2. *Definition of a Child*

There is no shared definition on who is a child in ASEAN national laws. Vietnam only considers children those up to sixteen years of age.⁸⁸ Aside from the lack of a consistent general age of who is a child, the ASEAN Member States have inconsistent minimum ages of marriage, criminal responsibility, employment, and sexual consent. Girls as young as 14 are legally allowed to marry in Brunei⁸⁹ and in Myanmar if with parental consent.⁹⁰

3.4.2.3. *General Principles*

Discrimination is a common issue among the ASEAN Member States especially against girls, children with disabilities, children from ethnic or religious minorities, and children in poverty situations.⁹¹ The discrimination mostly lies in their access to education and basic health and welfare services.

The best interests of the child as a principle is found in at least one domestic law in each AMS. However, it is not in all legislation on children or is not applied in practice. A gap is also the lack of its use in judicial and administrative proceedings.⁹²

With regard to the principle of life, survival, and development, there are unique issues to the ASEAN context such as drowning and road accidents as the leading causes of death of children in Cambodia, Thailand, and Vietnam.⁹³ Death due to accidentally stepping on landmines was identified in Cambodia

⁸² Lao PDR has a National Plan of Action on the Prevention and the Elimination of Violence against Women and Violence against Children.

⁸³ Cambodia has a National Plans Against Sexual Exploitation of Children; Indonesia has a National Plan of Action on the Eradication of the Criminal Act of Trafficking in Persons and Sexual Exploitation of Children.

⁸⁴ See e.g., Latest Concluding Observations: Lao PDR, *supra* note 51, para. 13.

⁸⁵ Latest Concluding Observations: Philippines, *supra* note 51, para. 16.

⁸⁶ Latest Concluding Observations: Vietnam, *supra* note 51, para. 14.

⁸⁷ Latest Concluding Observations: Malaysia, *supra* note 51, para. 18.

⁸⁸ Latest Concluding Observations: Vietnam, *supra* note 51, para. 27.

⁸⁹ Latest Concluding Observations: Brunei, *supra* note 51, para. 23.

⁹⁰ Latest Concluding Observations: Myanmar, *supra* note 51, para. 33.

⁹¹ Latest Concluding Observations: Brunei, *supra* note 51, para. 25-26; Latest Concluding Observations: Cambodia, *supra* note 51, para. 28; Latest Concluding Observations: Indonesia, *supra* note 51, para. 19; Latest Concluding Observations: Malaysia, *supra* note 51, para. 32; Latest Concluding Observations: Myanmar, *supra* note 51, para. 35; Latest Concluding Observations: Philippines, *supra* note 51, para. 30; Latest Concluding Observations: Singapore, *supra* note 51, para. 29; Latest Concluding Observations: Thailand, *supra* note 51, para. 33; and Latest Concluding Observations: Vietnam, *supra* note 51, para. 29.

⁹² See, e.g., Latest Concluding Observations: Vietnam, *supra* note 51, para. 31.

⁹³ Latest Concluding Observations: Cambodia, *supra* note 51, para. 32; Latest Concluding Observations: Thailand *supra* note 51, para. 37; and Latest Concluding Observations: Vietnam, *supra* note 51, para. 33.

while extrajudicial killings were mentioned in the Philippines.⁹⁴

Children have been involved and consulted in various forms in all ten AMS. The gaps identified when it comes to the general principle of respect for the views of a child lies in system strengthening of these various forms of consultation.

3.4.2.4. *Civil Rights and Freedoms*

ASEAN Member States have diverse political environments and forms of government range from struggling new democracies⁹⁵ to Islamic monarchies⁹⁶. These influence the fulfilment of children's civil rights and freedoms. One of the most persistent issues which plague all ten states is the lack of birth registration – a fundamental requirement to the enjoyment of civil rights and freedoms.⁹⁷ Challenges regarding the registration of poor, migrant, and rural children are still recurring.⁹⁸ Some countries such as Malaysia and Brunei also restrict their automatic granting of nationality to only children whose both parents are citizens.⁹⁹ Others such as Myanmar have left out minority groups such as the Rohingya from getting their nationality.¹⁰⁰ There also exist issues on mandatory religious schooling and religious minorities facing persecution.¹⁰¹

3.4.2.5. *Violence against Children*

Violence against children in all settings is a common issue among all ASEAN Member States with some at alarming levels. In the Philippines alone, a nationwide study showed that 80% of Filipino children have experienced some form of violence in their lives.¹⁰² There is growing awareness on the ills of corporal punishment which has been translated into its prohibition in nine of the ten AMS.¹⁰³ However, the practice is still being done at home.¹⁰⁴ Singapore and Malaysia still uses this practice within their juvenile justice system.¹⁰⁵ Sexual violence and sexual tourism is rampant. FGM and child marriage still occurs in countries such as Indonesia and Malaysia. Eighteen (18) as the minimum age of marriage is only in legislation in five out of then ten countries (Cambodia, Lao PDR, the Philippines, Singapore, and Vietnam) with the rest with ages below.¹⁰⁶

3.4.2.6. *Family Environment and Alternative Care*

Poverty and lack of government support is a significant factor that causes issues when it comes to the

⁹⁴ Latest Concluding Observations: Philippines, *supra* note 51, para. 32.

⁹⁵ For example, in Myanmar which underwent military rule.

⁹⁶ For example, in Brunei Darussalam.

⁹⁷ Child Rights Situation Analysis, *supra* note 23, at 56.

⁹⁸ Grace Agcaoili, Child Protection Specialist, UNICEF East Asia and Pacific Regional Office, CRC Concluding Observations in ASEAN, Presentation at Frontiers of Children's Rights in the ASEAN Region (Depok & Jakarta, 24 January 2017). Ms. Agcaoili's visual presentation is on file with the Author and all participants of the course.

⁹⁹ Latest Concluding Observations: Brunei, *supra* note 51, para. 35.

¹⁰⁰ Latest Concluding Observations: Myanmar, *supra* note 51, para. 35.

¹⁰¹ Agcaoili, *supra* note 70.

¹⁰² Council for the Welfare of Children and UNICEF, National Baseline Study on Violence Against Children: Philippines (2016), available at https://www.unicef.org/philippines/PHL_NBSVAC_Results_ES.pdf (last accessed 15 June 2017).

¹⁰³ Agcaoili, *supra* note 70.

¹⁰⁴ *Id.*

¹⁰⁵ Child Rights Situation Analysis, *supra* note 23, at 58.

¹⁰⁶ *Id.* at 34.

family's role as primary caregivers in the ASEAN region.¹⁰⁷ Because of poverty, many children are placed in informal care arrangements with grandparents or other family members by parents who feel they are inadequate to raise their children.¹⁰⁸ Also because of poverty and sometimes coupled with violence at home, many children leave their home and live in the streets.¹⁰⁹ Alternative care arrangements consist mostly of institutions such as government or NGO run orphanages and children's homes. Brunei's case is an exception for there are no orphanages there since children deprived of immediate family are always cared for by extended family.¹¹⁰ Brunei also has reservations to article 20 of the CRC because adoption is not allowed but kafalah is.¹¹¹ Five of the ten AMS have not yet ratified the Hague Convention on Inter-country Adoption. In all AMS, foster care is not a common practice at all and sometimes is completely inexistent.¹¹²

3.4.2.1. *Disability, Basic Health, and Welfare*

There remains issues on discrimination against children with disabilities in the region in terms of lack of access to education, basic health, and welfare services.¹¹³ In terms of healthcare, children from the most developed ASEAN countries (Brunei, Malaysia, and Singapore), enjoy a high standard while children from less developed countries are suffering from basic and preventable health issues such as malnutrition. However, infant mortality and malnutrition have been on a steady decrease.¹¹⁴ There is low awareness and lack of free access to reproductive health services and teenage pregnancies are generally high.¹¹⁵

Children from the most vulnerable groups such as ethnic minorities, the poorest, and those living in rural or hard to reach areas suffer the most from the lack of access to quality health and welfare services.¹¹⁶

3.4.2.2. *Education, Leisure, and Cultural Activities*

Similar to healthcare, children from Brunei, Malaysia, and Singapore, have been realizing their rights in education while children from poorer countries face several issues. However, it must be noted that Singapore and Malaysia have reservations to art. 28 of the CRC in terms of they only provide free education to their citizens. Common issues when it comes to the access and quality of education are lack of schools (especially for children in far flung and rural areas), costs, and teacher-student ratio.¹¹⁷ These lead to low enrolment and high drop out rates.

3.4.2.3. *Special Protection Measures*

Child labour remains rampant in the region except, again, in the most wealthy nations of Brunei, Malaysia, and Singapore.¹¹⁸ Southeast Asia is still known as one of the regions with the worst

¹⁰⁷ *Id.* at 61. See also Agcaoili, *supra* note 70.

¹⁰⁸ Child Rights Situation Analysis, *supra* note 23, at 61.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 62.

¹¹¹ Muslim Women's Shura Council, *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child* (2011) at 8.

¹¹² *Id.*

¹¹³ Agcaoili, *supra* note 70.

¹¹⁴ *Id.*

¹¹⁵ Child Rights Situation Analysis, *supra* note 23, at 57.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 59.

commercial sexual exploitation of children and sex tourism.¹¹⁹ Refugee and internally displaced children caused by internal conflicts such as the ones in southern Philippines, southern Thailand, and in the Rakhine state of Myanmar remain a growing issue in the region.¹²⁰ The average minimum age of criminal responsibility is still low in the region with some as young as seven (7) years old such as in Brunei.¹²¹ Forms of corporal punishment within the juvenile justice system are allowed in Singapore and Malaysia.

3.4.3. Conclusion

The diversity among the ASEAN Member States is seen not only in the differences in culture, tradition, and beliefs but also manifests in their levels of development and key child rights issues. High economic development does not exactly translate to high implementation of the rights of the child but also contributes to it. This is seen especially in the categories of basic health and welfare and education where wealthier nations are doing better than the poorer ones. However, the opposite is seen when it comes to juvenile justice where the more developed nations are still practicing backward ways of disciplining children using corporal punishment and their minimum ages of criminal responsibility are lower than the rest. Poverty is pointed to as the root cause of many of the issues such as child labour, children living in the streets, violence, and out of school children. The most critical cross border regional issue is child trafficking and sex tourism.

