

PREVENTION OF HUMAN TRAFFICKING: A STUDY ON MALAYSIA'S ANTI-TRAFFICKING IN PERSONS AND ANTI-SMUGGLING OF MIGRANTS ACT 2007

Zuraini Ab Hamid*

*Ms., International Islamic University Malaysia, MALAYSIA, zuraini.abhamid@gmail.com

Abstract

United Nations Universal Declaration of Human Rights 1948 and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children are the two core international conventions that have found the inclusion of human trafficking issue into international relations. Both of the international written documents have provided excellent guidelines to their state members in combating the heinous crime. In that context, the later has outlined "3P" paradigm to combat human trafficking where the major concern is given to prevent the crime, protect the victims and prosecute the perpetrators. Among the three, the prevention of human trafficking becomes the key component of the paradigm which practically is conducted through various public awareness campaigns, strengthening corporation between government and non-governmental organizations and implementation of laws. The campaign will acknowledge the issue, educate public to identify the vulnerable victims for trafficking and warn the migrant about the risk of their migration to the foreign countries. Then, a strong corporation between the parties will enhance the success. However, nobody can deny the power of laws, which can restrain an individual from committing any offence. Therefore, this paper provides legal analyses to determine whether the Malaysia's legal response through its Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 is in compliance with the international paradigm. This paper discloses that the Act has shown its capability in preventing the crime. However, an extensive effort could be taken in order to strengthen the paradigm of prevention in the Act where a greater priority should be given to the protection of the victim and enforcement of the Act itself.

Keywords: Human trafficking, prevention, Malaysia, Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.

1 INTRODUCTION

Human trafficking issue has gained a serious attention from the world at large only in the late 1990s. Since that, many anti-trafficking attempts have been made at international and national levels to fight the crime which include the adopting of international framework into states national legislations. The adoption of the United Nations Trafficking Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) in 2000 is often referred to as a milestone in this regard.

The Trafficking Protocol is one of three protocols to the Convention against Transnational Organized Crime (Palermo Convention) which have been introduced in 2000. The convention has become the leading international instrument in the fight against transnational organized crime and has entered into force since 29 September 2003. The Convention imposed the states parties to strengthen their efforts against transnational organized crime. Article 4 of the Trafficking Protocol states that "This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with Article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences".

Malaysia has ratified the Palermo Convention on 24 September 2004 though until now Malaysia is only an accession party to the Trafficking Protocol. However, the existence of various efforts by the government of Malaysia in combating the crime such as the introduction of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM 2007) and National Action Plan have shown Malaysia's intention to accede the Trafficking Protocol within the near future. Malaysia's action of signing the ASEAN Declaration against Trafficking in Persons Particularly Women and Children on 29 November 2004 in Vientiane, Laos has shown Malaysia's commitment as ASEAN member to curb the crime, thus lead Malaysia to ratify the

protocol. In preparing itself to ratify the protocol, Malaysia should put extra efforts to comply with the need of the protocol.

The Trafficking Protocol has introduced a 'formula' approach which is known as "3P" paradigm which aims to prevent human trafficking, protect the victim and prosecute the perpetrator. In this context, the first "P" which aims to prevent the crime has become the principal paradigm. Therefore, this article will carefully examine whether Malaysia's legal response through it ATIPSOM 2007 has fulfilled the needs of the formula. To achieve this, the Act will be closely studied. This article aims to illuminate the strengths of the Act and to highlight avenues to improve the Act that may lead to legislative reform.

2 ANTI-TRAFFICKING IN PERSONS AND ANTI-SMUGGLING OF MIGRANTS ACT 2007

In Malaysia, the supreme law of the land is the Federal Constitution. However, the Constitution is not clearly expressing the provision related to the trafficking. Before the introduction of the principal Act, the enforcement bodies in Malaysia mainly relied on provisions provided in Penal Code [Act 574], Child Act 2001 and Immigration Act 1959/1963 which lack of human trafficking offence. This situation has urged the Malaysian government to introduce ATIPSOM 2007 in response to the international efforts and the reports provided by the Trafficking in Persons by U.S Government since 2001 until now. The pass of the Act by Malaysia's House of Representatives on 10 May 2007 has brought a new light and hope to Malaysia where it will be a significant tool to affect anti-trafficking reforms. The main source of reference for the Act is based on the Trafficking Protocol and the Protocol against the Smuggling of Migrants by Land, Sea and Air.

2.1 The Application of Prevention Principle

The enactment of the Act is a manifestation of the Malaysia's determination to tackle human trafficking issues by having a specific legislation encompassing aspects of prevention, prosecution, care and protection to address the crime of trafficking. The prevention principle is portrayed on the nature of the Act itself where:

2.1.1 Prevention by having a wide scope of application

Human trafficking is a transnational organized crime which across the border of many countries. They are global in reach where the members of a syndicate might consist of individuals or groups around the worlds. They might expand their business and criminal markets internally and externally. They continue to branch out beyond their traditional parameters by extending their business to new geographic areas as long as there is an opportunity to generate profit. To prevent the crime, the nature of jurisdiction should also extend across the transborder. Therefore, ATIPSOM 2007 has widen its scope of application where it applies to the offences conducted either inside or outside Malaysia, regardless of the nationality or citizenship of the offender. The Act is applicable whether Malaysia is the receiving or transit country, or whether the exploitation occurs in Malaysia, and whether the receiving or transit country is a foreign country but the trafficking in persons starts or transits in Malaysia.