The limited knowledge of the CRC, the lack of its use in the domestic setting including the general principles, and the lack of comprehensive national plans of action reflecting international commitments is telling on how much force the CRC is seen as an authority in the region. Also, given the situation of children in ASEAN and, as will be seen in the next section, the crucial reservations AMS have made to CRC points us to the direction that the CRC is not as relatable and persuasive in standard-setting in the region and perhaps a regional treaty on children's rights will be more apt.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 60.

¹²¹ Latest Concluding Observations: Brunei, *supra* note 51.

4. ASEAN Declarations and Conventions

4.1. Introduction

Regionally, there is no single comprehensive instrument containing the rights of children in ASEAN. However, ASEAN has passed several instruments as early as 1983 even before the ASEAN Charter gave basis to the ASEAN as a legal entity. This chapter will provide a comparative analysis of selected ASEAN declarations and conventions which are specifically related to or contain substantive provisions on children's rights. Substantive provisions from the instruments particularly relevant will be mentioned and analysed vis-à-vis international standards set by the CRC and to what extent they are compliant or not compliant. This is needed to assess whether and why there may be a need for a more comprehensive regional child right's instrument.

The instruments below are tackled in reverse chronological order in terms of adoption date starting with the ACTIP as the most recent instrument and the only Convention relating to children, followed by the declarations.

4.2. ASEAN Convention Against Trafficking in Persons Particularly Women and Children 2015 (ACTIP)

4.2.1. Brief Background

In all its 50 years of existence, ASEAN has only passed two conventions. One of which is the ACTIP.¹²² It is the only binding ASEAN legal instrument on children. The ACTIP was signed in November 2015 but only entered into force in March 2017 when it gained the minimum six required ratifications.¹²³ The Convention is meant to combat trafficking, a regional issue in ASEAN, as well as to protect victims, strengthen enforcement, and promote collaboration.¹²⁴

4.2.2. Related CRC articles

The CRC provisions related to the ACTIP are all those dealing with forms of trafficking and exploitation. These are trafficking for the exploitative purpose of adoption which is sought to be prevented in art. 21 of the CRC, child labour in art. 32, sexual exploitation in art. 34, abduction, sale, and trafficking in art. 35, and other forms of exploitation in art. 36.

4.2.3. Similarities and Differences to the CRC

The ACTIP is compliant with, and even more comprehensive than, the CRC in terms of covering all kinds of trafficking and exploitation of children as outlined. This is because art. 1 of the ACTIP covers a broad definition of trafficking:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of

¹²² The other is the ASEAN Convention on Counter-Terrorism (ACCT) which was signed in 2007 and entered into force in 2011.

¹²³ ASEAN Secretariat, ASEAN Welcomes Entry into Force of ACTIP, *available at* <http://asean.org/asean-welcomes-entry-into-force-of-actip/> (last accessed 15 June 2017).

¹²⁴ ASEAN Convention Against Trafficking in Persons Particularly Women and Children, 21 November 2015, art. 1, *available at* <http://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf> (last accessed 15 June 2017) [hereinafter ACTIP].

abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹²⁵

This is the exact broad definition of trafficking in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons of 2000 or the Palermo Protocol.¹²⁶ This definition is not found in the CRC but only in the non-binding general comments.

Apart from trafficking, it is also compliant with the CRC because it also covers the intended criminal acts in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Again, the ACTIP adopted the same definition of exploitation in the Palermo Protocol in saying that it “shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹²⁷ This covers child labour in art. 32, sexual exploitation in art. 34, and other forms of exploitation in art. 36.

Aside from adopting the Palermo Protocol definitions, the rule that consent of the victim is irrelevant when any of the means as found in the definition was used to obtain consent was also incorporated.¹²⁸ Additionally, it included the rule that means is irrelevant when the victim of the recruitment, transportation, transfer, harbouring, or receipt for the purpose of exploitation is a child.¹²⁹

A very important provision of this Convention is that it defines a child as any person under eighteen (18) years of age¹³⁰ which is consistent with the CRC. This is crucial especially considering that not all ASEAN Member States define the child this way.¹³¹ Hence, when it comes to trafficking, the Convention applies to persons under 18 even if the domestic law in the AMS have a different age of majority.

The points of non-compliance are found in the provisions on cooperation and assistance which require conformity with domestic laws of respective AMS. For example, art. 12 of the ACTIP outlines the areas of cooperation especially when it comes to children which include combating the root causes such as poverty, underdevelopment and lack of education and equal opportunity, exchanging and sharing of information on how to reduce children’s vulnerability to trafficking, and discouraging the demands of all forms of exploitation that leads to trafficking.¹³² This sounds all well and good. However, the first paragraph subjects this cooperation to those “in conformity with domestic laws of the respective Parties.”¹³³ Also, when it comes to mutual legal assistance in criminal investigations or criminal proceedings – an extremely crucial aspect of the prosecution of offenders – it is subject again to respective domestic laws.¹³⁴

Another point of non-compliance is found in article 4 which says that “[p]arties shall carry out their

¹²⁵ *Id.* art. 1(a).

¹²⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), 15 November 2000, 2237 U.N.T.S. 319.

¹²⁷ ACTIP, *supra* note 124, art. 1(a).

¹²⁸ *Id.* art. 1(b).

¹²⁹ *Id.* art. 1(c).

¹³⁰ *Id.* art. 1(d).

¹³¹ Vietnam defines a child as under 16. See Latest Concluding Observations: Vietnam, *supra* note 51, para. 27.

¹³² ACTIP, *supra* note 124, art. 12.

¹³³ *Id.*

¹³⁴ *Id.* art. 18(1).

obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.”¹³⁵ These principles can again be used as excuses not to implement provisions and reaffirms the cautious approach of ASEAN to human rights which was discussed earlier in Chapter 2.

4.2.4. Conclusion

The ACTIP is arguably the most important instrument on children’s rights in the region because it is the only legally binding one and it deals with one of the most pressing regional issues that children face. Adopting the definitions of the Palermo Protocol on trafficking was wise and went beyond the CRC which lacked a concrete definition of trafficking. However, the articles which provide ways or excuses for AMS to renege on their obligations is worrisome.

4.3. ASEAN Human Rights Declaration of 2012 (AHRD)

4.3.1. Brief Background

The ASEAN Charter tasked the ASEAN to establish a human rights body which later led to the establishment of the AICHR.¹³⁶ The AICHR was then tasked to develop an ASEAN Human Rights Declaration “with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights.”¹³⁷ Thus, after several years and a long process, the AHRD was adopted by ASEAN on November 2012.¹³⁸ It was a crucial step in the realization of a formal human rights system that would serve as a foundation for human rights in the region much like its equivalents in the regions of Africa, the Americas, and Europe.¹³⁹ Unlike its counterparts, however, it is still a declaration and therefore non-binding. Neither does it clearly link to a body that can officially and legally apply and interpret its provisions unlike the Inter-American Commission on Human Rights in relation to the American Convention on Human Rights¹⁴⁰ and the African Committee of Experts on the Rights and Welfare of the Child related to the African Children’s Charter.

4.3.2. Related CRC Articles

Article 40 of the AHRD says that its interpretation should not be “undermining the purposes and principles of ASEAN, or at the destruction of any of the rights and fundamental freedoms set forth in this Declaration and international human rights instruments to which ASEAN Member States are parties.”¹⁴¹ Considering that the CRC is an ‘international human rights instrument to which ASEAN Member States are parties,’ it can be concluded that the AHRD should be interpreted in light of the CRC. Also, although not specifically on children’s rights, it can also be said that each and every provision of the AHRD applies to children as children’s rights are human rights. This argument also

¹³⁵ *Id.* art. 4(1).

¹³⁶ ASEAN Charter, *supra* note 31, art. 14.

¹³⁷ AICHR TOR, *supra* note 32, arts. 3, 4.2, & 7.1.

¹³⁸ Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD), 18 November 2012, *available at* <http://asean.org/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd/> (last accessed 15 June 2017) [hereinafter AHRD].

¹³⁹ American Bar Association Rule of Law Initiative (ABAROLI), *The ASEAN Human Rights Declaration: A Legal Analysis 1* (2014).

¹⁴⁰ Organization of American States (OAS) Inter-American Commission on Human Rights (IACHR), *What is the IACHR*, *available at* <http://www.oas.org/en/iachr/mandate/what.asp> (last accessed 15 June 2017).

¹⁴¹ AHRD, *supra* note 138, art. 40.

finds basis in the fourth general principle of the AHRD which explicitly recognizes that the rights of children are “an inalienable, integral, and indivisible part of human rights and fundamental freedoms.”¹⁴²

4.3.3. Similarities and Differences to the CRC

One of the AHRD provisions which explicitly refers to children is found in article 27(3) which prohibits children or any young person from being subjected to economic and social exploitation.¹⁴³ However, it does not specify the age range of who constitutes a child or young person. Additionally, it directs that AMS should set a minimum age of employment and requires that below this “paid employment of child labour should be prohibited and punished by law.”¹⁴⁴ This provision is compliant with its corresponding article and obligation in the CRC which is article 32. In fact, it goes even beyond the CRC by not only referring to economic exploitation but social exploitation as well. It is also more specific than the CRC by requiring legal prohibition and punishment.

Nevertheless, the AHRD does not get perfect marks at this point because the CRC is not a very specific international standard when it comes to child labour and exploitation. One must turn to the ILO Conventions. The ILO Minimum Age Convention (ILO 138, 1973) and the ILO Convention on the Worst Forms of Child Labour (ILO 182, 1999), which all ASEAN Member States have ratified except Myanmar, goes beyond article 32 of the CRC by requiring a complete elimination of child labour especially in its worst forms. What is allowed is child work at a certain age with particularities per industry. Although the AHRD prohibits economic exploitation, it is lacking a specific provision for the complete elimination of child labour at any age below 18.

Another provision of the AHRD which specifically mentions children is in article 30(3) which states that even children born out of wedlock should enjoy the same social protection as all other children. Although this right may seem obvious, one can infer that it was intentionally placed in the Declaration because some ASEAN countries still discriminate children born out of wedlock.¹⁴⁵ This AHRD provision is in line with the CRC for not allowing discrimination and for guaranteeing children the right to benefit from social security as required by article 26 of the later.

Article 31 of the AHRD states that “[e]very person has the right to education” which undoubtedly includes the age group this right is most crucial to: children. Its words echo the UDHR¹⁴⁶ and is compliant to the CRC on the aspects of primary and secondary education as well as the direction of education to full development but lacks compliance to the CRC in other aspects. Points of in compliance are regarding the accessibility (and not only availability) of technical and vocational education¹⁴⁷ and measures to encourage regular attendance and reduce drop-outs.¹⁴⁸ It also fails to mention international cooperation in matters relating to the elimination of ignorance and illiteracy.¹⁴⁹

Of particular importance is the wording of the AHRD provision which states that “[p]rimary education

¹⁴² *Id.* art. 4.

¹⁴³ *Id.* art. 27(3).

¹⁴⁴ *Id.*

¹⁴⁵ In the Philippines, for example, child born out of wedlock are registered as “illegitimate” in their birth certificate and are entitled to less inheritance.

¹⁴⁶ ABAROLI, *supra* note 139, at 100.

¹⁴⁷ Convention on the Rights of the Child, Nov. 20, 1989, art. 28 (1) (d), 1577 U.N.T.S. 3 [hereinafter CRC].

¹⁴⁸ *Id.* art. 28 (1) (e).

¹⁴⁹ *Id.* 28 (3).

shall be compulsory and made available free to **all**¹⁵⁰ given some AMS reservations to this right. Singapore's reservation to this CRC article states that it "does not consider itself bound by the requirement to make primary education compulsory because such a measure is unnecessary in our social context where in practice virtually all children attend primary school; and (b) reserves the right to provide primary education free only to children who are citizens of Singapore."¹⁵¹ Malaysia also has a reservation on article 28(1)(a) stating that it will be "applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia."¹⁵² Malaysia's laws require primary education to be compulsory but is not free for all.¹⁵³

Another important provision of the AHRD when it comes to children is the right to nationality found in article 18. When it comes to nationality, the CRC, in articles 7 and 8, states that children have the right to acquire a nationality and the preservation of such.¹⁵⁴ The AHRD, however, qualifies this right to nationality "as prescribed by law."¹⁵⁵ This can be wrongfully interpreted to mean that should a domestic nationality law not confer nationality to certain children, then it is acceptable with the AHRD standards. Take the case of Mai as stated in the introduction of this paper. Being of Rohingya descent and considering that the Myanmar Citizenship Law does not confer Myanmar nationality on them, then Myanmar is justified under the AHRD since the exercise of the right to nationality has to be "as prescribed by law."

A unique provision in the AHRD which is not in the CRC is the right to enjoy peace found in article 38.¹⁵⁶ In times of war and conflict, children are one of those affected the most. Guaranteeing this right is not only in conformity with the goals of the formation of ASEAN but may also extremely beneficial for the rights of the child because in a time of war and conflict, most children cannot even be properly enjoy their rights despite it being legally guaranteed. There are some critics to this novel inclusion, however. It is opined that this right may be used to shield human rights abuse under the guise of keeping the peace.¹⁵⁷

4.3.4. Conclusion

Based on the checklist, the AHRD has mentioned to some extent most rights found in the CRC. Completely missing, however, are crucial provisions on definition of the child (art. 1), the best interests of the child (art. 3), parental responsibilities, guidance and state assistance to parents (art. 5, 18), non-separation of parents (art. 9), family reunification (art. 10), abductions (art. 11), association (art. 15), adoption (art. 21), drug abuse (art. 33), war and armed conflict (art. 38). The analysis below of the

¹⁵⁰ AHRD, *supra* note 137, art. 31(2) (emphasis supplied).

¹⁵¹ Singapore, Declarations and Reservations *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec (last accessed 15 June 2017).

¹⁵² Malaysia, Declarations and Reservations, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en#EndDec (last accessed 15 June 2017).

¹⁵³ Right to Education Project, National Law and Policies on Fee for Free – Malaysia, *available at* <http://r2e.gn.apc.org/country-node/458/country-fee> (last accessed 1 June 2017). *See also* Dina Imam Supaat, *Refugee Children under the Malaysian Legal Framework*, U.U.M. Journal of Legal Studies Vol. 4, at 130 (2014).

¹⁵⁴ CRC, *supra* note 147, arts. 7 & 8.

¹⁵⁵ AHRD, *supra* note 138, art. 18.

¹⁵⁶ Article 38 of the AHRD states: "Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realised. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region." *Id.* art. 38.

¹⁵⁷ ABAROLI, *supra* note 139, at 8.

other instruments relating to children will show whether these provisions are covered or not.

4.4. Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN of 2013 (EVAWC Declaration)

4.4.1. Brief Background

In the 2004, ASEAN adopted a Declaration on the Elimination of Violence against Women. As an update and an addendum, in 2014, ASEAN adopted the Declaration on the Elimination of Violence against Women and Elimination of Violence against Children. Unlike other previous declarations passed, the EVAWC Declaration specifically calls for the ACWC to promote and review progress as well as to monitoring implementation of the Concluding Observations and recommendations of the CRC and the UPR in relation to violence against children (and women).

4.4.2. Related CRC articles

The CRC provision most related to the EVAWC Declaration is article 19 on violence. This CRC provision guarantees the right of the child to be protected from all forms of violence and requires protective measures be taken.

4.4.3. Similarities and Differences to the CRC

The first paragraph of article 19 of the CRC requires States to take “all appropriate legislative, administrative, social and educational measures to protect the child.”¹⁵⁸ The enactment of these measures are also part of the EVAWC Declaration and signifies the points of compliance to the CRC. These measures are found in sections 1 and 2 of the EVAWC Declaration which states that AMS should strengthen, enact, or amend national legislations on the elimination of violence against children and to “enhance the protection, services, rehabilitation, education and training, recovery and reintegration of victims/survivors.”¹⁵⁹ It continues to section 2 which requires that these measures should be in the national development plans and programmes of the Member States.¹⁶⁰

The second paragraph of article 19 of the CRC requires the inclusion of social programmes of support, prevention, reporting, and others related to the rehabilitation of the victim and the prosecution of the offender.¹⁶¹ The aspects of these are found in sections 3 – 7 of the EVAWC Declaration which suggests a “holistic, multi-disciplinary, gender responsive, child sensitive, and age responsive”¹⁶² approaches – even more specific than the CRC. These sections also include beyond what the CRC states. For example, the creation of an enabling environment for participation of children and the development of strategies to eliminate harmful practices and gender stereotyping.¹⁶³ These are progressive inclusions for it tackles some root causes of violence against children and ways to prevent it.

Other aspects of the Declaration which are not clearly found in the CRC are that it recognises, in the

¹⁵⁸ CRC, *supra* note 147, art. 19 (1).

¹⁵⁹ Declaration on the Elimination of Violence against Women in the ASEAN Region, 30 June 2004, § 1, *available at* http://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4 (last accessed 15 June 2017) [hereinafter EVAWC].

¹⁶⁰ *Id.* § 2.

¹⁶¹ CRC, *supra* note 147, art. 19 (2).

¹⁶² EVAWC, *supra* note 159, § 3.

¹⁶³ *Id.* § 3.

preamble, that “prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”¹⁶⁴ should be eliminated. Another is that it acknowledges the special protection that should be afforded to children in vulnerable situations:

domestic violence, women and children who are sexually exploited, women and children with disabilities, women and children living with and affected by HIV and AIDS, women and children in conflict with laws, cyber pornography and cyber prostitution, trafficking in women and children, women and children in disasters, women and children in armed conflict, women and children in refugee camps, women and children on the move, stateless women and children, migrant women and children, women and children belonging to ethnic and/or indigenous groups, children in early marriage, physical abuse of children, bullying, discrimination against women and children in mass and social media¹⁶⁵

The fact that the EVAWC Declaration is more up-to-date than the CRC is also seen in the fact that the former specifically mentions that AMS should recognise that violence can happen at all “stages of the life cycle, whether at home, in school, in the workplace, in public or private spaces (including cyber space).”¹⁶⁶ The problem with these progressive inclusions are that they are all found only in the preamble. And, arguably, preambles are sources of interpretation and do not necessarily confer substantive rights.¹⁶⁷

Similar to the CRC, however, is the lack of the specific mention of corporal punishment. Although, like the CRC, it can be inferred. Also, the ASEAN Regional Plan of Action on Elimination of Violence against Children which was meant to carry out the actions of the EVAWC Declaration among others, defines the word violence and includes the forms of violence, one of which is corporal punishment.¹⁶⁸ The Regional Plan includes many of the definitions, principles, and suggestions from General Comment 13 and 19 of the CRC and is much stronger-worded document than the Declaration. However, it is a regional plan and neither is it a legally binding instrument.

4.4.4. Conclusion

As seen above, the EVAWC Declaration is more comprehensive than the CRC when it comes to policies concerning violence against children. It is also more progressive by inserting gender sensitive aspects to the approach toward the elimination of violence. The biggest setback of this Declaration on EVAWC is, like the others, non-binding. Neither does it set specific enforceable rights for the protection of children. Should ASEAN decide to adopt a more comprehensive legally-binding instrument on children’s rights, they can incorporate provisions of this Declaration (in a rights format) and certain aspects of the regional plan.

4.5. Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children of 2010 (Ha Noi Declaration)

¹⁶⁴ *Id.* Preamble, para. 8.

¹⁶⁵ *Id.* Preamble, para. 9.

¹⁶⁶ *Id.* Preamble, para. 10.

¹⁶⁷ Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties 43 (2009). See also Liav Orgad, *The preamble in constitutional interpretation*, I-CON (2010), Vol. 8 No. 4, 714-738, 722.

¹⁶⁸ ASEAN Regional Plan of Action on Elimination of Violence against Children, *supra* note 40, II. B & C.

4.5.1. Brief Background

The Ha Noi Declaration was adopted by the Heads of States at the 17th ASEAN Summit in Ha Noi, Vietnam on 28 October 2010. It is said that this Declaration has strengthened the establishment of the ACWC which was recognised earlier that year in April 2010.¹⁶⁹ Its aim is to ensure that ASEAN's commitment that women and children fully benefit from the building of the ASEAN community and integration process.¹⁷⁰

4.5.2. Related CRC articles

The CRC provisions related to the Ha Noi Declaration are: survival and development in art. 6 of the CRC, participation in art. 12, access to information in art. 17, protection from violence in art. 19, health in art. 24, education in art. 28, leisure and culture in art. 31, juvenile justice in art. 40, and international and regional cooperation in art. 45.

4.5.3. Similarities and Differences to the CRC

Related to art. 6 and 24 of the CRC on survival and development and health, the Ha Noi Declaration's agreement found in sec. 17 to "promote a healthy start in life through early child care and development, healthcare and education especially children under-5 years of age so as to enable them to achieve optimal growth and development"¹⁷¹ gives premium to very young children. It is more specific than art. 6 of the CRC which ensures "to the maximum extent possible the survival and development of the child" making a double edged sword. This is because it adds importance to this crucial period in early childhood but at the same time limits the enjoyment of these rights to children under 5. There is, however, another provision on health which seems to cover a wider age range in mentioning that issues of child mortality and poor reproductive health should be addressed through enabling access to "safe contraception, safe family planning methods, and HIV and AIDS information, treatment, and care."¹⁷² This provision analysed against art. 24 of the CRC on health, again mentions something the CRC is lacking: specific reference to reproductive health and HIV and AIDS. What the Ha Noi Declaration lacks that the CRC contains, are references to breastfeeding, primary health care, and medical assistance.

With regard to participation, the Ha Noi Declaration mentions that AMS have agreed to "promote and encourage child participation in the ASEAN Community building through the establishment of the ASEAN Children's Forum and other relevant programmes or activities." The provision does not specifically mention that a child's views should be freely expressed and given due weight as stated in article 12 of the CRC. In a way, it limits participation of the child merely to the avenue of the ASEAN Children's Forum which may, in concept, be a great way to allow and encourage child participation but has also been criticized as a way of curtailing it.¹⁷³

¹⁶⁹ Comparative Regional Protection Frameworks for Refugees 31 (Susan Kneebone ed., 2017).

¹⁷⁰ *Id.*

¹⁷¹ Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, 28 October 2010, § 17, available at http://asean.org/?static_post=ha-noi-declaration-on-the-enhancement-of-welfare-and-development-of-asean-women-and-children (last accessed 15 June 2017) [hereinafter Ha Noi Declaration].

¹⁷² *Id.* § 8.

¹⁷³ See generally Ryan V. Silverio, *Beyond the ASEAN Children's Forum: Exploring and Imagining Spaces for Children's Participation in ASEAN in Human Rights and Peace in ASEAN*, Human Rights and Peace in Southeast Asia Series 5: Pushing the Boundaries (Azmi Sharom, et al., eds., August 2016).

Related to the protection of the child against violence, the Ha Noi Declaration's provision mentions "strengthening gender sensitive legislations and plans of action to prevent and address violence through intensifying training for policy-makers, programme developers, implementers and service providers." It is hardly compliant with article 19 of the CRC's requirement of taking all kinds of measures and is more of a general reminder. Fortunately, this gap was later on filled in by the Declaration on EVAWC as discussed in the previous section.

Information, leisure, recreational and cultural activities are all lumped into one provision consisting of one sentence of the Ha Noi Declaration. It merely says that children should be ensured access to it.¹⁷⁴ It is compliant to the CRC in the most basic sense since it at least mentions those rights but nothing more. This has both positive and negative sides. Positive for this general wording may allow a broader interpretation of these rights and may allow children to claim access in different forms. For example, on the basis of this, children may claim that they should be allowed information on a state's budget and demand that a part of this budget be allocated to building more parks and playgrounds or safe places where children can play. The negative side of this is because it is completely general, then this right might not be enforced at all for lack of knowing what the scope is.

With regard to education, the Ha Noi Declaration, in sec. 18, focuses in equality and inclusion. It says that investments have to be made to ensure "enrolment to children, including children of ethnic and/or indigenous groups as well as children with disability and with special needs, especially at pre-school, primary and secondary levels."¹⁷⁵ Comparing this to the provisions in the CRC on education, it lacks the requirement of making primary education compulsory and free, the accessibility of higher education, and the aims of education.¹⁷⁶ Also lacking is the obligation found in the CRC to administer school discipline in a manner consistent with the child's dignity.¹⁷⁷ This is crucial for corporal punishment is a common issue in South East Asia.¹⁷⁸ Despite these gaps, it is compliant with the CRC in terms of clarifying that focusing on making education inclusive to children from minorities and those with disabilities is part of the state obligations. However, this is also the only provision in the Ha Noi Declaration that mentions minorities or children with disabilities and the rights of these children are far beyond just inclusive education.

The Ha Noi Declaration also contains a provision on juvenile justice. Section 19 encourages AMS "[t]o provide restorative instead of punitive measures to rehabilitate the child in conflict with the law to promote his/her reintegration into society."¹⁷⁹ This is consistent with the spirit of restorative justice found in art. 40 of the CRC which says that children in conflict with the law should be treated with "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."¹⁸⁰ However, what the Ha Noi Declaration lacks is the important mention of the rights of children in conflict with the law and the specific obligations found in art. 37.¹⁸¹ It is especially important to mention the requirements such as not imposing capital punishment or life imprisonment without the possibility of release and detention as a last resort – requirements which are not met in many ASEAN Member States.¹⁸²

¹⁷⁴ Ha Noi Declaration, *supra* note 171, § 21.

¹⁷⁵ *Id.* § 18.

¹⁷⁶ CRC, *supra* note 147, art. 28.

¹⁷⁷ *Id.* art. 28 (2).

¹⁷⁸ See generally Save the Children, Prohibiting all corporal punishment in Southeast Asia and the Pacific (2009).

¹⁷⁹ Ha Noi Declaration, *supra* note 170, § 19.

¹⁸⁰ CRC, *supra* note 147, art. 40 (1).

¹⁸¹ *Id.* art. 37.

¹⁸² See, e.g., Latest Concluding Observations: *supra* note 51, para. 39.

Similar to all the other ASEAN instruments already discussed, the Ha Noi Declaration contains several provisions on international cooperation similar to the encouragement of this cooperation in article 23, para. 4, article 24, para. 3, article 28, para. 3, and 45 of the CRC. No less than five provisions of the Ha Noi Declaration discuss regional cooperation to promote and protect the rights of children. Section 1 mentions regional cooperation to “cope with the challenges and seize the opportunities created by globalisation and regional integration.”¹⁸³ Section 2 says that closer regional cooperation should be encouraged especially to help the disadvantaged, vulnerable, and those suffering from disaster and conflict.¹⁸⁴ Section 3 specifically mentions the CRC and how the abilities of AMS should be strengthened in order to fulfil their international commitments.¹⁸⁵ It also mentions “effectively utilising national resources and prioritizing adequate national budget allocation for the enhancement of welfare, development and participation of women and children.”¹⁸⁶ Section 4 says that institutional mechanisms and technical capacities should be strengthened in order to use “gender mainstreaming and child-centered approach in planning, programming and budgeting, implementation, monitoring and evaluation processes at all levels in the region.”¹⁸⁷ Section 12 has similar wording to art. 45 of the CRC and tells AMS to foster collaboration with the international community and UN agencies.¹⁸⁸ These provisions are more comprehensive than what is found in the CRC on collaboration by not only repeatedly mentioning the need for regional cooperation but also by mentioning in what specific aspects or focus topics the States should be helping each other with. It can be said that the Ha Noi Declaration expands the obligation found in the CRC of States to cooperate and collaborate.

4.5.4. Conclusion

The Ha Noi Declaration only mentions nine rights found in the CRC – less than one-fifths of the rights found in the international instrument. Should Mai, in the fictitious case presented in the beginning, use only this Declaration to seek redress from the violations done to her, the most helpful provisions for her would be those on regional cooperation and most likely nothing more. The Declaration merely contains general statements of commitments which are not exactly rights. This may cause a problem with regard to its enforceability unless broad interpretations are given and later enforced. It is also a regression from the Declaration on the Commitments for Children in ASEAN which was just passed almost a decade before in 2001.

4.6. Declaration on the Commitments for Children in ASEAN of 2001 (Commitments Declaration)

4.6.1. Brief Background

In 2000, formal meetings between ASEAN and the Working Group for an ASEAN Human Rights Mechanism were taking place to establish an ASEAN human rights body and the idea of coming up with a body for women and children’s rights was discussed.¹⁸⁹ The Declaration on the Commitments for Children in ASEAN was a result of that discussion to form the basis of the commonality within ASEAN to promote and protect children’s rights.¹⁹⁰ It was the first ASEAN instrument to adopt a rights-

¹⁸³ Ha Noi Declaration, *supra* note 171, § 1.

¹⁸⁴ *Id.* § 2.

¹⁸⁵ *Id.* § 3.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* § 4.

¹⁸⁸ *Id.* § 12.

¹⁸⁹ Pisanò, *supra* note 15, at 325.

¹⁹⁰ *Id.*

based approach toward children's rights.¹⁹¹ It was passed in August 2001 at the fourth meeting of ASEAN Ministers Responsible for Social Welfare.¹⁹² Its preamble specifically states that ASEAN has adopted to promote "regional cooperation for the survival, development, protection, and participation of the ASEAN child."¹⁹³ Also in the preamble, it is mentioned that the document is guided by the CRC.¹⁹⁴

4.6.2. Related CRC articles

There are several CRC rights found in the Commitments Declaration. They are the following: the right to express views or participation in art. 12 of the CRC, parental responsibility and state assistance in art. 18, protection from violence in art. 19, alternative care in art. 20, rights of children with disabilities in art. 23, right to health in art. 24, right to education in art. 28, right of minorities or indigenous children in art. 30, drug abuse in art. 33, war and armed conflict in art. 38, juvenile justice in art. 40, and international or regional cooperation in art. 45. As can be seen, the rights are more on economic, social, and cultural rights rather than civil political rights.

4.6.3. Similarities and Differences to the CRC

There are two provisions in the Commitments Declaration that relate to child participation. One is found in section 6 which sets the agreement to "[c]reate opportunities for children and young people to express their views, advocate their rights and concerns, and participate in community development."¹⁹⁵ The other is section 7 which says to "[e]ncourage the empowerment of children to meet the challenges of and seize the opportunities created by globalisation."¹⁹⁶ Comparing this to art. 12 of the CRC, the Commitments Declaration is a little more specific for it adds aside from expressing their views, children should be able to advocate for their rights and participate in community development. The declaration is also worded more progressively in recognising that children should be empowered to exercise this right in the context of globalisation. What it lacks, however, is the twin criteria found in the CRC on age and maturity. Also lacking is the specific reference to being heard in judicial and administrative proceedings. However, the phrase "advocate their rights and concerns" can be interpreted to include such situations.

Related to the provisions on parental responsibility and state assistance found in art. 18 of the CRC, the Commitments Declaration contains two similar provisions. These are sec. 8 which contains the agreement to "[c]reate employment opportunities for adult family members in ASEAN countries, as stable families are the key to the social, physical and emotional development of children"¹⁹⁷ and sec. 9 which says to "[d]evelop family support and family life education programmes to help families, the primary caretakers of children, to nurture and protect their children."¹⁹⁸ These provisions recognise the role of parental responsibility in the upbringing and development of their children and the role of the state to supplement this responsibility. Comparing these to the CRC provision which states that: "[s]tate Parties shall take all appropriate measures to ensure that children of working parents have the

¹⁹¹ Office of Human Rights Studies and Social Development (OHRSD) Mahidol University, Thailand, Towards an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, at 11 (Makati City: Working Group for an ASEAN Human Rights Mechanism, 2008) 11.

¹⁹² Declaration on the Commitments for Children in ASEAN, 2 August 2001, [hereinafter Commitments Declaration].

¹⁹³ *Id.* Preamble, para. 3.

¹⁹⁴ *Id.* Preamble, para. 5.

¹⁹⁵ *Id.* § 6.

¹⁹⁶ *Id.* § 7.

¹⁹⁷ *Id.* § 7. 8.

¹⁹⁸ *Id.* § 7. 9.

right to benefit from child-care services and facilities for which they are eligible,”¹⁹⁹ the Commitments Declaration is not only compliant but is even more specific. The later not only ensures child-care but agrees that States should create employment opportunities. Unlike the CRC which only emphasizes the role of family in its preamble, this Commitments Declaration provisions specifically recognizes the importance of having a stable family in terms of the full development of the child.

The sole provision on violence in the Commitments Declaration is found in sec. 15 which sets the agreement to “[p]rotect children from all forms of violence, abuse, neglect, trafficking and exploitation while at home, in school and in the community.”²⁰⁰ This is a very general statement of the rights found in CRC articles 19, 34, 35, and 36. Although it is not saying anything incompliant to the CRC, as discussed earlier, the problem with a generally sweeping statement is that it can cause a problem with regard to its enforceability unless broad interpretations are given and later enforced. It can be regarded as vague without knowing the scope of the rights of children it seeks to protect. Fortunately, however, this gap was remedied more than a decade after with the EVAWC Declaration (and the Regional Plan of Action on EVAC) and the ACTIP.

The Commitments Declaration is the only ASEAN instrument from those selected in these thesis that contains a provision on alternative care. It is found in sec. 10 which lays down the agreement to “[p]rovide appropriate care, including alternative family care or home with a family environment, to homeless children and those without families.”²⁰¹ Comparing this to art. 20 of the CRC, the Commitments Declaration is more specific yet limiting. Art. 20 of the CRC ensures alternative care to children who are temporarily or permanently deprived of a family environment which not only includes those who are eligible for adoption but also those who are in abusive environments or when it is not in their best interests anymore.²⁰² The Commitments Declaration limits alternative care to only children who are homeless and without families but does not seem to consider those who are in abusive situations. Hence, in that sense, it is incompliant with the obligations in the CRC.

With regard to children with disabilities, the Commitments Declaration acknowledges “[t]hat children with special needs should be granted opportunities to enable them to take their proper place in society and live as independently as possible.”²⁰³ Comparing this to art. 23 of the CRC, the declaration only echoes what is found in the former’s first paragraph which states that “[s]tates Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”²⁰⁴ The Commitments Declaration does not contain the other rights in the CRC which entitles disabled children to special care and assistance that should be free of charge whenever possible and also ability to access “education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities.”²⁰⁵ It is a welcome development that an ASEAN instrument acknowledged that special recognition should be given to children with disabilities but is again another vaguely general statement which can be improved.

On the right to health, the Commitments Declaration merely states that primary health care services to children should be strengthened.²⁰⁶ This statement, although not saying anything contrary to the

¹⁹⁹ CRC, *supra* note 146, art. 18 (3).

²⁰⁰ Commitments Declaration, *supra* note 192, § 15.

²⁰¹ *Id.* § 10.

²⁰² CRC, *supra* note 146, art. 20.

²⁰³ Commitments Declaration, *supra* note 192, § 5.

²⁰⁴ CRC, *supra* note 146, art. 23, para. 1.

²⁰⁵ *Id.* art. 23, para. 3.

²⁰⁶ Commitments Declaration, *supra* note 192, § 14.

child's right to health is not saying enough when compared to the CRC. The CRC provision on health which is primarily found in art. 24 which says "the right of the child to the enjoyment of the highest attainable standard of health"²⁰⁷ and that "[s]tates Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."²⁰⁸ This shows that the CRC contains more specific wording and stronger statements in ensuring the child's right to health.

On drug abuse, the Commitments Declaration states that children should be ensured the protection "from HIV/AIDs and drug abuse by instituting broad based programmes and strategies to halt its spread and provide care for its victims."²⁰⁹ The related CRC provision is found in art. 33 which says that "[s]tates Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances."²¹⁰ Although also broadly stated, the wording of the CRC is still more comprehensive. The Declaration lacks the crucial element of requiring the prevention of the use of children in drug-related crimes. Also, the Declaration lumps together HIV/AIDs and drug abuse in one provision, which are completely different issues which can arguable be closely related in some ways but should be tackled separately.

On education, the Commitments Declaration suggests to strengthen "functional literacy programs and promoting access to education, and information and communication technology (ICT) skills."²¹¹ A welcome development in terms of including ICT skills but clearly lacking in the required obligations found in the CRC. One crucial element found in the CRC which is lacking in the Commitments Declaration is the obligation to make primary education compulsory and free to all especially since both Singapore and Malaysia have reservations to this by ensuring this only to its citizens. Hence, Mai, a non-citizen, will most likely be unable to claim her right to education based on only this provision.

With regard to the rights of minorities, the Commitments Declaration assures the commitment to "[p]rotect, respect and recognise the rights of all children, including those of indigenous people, consistent with the customs and traditions of their respective communities."²¹² Even if this is compliant with the CRC's art. 30 which states that "a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language," it is problematic because of the phrase 'consistent with the customs and traditions.' Such phrase may be wrongfully interpreted to justify harmful practices such as FGM or child marriage which does occur in countries such as Indonesia.

Concerning war and armed conflict, the Commitments Declaration states that children should be protected "from armed conflict, victimization or deprivation of a childhood rooted in peace and joy"²¹³ It is also the only ASEAN instrument from the selected that explicitly grants the protection of children from armed conflict. Considering that the use of child soldiers is a common issue in the ASEAN region and that one of the principles of the foundation of ASEAN is peace, it is a necessary provision should a comprehensive instrument be considered. However, what it lacks is the vital element on the

²⁰⁷ CRC, *supra* note 146, art. 24, para. 1.

²⁰⁸ *Id.*

²⁰⁹ Commitments Declaration, *supra* note 192, § 13.

²¹⁰ CRC, *supra* note 146, art. 33.

²¹¹ Commitments Declaration, *supra* note 192, § 12.

²¹² *Id.* § 3.

²¹³ *Id.* § 16.

minimum age of recruitment which from fifteen in the CRC has been updated to eighteen by the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.²¹⁴

On juvenile justice, the Commitments Declaration recognizes the State's responsibility to "[e]stablish a child-centered juvenile justice system which fully safeguards children's rights and promotes children's reintegration to society." Similar to the analysis in the Ha Noi Declaration, this provision is consistent with the spirit of art. 40 of the CRC which says that children in conflict with the law should be treated with "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"²¹⁵ and improves it with the progressive addition of requiring a child-centered juvenile justice system. However, it is also lacking is the important mention of the specific rights of children in conflict with the law and the specific obligations found in art. 37 such as restrictions on capital punishment, life imprisonment, and detention.²¹⁶

A pattern that can be detected from all the ASEAN instruments is the inclusion of provisions on international cooperation related to art. 45 of the CRC. The promotion of regional cooperation is found in three sections of the Commitments Declaration, specifically in sections 1, 2, and 4.

Provisions that are found in the Commitments Declaration which are not found in the black letter law of the CRC are regarding early childhood education and calamities and natural disasters. Sec. 11 recognises state responsibility to "[g]ive attention to early childhood education and care through training and sharing of best practices among ASEAN child care professionals."²¹⁷ Although mentioned in General Comment no. 7 of the CRC, early childhood education is not found in the CRC itself. Neither is the giving of "priority to children in rescue and relief operations during calamities and natural disasters in the provision of services to alleviate their trauma and hasten their reunification with their families"²¹⁸ which is found in sec. 17 of the Commitments Declaration. These are welcome developments because these are issues common in ASEAN which should rightfully be tackled through regional cooperation.

4.6.4. Conclusion

The analysis of the Commitments Declaration shows that although it contains many of the rights found in the CRC, most are still generally and vaguely worded. This may cause a problem in claiming an enforceable right. Applying it to the case of Mai, she may be able to use the general provision on protection but might have a hard time claiming it as an enforceable right as it says nothing about detention.

4.7. Summary and Conclusion

Looking at the Convention and Declarations as a whole, they cover almost all rights found in the CRC except eight (8). The CRC rights that were left out are the best interests of the child in art. 3, parental guidance and evolving capacities in art. 5, identity in art. 8, non-separation from parents in art. 9, family reunification in art. 10, protection from abduction in art. 11, freedom of association in art. 15, and the review of treatment in art. 25. A summary of this can be found in the following table.

²¹⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, art. 1.

²¹⁵ CRC, *supra* note 147, art. 40 (1).

²¹⁶ *Id.* art. 37.

²¹⁷ Commitments Declaration, *supra* note 192, § 11.

²¹⁸ *Id.* § 17.

CRC right	AHRD	ACTIP	EVAWC Declaration	Hanoi Declaration	Commitments Declaration
Definition of a child		✓			
Non-discrimination	✓				
Best interests					
General Implementation	✓	✓	✓	✓	✓
Parental Guidance					
Survival & Development	✓			✓	
Registration, name, nationality and care	✓				
Preservation of Identity					
Non-separation					
Family reunification					
Abductions					
Respect for views	✓			✓	✓
Freedom of expression	✓				
Freedom of religion	✓				
Freedom of association					
Right to privacy	✓				
Access to information				✓	
Parental responsibility and state assistance					✓
Protection from violence	✓		✓	✓	✓
Alternative Care					✓
Adoption		✓			
Refugees	✓				
Disabilities	✓			✓	✓
Health	✓			✓	✓
Review of treatment					
Social security	✓				
Standard of Living				✓	
Education	✓			✓	✓
Minorities/Indigenous				✓	✓
Leisure, play, & culture	✓			✓	
Child labour	✓	✓			
Drug abuse		✓			✓
Sexual Exploitation	✓	✓			✓
Sale and trafficking	✓	✓			✓
Other forms of exploitation		✓			✓
Detention & punishment	✓				
War and armed conflict					✓
Rehabilitation of victims		✓	✓		✓
Juvenile Justice	✓			✓	✓
Knowledge of Rights and International cooperation	✓	✓	✓	✓	✓

Figure 5. Summary of CRC rights in ASEAN instruments

The reasons behind the exclusions of these rights are yet to be determined. It is difficult to identify the specific reason behind this for the lack of *travaux préparatoires* or literature on the drafting of these

documents. Also, many, except the AHRD, were formed behind close doors.

Out of all the instruments, the AHRD is the most comprehensive when it comes to containing the most rights found in the CRC even if it did not specifically mention children. This is because it is meant to be a comprehensive document on human rights which includes children. Yet, it still lacks important rights such as access to information, state assistance to parents, alternative care and adoption, rights of minorities and indigenous, and protection from war and armed conflict. As seen in the chapter on the regional situation of ASEAN children, these are the very issues that are common in AMS yet are not tackled by the most comprehensive instrument in ASEAN.

The rights that are mentioned the most are those on protection from violence and regional cooperation with knowledge sharing. The later is not surprising for one of the core purposes of forming ASEAN was for regional cooperation. Violence against children in all settings has been identified as one of the common key critical issues among AMS which can explain why the instruments seem to focus more on this. However, considering that this remains a common critical issue up to this day is telling about the seriousness of the commitments towards its eradication found in these documents.

The instruments do not technically say anything radically incompliant to the CRC but are often worded broadly and vaguely. Concerning the General Principles of the CRC, none of the instruments mention the best interests of the child (article 3, para. 1) although none of the ASEAN Member States have made reservations to this general principle. Also, only the AHRD contains a provision on non-discrimination. The most mentioned general principle is participation where three of the five instruments mention that children's views should be taken into account and some also mention participation in the global context and not merely in regional and local spheres.

On the Definition of the child, only the ACTIP defines children as all persons below 18 and only with regard to trafficking. This is noteworthy because not all AMS have 18 as the age of which below are considered children. Vietnam still has their age at 16. Minimum ages of employment, sexual consent, and marriage are all varied and inconsistent with international standards.

On Civil Rights and Freedoms, strangely, none of the instruments mention the right to birth registration and only the AHRD mentions the right to a nationality. It is also the only document that mentions the freedoms to expression, religion, assembly, and association. As discussed previously, the lack of birth registration remains a common issue in all AMS yet is not tackled by any of the selected instruments.

On Violence against Children, as mentioned earlier, this is the category that is most mentioned by the selected instruments. Considering that there is a whole declaration dedicated to the elimination on violence, there is still no specific mention in any of the protection against harmful cultural practices and corporal punishment. Nevertheless, these are mentioned in the Regional Action Plan on the Elimination of Violence against Children.

On Family Environment and Alternative Care, none of the documents tackle the right not to be separated from parents and family reunification. Only the Commitments Declaration talks about alternative care and only the ACTIP mentions adoption in the context of trafficking. Considering that families as a social unit are extremely important in ASEAN, this is surprising.

On disability, basic health and welfare, the issue of basic health and HIV and AIDs is mentioned often. This is an issue not specifically mentioned by the CRC but are only in the general comments. Tackling drug abuse is found in two of the five instruments. Children with disabilities are mentioned in three of the five and in those instruments, special attention is given to inclusive education and access to health

care.

On education, leisure, and cultural activities, education is tackled by three of the five instruments. Noteworthy is the inclusion of early childhood education in the Commitments Declaration – a right not explicitly found in the CRC but only in the general comments. None of the instruments mention the CRC requirement of making primary education free and compulsory except the AHRD. This is an important element because of Singapore and Malaysia's reservation to this right, reserving it only to citizens.

On Special Protection Measures, the rights of children from minorities or indigenous groups are only found in the last two instruments, one of which is almost two decades old. Their rights are not even mentioned in the AHRD despite all ASEAN Member States having minorities or indigenous children. Considering the case of Mai, from the Rohingya minority, although a fictitious case, this is troubling because of the reality that children from minorities or indigenous communities are among the ones most left behind. From the array of special protection measures, trafficking is included the most and is the subject of the only convention in ASEAN with regard to children – the ACTIP. The next most tackled issue is on juvenile justice with majority of the instruments mentioning the principles of restorative justice but with no specifics on the prohibitions on capital punishment, life imprisonment, and detention.

Going back to the fictitious story of Mai and her desire to use the selected instruments as the basis of her claims on the violations of her rights, it is seen that these instruments are not enough. None of them will be able to substantiate her claim on the lack of access to birth registration. She can only use the AHRD's provision on non-discrimination. Only the Commitments Declaration mentions the right to be protected from war and armed conflict but vaguely. Hence, claiming that she should have been protected by the armed conflict in the Rakhine state may also turn out to be futile. The only possible claims that she may be able to sustain are against her right to be protected from the violence she experienced in the detention center because of the EVAWC Declaration which covers all forms of violence. However, the fact that she was detained as a minor cannot be claimed as a violation because again, there is no legal basis in any of the selected ASEAN instruments. Her detention will most likely be wrongly justified on the basis of immigration policies.

From the following comparative analysis, it can be seen that the ASEAN policy standard on children still follows a welfare approach where most of the commitments and recognised obligations focus on welfare provisions and the notion that children need to be protected. Although some rights in the ASEAN instruments are merely mirrors of those found in the CRC, there are still striking differences. There is hardly any mention of civil rights and freedoms but many on economic, social, and cultural rights. Correlating the critical issues identified and the regional instruments on children's rights, it can be seen that ASEAN has responded in terms of policy formation toward common issues such as violence against children but remains lacking in terms of civil political rights such as birth registration. Also, the remaining reservations of AMS are inconsistent with the regional instruments such as those on juvenile justice and again, birth registration. It is peculiar that, despite many references in the preambles to the CRC, there is no reference at all to the best interests of the child. Non-discrimination and the right to life, survival, and development are hardly mentioned or referred to. However, what is welcome is that the most talked about general principle of the CRC is child participation. Should a comprehensive and legally binding charter or convention on children's rights in ASEAN be considered, substantive provisions from the existing instruments may be included but many still need to be added.

5. A Comprehensive Regional Instrument on Children's Rights in ASEAN

5.1. Introduction

This chapter will explore the significance of a comprehensive regional instrument on children's rights and the possibility of such for ASEAN. It will briefly discuss the three most known regional human rights systems namely those in the regions of Africa, the Americas, and Europe. It will identify the comprehensive child rights instrument, if any, that each of these regional systems have, how they have contributed to the advancement of children's rights in said region, and what ASEAN can take from this.

5.2. Africa's Regional Child Rights System

In the African Union, the mechanism working on children's rights is the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).²¹⁹ This was legally created by the African Charter on the Rights and Welfare of the Child (ACRWC).²²⁰ The ACERWC has the legal mandate to receive individual communications and conduct investigations on child rights violations. In ASEAN, its equivalent will be the AICHR but the latter does not have legal authority to receive communications nor conduct investigations.

Aside from the ACERWC, the AU also has the African Commission on Human and Peoples' Rights (ACHPR) created by the African Charter on Human and Peoples' Rights (ACHPR). In ASEAN, its equivalent will be the AICHR. Just as the ACHPR is mandated to monitor the implementation of the Charter, so is the AICHR. The AICHR, mandated to monitor the implementation of the ASEAN Human Rights Declaration, is limited in its function due to the fact that it cannot receive and deal with complaints on violations of human rights. The African Court on Human and Peoples' Rights is the body which rules on human rights violations to the ACHPR.

ACRWC is the legally binding comprehensive instrument in the African Union. In fact, it was formed because many African states did not feel that the CRC reflected African values and heritage since not many African nations were part of the CRC drafting process.²²¹ Hence, new provisions were introduced in the ACRWC that was not explicitly found in the CRC such as child responsibilities, protection of children of mothers in jail, children living in apartheid, and other harmful socio cultural practices, among others.²²²

Although the ACRWC echoed many of the rights in the CRC and some concepts were replicated such as the best interests of the child, it was still hailed as a necessary instrument for the safeguarding of

²¹⁹ Child Rights International Network, African Union, *available at* <https://www.crin.org/en/guides/un-international-system/regional-mechanisms/african-union> (last accessed 15 June 2017).

²²⁰ Child Rights International Network, African Committee of Experts on the Rights and Welfare of the Child, *available at* <https://www.crin.org/en/guides/un-international-system/regional-mechanisms/african-committee-experts-rights-and-welfare> (last accessed 15 June 2017).

²²¹ Edmund Amarkwei Foley, Evaluating the 'African' in the Charter on the Rights and Welfare of the Child at 1, ACERWC@25: Looking Back to Look Ahead – Conference on the Status of Children's Rights in Africa, 25 Years after Adoption of the ACRWC. *See also* Thoko Kaime, The African Charter on the Rights and Welfare of the Child: A socio-legal perspective 2-3 (2009).

²²² Foley, *supra* note 220. *See also* Louis O. Oyaro, *Africa at the Crossroads: The United Nations Convention on the Rights of Persons with Disabilities*, 30 Am. U. Int'l L. Rev. 361 (2015); Julia Sloth-Nielsen, *Regional Frameworks for Safeguarding Children: The Role of the African Committee of Experts on the Rights and Welfare of the Child*, Soc. Sci. 2014, 3, 948-961.

the rights of the African child. It made the CRC rights more relatable to people and children in the African region and closed the gaps that the CRC had in relation to the African context. Its success is seen by the fact that Africa has been more child-friendly not merely policy-wise but also in concrete results such as lower infant mortality rates, increased budgets in education, and improved safe drinking water sources.²²³

Should ASEAN consider a comprehensive regional instrument on children's rights, they can learn a lot from how the ACRWC was conceived – acknowledging and adopting the universal rights in the CRC but localising it to the regional context.

5.3. The Americas Regional Child Rights System

Within the Organization of American States (OAS), there are two mechanisms on human rights: the Inter-American Commission on Human Rights (IACHR) created by the Charter of the OAS and the Inter-American Court on Human Rights (IACtHR) created by the American Convention on Human Rights.²²⁴

There is no comprehensive instrument on children's rights in the Inter-American System. However, all members of the OAS have ratified the CRC except for one – the only country remaining in the world who has not ratified – the United States of America. Despite the non-existence of a single treaty covering children's rights in the Inter-American system, there are different binding conventions and protocols that can be invoked to the redress child rights violations. These are the American Declaration on Human Rights (arts. 7, 30, 31), American Convention on Human Rights (arts. 5, 17, 19), the Additional Protocol to the American Convention on Human Rights (arts. 7, 13, 15 and 16), the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.²²⁵

The Inter-American Court has also issued an advisory opinion entitled the 'Juridical Condition and Human Rights of the Child' which includes references to the CRC and the CRC Committee's General Comments.²²⁶ Violations on children's rights can be brought up to the court. Additionally, the IACHR has a Rapporteurship on Children's Rights whose primary mandate is the promotion of the human rights of children and adolescents within the jurisdiction of the OAS.²²⁷ This office gives advice to the IACHR regarding violations of children's rights that are filed to the IACtHR.

There may be no comprehensive regional treaty on children's rights in the Inter-American system but it

²²³ Osifunke Ekundayo, *Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC*, International Journal of Humanities and Social Science Vol. 5, No. 7 (1), at 156-57 (July 2015).

²²⁴ OAS, Who We Are, available at http://www.oas.org/en/about/who_we_are.asp (last accessed 15 June 2017).

²²⁵ Child Rights International Network, Q&A, available at <https://www.crin.org/en/guides/un-international-system/regional-mechanisms/qa> (last accessed 15 June 2017).

²²⁶ IACHR, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, 28 August 2002, available at http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf (last accessed 15 June 2017).

²²⁷ OAS-IACHR, Functions, available at <https://www.oas.org/en/iachr/children/mandate/Functions.asp> (last accessed 15 June 2017).

may be said that one is not needed for the IACtHR is able to rule on violations of children's rights without one. In fact, it is the only regional court in the world that has produced several binding decisions which extensively rule on children's rights.²²⁸ The decisions are mostly based on article 19 of the American Convention on Human Rights which states that "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."²²⁹ And despite the very general wording of this provision, the Court was able to rule on very specific regional issues. It has made child rights based pronouncements on street children in the Villagrán Morales case,²³⁰ children deprived of liberty in the Bulacio case,²³¹ the Adolescents in the Custody of the FEBEM case²³², the Panchito López Rehabilitation Institute case,²³³ violence against children during wartime or armed conflict in the Molina Theissen case,²³⁴ the Gómez Paquiyauri Brothers case,²³⁵ the Barrios Altos case,²³⁶ the the Serrano Cruz Sisters case,²³⁷ and indigenous children in The Kichwa Peoples of the Sarayaku Community and its members case.²³⁸

Philip Alston has called the Inter-American system, when it comes to the rights of the child, an anomaly.²³⁹ This is because, he explained, the substantive provisions on children's rights in their instruments seem limited and dated; yet, the institutions of the IACHR and IACtHR are able to be progressive and child-rights specific in its interpretation and pronouncements.²⁴⁰ Hence, what can be learned from the Inter-American system is that despite the absence of a comprehensive regional treaty on children's rights, the important element is a mechanism that is able to sufficiently receive, progressively assess, and issue binding judgments on child rights violations.

5.4. Europe's Regional Child Rights System

²²⁸ Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child: Protecting the Most Vulnerable at the Edge* (2008).

²²⁹ American Convention on Human Rights, 22 November 1969, art. 19.

²³⁰ Int-Am. Ct H.R., Villagrán Morales *et al.* case, Series C Decisions and Judgments No. 63, Judgment of November 19, 1999.

²³¹ Int-Am. Ct H.R., Series C: Decisions and Judgments No. 100; Case of Bulacio v Argentina, Judgment of September 18, 2003.

²³² Inter-American Commission on Human Rights, Report No. 39/02, Decision on Admissibility, Petition 12.328, Adolescents in the Custody of the FEBEM, Brazil, 9 October, 2002.

²³³ Int-Am. Ct H.R., Series C: Decisions and Judgments No. 112; Case of the "Juvenile Reeducation Institute" v. Paraguay, Judgment of September 2, 2004.

²³⁴ Int-Am Ct H.R., Series C: Decisions and Judgments No. 106, Case of Molina Theissen vs. Guatemala, Judgment of May 4, 2004 and Series C: No. 108, Case of Molina Theissen vs. Guatemala, Reparations, Judgment of July 3, 2004.

²³⁵ Int-Am. Ct H.R., Series C: Decisions and Judgments No. 110, Case of the Gómez Paquiyauri Brothers vs. Perú, Judgment of July 8, 2004.

²³⁶ Int-Am. Ct H.R., Series C: Decisions and Judgments No. 75, Case of Barrios Altos vs. Peru (Chumbipuma Aguirre *et al.* versus Peru), Judgment of March 14, 2001.

²³⁷ Int-Am. Ct H.R., Series C: Decisions and Judgments No. 118, Case of Serrano Cruz Sisters vs El Salvador, Preliminary Objections, Judgment of Nov. 23, 2004 (In Spanish only) and Series C No. 120 Case of Serrano Cruz Sisters vs El Salvador, Judgment of March 1, 2005.

²³⁸ Inter-American Commission on Human Rights, Report No. 64/04, Admissibility, The Kichwa Peoples of the Sarayaku Community and its Members, Ecuador, October 13, 2004.

²³⁹ Philip Alston & John Tobin, *Laying the Foundations for Children's Rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child 14* (UNICEF Innocenti Research Centre, 2005).

²⁴⁰ *Id.*

5.4.1. Council of Europe

The Council of Europe (CoE) has 47 member states and is the “continent’s leading human rights organisation.”²⁴¹ All members of the CoE have signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which contains civil and political rights but no specific mention of children’s rights.²⁴² Part of the structure of the CoE is the European Court of Human Rights (ECtHR) which rules on violations of the ECHR.²⁴³ The other main human rights treaty of the CoE is the European Social Charter (ESC) which contains economic and social rights. It has specific provisions on children regarding child work and labour, education, social and economic protection, among others.²⁴⁴ The European Committee of Social Rights is the body that monitors compliance of State Parties to the ESC.²⁴⁵

The CoE has several Conventions specifically on children’s rights but no comprehensive one.²⁴⁶ Since all State Parties are signatories to the CRC, the CRC is considered the main international instrument on children’s rights applicable in the region. Other Conventions were meant to merely supplement the CRC. The ECtHR has always referred to the CRC in relation to the ECHR in its rulings on issues of children’s rights.²⁴⁷

5.4.2. European Union

The EU is composed of 28 European countries, all of which are part of the CoE, which was primarily formed as a political and economic union.²⁴⁸ One of the EU’s goals is to promote human rights, which includes children’s rights, within the Union and around the world. Their website specifically states that “[p]rotection and promotion of the rights of the child is one of the objectives of the European Union. All policies and actions with an impact on children must be designed, implemented and monitored in line with the best interests of the child.”²⁴⁹ The EU Charter of Fundamental Rights contains all the human rights that all EU institutions and governments are bound to uphold. This Charter, given the legal status of a treaty by the Treaty of Lisbon, also contains many provisions relating to children such as on

²⁴¹ Council of Europe, *Who We Are*, available at <http://www.coe.int/en/web/about-us/who-we-are> (last accessed 11 June 2017).

²⁴² European Court of Human Rights, *The Court in brief*, available at http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last accessed 15 June 2017).

²⁴³ *Id.*

²⁴⁴ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.

²⁴⁵ Council of Europe, *European Committee of Social Rights*, available at <http://www.coe.int/en/web/turin-european-social-charter/european-committee-of-social-rights> (last accessed 11 June 2017).

²⁴⁶ The treaties are: Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; European Convention on the Exercise of Children’s Rights; European Convention on the Legal Status of Children born out of Wedlock; European Convention on the Adoption of Children; European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children; European Convention on Nationality; European Convention on the Repatriation of Minors; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; Convention on Action against Trafficking in Human Beings; Convention on Cybercrime. Child Rights International Network, Council of Europe (CoE) – Children’s Rights and the CoE, available at <https://www.crin.org/en/guides/un-international-system/regional-mechanisms/council-europe> (last accessed 7 June 2017).

²⁴⁷ European Union Agency for Fundamental Rights, *Handbook on European law relating to the rights of the child*, at 28, available at <http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights> (last accessed 15 June 2017) [hereinafter FRA Handbook].

²⁴⁸ European Union, *The EU in brief*, available at https://europa.eu/european-union/about-eu/eu-in-brief_en#human_rights_and_equality (last accessed 15 June 2017).

²⁴⁹ European Union, *Rights of the child*, available at http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm (last accessed 15 June 2017).

education and child labour.²⁵⁰ It is said that many of these provisions were modelled on the CRC.²⁵¹ Additionally, article 24 of said Charter entitled ‘the rights of the child’ specifically states the rights of care and protection, expression of views, the child’s best interests, and maintenance of a relationship and contact with parents.²⁵²

The Court of Justice of the European Union (CJEU) is the court of the EU and has also – though not as extensively as the ECHR – ruled on children’s rights cases. The CJEU has made direct reference to the CRC in a case involving labelling restrictions to protect children’s rights.²⁵³ When it does not specifically refer to the CRC in its decisions, it will always at the very least refer to its general principles.²⁵⁴

In conclusion, neither do the CoE nor the EU have a comprehensive regional treaty on children’s rights. Nevertheless, out of the three regions, Europe is the region with the most policy documents on children’s rights – from EU directives, regulations, to commission recommendations, guidelines, communications, plans of action, etc.²⁵⁵ In addition, because coordination within the CoE and the EU is strong²⁵⁶, the different and focused instruments on children’s rights are sufficient as legal sources on children’s rights. Also, it can be said that one is not needed for not only was the initiator of the CRC a European country, but also many European countries were involved in the drafting of the CRC.²⁵⁷ Hence, the notions of countries from the African region that the CRC is a “Western-created” document does not exist in Europe which is what is considered part of the “West.” The CRC is seen as the comprehensive treaty on children’s rights and many of the regional conventions are patterned after the CRC as a supplement to it.

5.5. An ASEAN Regional Child Rights Instrument?

A study²⁵⁸ has put together the elements of an advanced human rights system and this can be applied to children’s rights. It said that the key elements for a well-equipped, functional, and effective human rights system are the following. First, that all the countries in the region are part of the system and are bound by the legal commitments equally. Second, a regional human rights treaty is in place and a system of monitoring and ensuring its implementation is in place. Third, a complaint mechanism or a judicial procedure which can assess and adjudicate on human rights violations that is available and accessible to victims. Fourth and last, a system of follow up to and enforcement of these decisions.

From the description above of the systems in Africa, the Americas, and Europe, all three fulfil these criteria to a certain extent one way or another. If one were to look at good or best practices from these regions, then, on the first element of all countries being legally bound and committed, the European system arguably has it best because of the strong coordination system between the CoE and the EU

²⁵⁰ FRA Handbook, *supra* note 247, at 21.

²⁵¹ Alston & Tobin, *supra* note 239.

²⁵² Charter of Fundamental Rights of the European Union, art. 24, 2012/C 326/02, OJ C 326.

²⁵³ Dynamic Medien Vertriebs GmbH v. Avides Media AG, CJEU, C-244/06, 14 February 2008.

²⁵⁴ FRA Handbook, *supra* note 246, at 29.

²⁵⁵ See generally European Commission, EU acquis and policy documents on the rights of the child, 2016, available at http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm (last accessed 10 June 2017).

²⁵⁶ FRA Handbook, *supra* note 246, at 19.

²⁵⁷ Office of the United Nations High Commissioner for Human Rights, Legislative History of the Convention on the Rights of the Child (2007), Vol. 1, page xxxvii, available at <http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf> (last accessed 15 June 2017).

²⁵⁸ European Parliament, Directorate-General for External Policies – Policy Department, The role of regional human rights mechanisms 12 (2010).

coupled with the strong legal commitment of these systems to the CRC. On the second criteria with regard to a regional human rights treaty in place, the African system can be cited as a good practice on paper with the ACRWC as the comprehensive regional children's rights treaty in place and the ACERWC as the body in charge of monitoring and ensuring implementation. The ACRWC is not only compliant with the CRC but also reflects African particularities. On the third criteria regarding a complaint mechanism, the Inter-American system has it best with its strong adjudicatory body, the IACtHR – the only regional body that has produced several binding progressive decisions on children's rights. All regional systems seem to lack the fourth criteria but at least in policy, all have a form of follow up and enforcement.

When it comes to ASEAN, it can be said that it has passed the first criteria on all countries being legally bound since all ten countries are part of the system with representatives in the AICHR and ACWC. All ten countries are in equal footing and in fact no policy or treaty can pass unless there is consensus among them. This is the ASEAN Way. With regard to the second criteria on a regional children's rights treaty in place and a system of monitoring and enforcement, ASEAN is halfway there. The ACWC can act as the body which can monitor and enforce but the key component is missing: a regional children's rights treaty. This, therefore, strengthens the position that ASEAN is in need of a regional children's rights treaty in order to have a functional and effective child rights system. Regarding the third and fourth criteria, this is also lacking for there is no ASEAN Court nor are the human rights bodies legally equipped to receive complaints and to later on follow up and enforce possible decisions. There are, however, talks on the establishment of an ASEAN Court. What is in existence are talks on establishing the second crucial criteria on a regional children's rights treaty.

A comprehensive instrument on ASEAN children's rights can take into account the current situation of children in the region and the historical experience of the ASEAN children. This is what the African child rights system did with the ACRWC. The mechanism that is meant to monitor and enforce such ASEAN treaty – the ACWC – should also be strengthened with an increased mandate to handle these responsibilities and stronger criteria of independent experts. A regional treaty can give a Charter-based mandate to the ACWC therefore strengthening it.

ASEAN is not yet at such a level that it can manage without a comprehensive treaty and merely rely on an adjudicating body to interpret AHRD provisions in line with international obligations under the CRC such as what is being done in the Inter-American and European systems. At this point in time, ASEAN is still seen as quite weak as a regional child rights system.²⁵⁹ Contributing to this weakness is the lack of a comprehensive binding treaty paired with an effective body that can promote and protect children's rights. However, and given of the existence of the ACWC, this can be strengthened with a comprehensive regional treaty on children's rights that will pave the way to its being strong and effective.

²⁵⁹ See, e.g., *id.* at 20.

6. Conclusion

Today, ASEAN, despite its diversity, is regarded as one of the most sustainable regional organizations in the world.²⁶⁰ Its diversity is not only seen in its political systems and cultural practices but also in its levels of development and responses to child rights issues. High economic development does not exactly translate to high implementation of the rights of the child but also contributes to it.

The CRC has been ratified by all ten (10) the ASEAN Member States. Despite the universal ratification, there remains several declarations and reservations to the fundamental rights of the child, including the general principles. The countries with the most reservations, Brunei, Singapore, Malaysia, are those considered the most developed, being in the top 3 in terms of GDP. These reservations are telling in whether there truly is an ASEAN standard on children's rights and the level of commitment the AMS have in respecting them.

Regionally, there is no single comprehensive instrument containing the rights of children in ASEAN. However, ASEAN has passed several instruments specifically related to or contain substantive provisions on children's rights. An analysis of these instruments show that they cover almost all rights found in the CRC except eight (8). The CRC rights that were left out are the best interests of the child in art. 3, parental guidance and evolving capacities in art. 5, identity in art. 8, non-separation from parents in art. 9, family reunification in art. 10, protection from abduction in art. 11, freedom of association in art. 15, and the review of treatment in art. 25. The reasons behind the exclusions of these rights are yet to be determined. It is difficult to identify the specific reason behind this for the lack of *travaux preparatoires* and literature on the formation of these documents and because many were formed behind closed doors. The rights that are the mentioned the most are those on protection from violence and regional cooperation. The later is not surprising for the one of the core purposes of forming ASEAN was for regional cooperation. Violence against children in all settings has been identified as one of the common key critical issues among AMS which can explain why the instruments seem to focus more on this.

The instruments do not technically say anything radically incompliant to the CRC but are often worded broadly and vaguely. Concerning the General Principles, none of the instruments mention the best interests of the child even if none of the AMS have reservations to this general principle. Also, only the AHRD contains a provision on non-discrimination. The most mentioned general principle is participation where three of the five instruments mention that children's views should be taken into account and some also mention participation in the global context and not merely in regional and local spheres.

The analysis also shows that the ASEAN legal standard on children still follows a welfare approach where most of the commitments and recognised obligations focus on welfare provisions and the notion that children need to be protected. Although some rights in the ASEAN instruments are merely mirrors of those found in the CRC, there are still striking differences. There is hardly any mention of civil rights and freedoms but many on economic, social, and cultural rights. Correlating the critical issues identified and the regional instruments on children's rights, it can be seen that ASEAN has responded in terms of policy formation toward common issues such as violence against children but remains lacking in terms of civil political rights such as birth registration. Also, the remaining reservations of AMS are inconsistent with the regional instruments such as those on juvenile justice and again, birth registration.

²⁶⁰ Kranrattanasuit, *supra* note 6, at 10.

ASEAN is still seen as quite weak as a regional child rights system as compared to other more established systems in Africa, the Americas, and Europe. Contributing to this weakness is the lack of a comprehensive binding treaty paired with an effective body that can promote and protect children's rights. A comprehensive instrument on ASEAN children's rights can take into account the current situation of children in the region and the historical experience of the ASEAN children. Also, the ACWC can be strengthened by such a comprehensive regional treaty on children's rights and a stronger mandate. This can pave the way to ASEAN being a durable and effective regional child rights body and system.

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