2.1.2 Prevention of Crime by Having "Open Form" of Exploitation

ATIPSOM 2007 has set out a few forms of exploitation which include sexual exploitation, forced labour or services, slavery or any practice similar to slavery, servitude, any illegal activity or the removal of human organs on its first introduction. In defining the exploitation, Malaysia has taken a step further by introducing the open form of exploitation of "any illegal activities". The open definition has allowed the prosecution to interpret the crime, thus prosecute the traffickers for a new form of exploitation which might exist in future without going through a complex procedure for a reformation.

2.1.3 Prevention of Crime by Punishing All the Potential Perpetrators

A syndicate of human trafficking may consist more than three members existing for a period of time and acts. Their concern is for committing one or more serious crime. The criminal activities running in the syndicate may be in multiple forms. As for human trafficking, the syndicate includes running other business such as human smuggling, drugs and weapons. This syndicate might be linked to the terrorist group or engaged with pirates. A syndicate from China may have a link with a syndicate at Malaysia and Australia. For example, a victim might be recruited by a syndicate in China, transiting in Malaysia by smuggle, and sold for prostitution in Australia. Therefore, the Act has provide consideration to various offences which have links to each other such as the act of transiting, trafficking and recruiting the trafficking victim.

2.1.4 The Prevention through Severe Punishment

The U.S. State Department recommends that the state members should provide at least a maximum of four (4) years' imprisonments, with comparatively longer sentences based on the severity of their actions. In Australia, the offences relating to trafficking in children will carry to a maximum penalty of twenty five (25) years' imprisonment.

As for Malaysia, it provides a maximum life imprisonment of twenty (20) years and fine of RM1 million for the trafficking offence committed in the ATIPSOM 2007. The prosecution successful rate will be one of the criteria that will be looked by the U. S Department in determining the Tier level of the countries in TIP report. The prosecution becomes an indispensable element of the state members to fight the trafficking as what have been set forth in Palermo Convention and TVPA. In this situation, Malaysia has shown its modest overall progress where the number of cases in the investigation and prosecution has increased from 2008 to 2013. Most of the accused persons have received significant punishment for the offence committed under the Act.

There are a few numbers of offences which are frequently committed in Malaysia. They are related to Section 12, Section 13, Section 14, Section 15, and Section 19. All of the punishments can be up to fifteen (15) and twenty (20) years' imprisonment. The punishments provided has shown that ATIPSOM 2007 has fulfilled international standard as what has been recommended by the U. S Department.

2.1.5 Prevention of Crime through Supplemented Acts to ATIPSOM 2007

In some situations, the trafficking case will be investigated together with or under supplemented Acts which including Immigration Act 1959/63 [Act 155], Malaysian Maritime Enforcement Agency Act 2004 [Act 633], Customs Act 1967 [Act 235], Evidence Act 1950 [Act 56], Court of Judicature Act 1964 [Act 91], Child Act 2001 [Act 611], Penal Code [Act 574], or Prevention of Crime Act 1950 [Act 297]. These supplemented Acts are available in the situations where:

- i) The accused person is a foreign citizen. Therefore, his status in Malaysia must be investigated in accordance with Immigration Act 1959/63.
- ii) The offence committed in ATIPSOM 2007 is committed together with other offence in supplemented Acts.
- iii) The offence which are not governed or proven under the principal Act, but the offence might contributes to trafficking crime or has been committed under the supplemented Acts.

The existence of these supplemented Acts have supported the ATIPSOM 2007 in preventing human trafficking and other criminal acts which leads to the crime or committed outside the trafficking offence. As in the case of Siti Rasyidah, the learned judge found that the offence was proven under Section 56 (1) (d) of the Immigration Act 1959/63 instead of under Section 12 or 14 of the ATIPSOM 2007 after the prosecution failed to prove the element of "exploitation". The conviction and sentence of original charges were struck out and the accused were convicted with Section 56 (1) (d) of the Immigration Act 1959/63 for harbouring illegal immigrant in the premise.

In addition, laws in labour, migrants, partnership and enforcement in Malaysia also have been enhancing the country in combating the trafficking issues. For example, there is a case where the victim is forced to work more than eight (8) hours per day while he works five (5) days per week or no rest day per week are given. As in Malaysia, the act is against the Malaysia Employment Act 1955 and is totally prohibited. Both foreign workers and local citizens should have equal rights where an employer is required to provide salary and benefits package similar to the domestic workers.

Besides, Malaysia has strengthened their laws by having a strict border control on the mainland and coastal areas to prevent any irregular movement entering Malaysia. In this case, the suspect will be subjected to an investigation if the enforcement found that he has committed a criminal act regardless whether he has legal document to enter Malaysia. This power of investigation is entrusted to five (5) enforcement bodies in Malaysia such as Royal Malaysian Police.

2.1.6 Prevention of Crime by Protecting the Victims against the Perpetrators

The prevention of crime through laws requires a big commitment from the victims since their testimony will

help the government to prosecute the perpetrator, thus preventing the crime. Therefore, the standard of proof for the offences committed such as under Section 12 and 14 of ATIPSOM 2007 does not require the victim as a legal immigrant or vice versa. He has the same position with the foreign national who legally enters Malaysia with proper travel documentation and masquerade as tourist or student. In this case, he will be regarded as a victim if it is proved that the committing of the offence is resulted from his exploitation. Only the trafficker will be investigated or charged for the offence committed under the Act. Furthermore, Section 16 of the Act stated that the consent of the victim to be exploited will not be a defense for the accused person for the offence committed under Section 12, 13, and 14 of the Act.

Section 25 further gives immunity to the trafficked victim from any criminal prosecution for his illegality being in Malaysia without any legal document. If the victim is identified as an informer, he will be protected under Section 26 of the Act where his name, address and identity will be concealed, unless the court found that his identity need to be revealed after given some considerations.

Judges in Malaysia suggested that the Act will be more beneficial if the purpose can be served as guidance for the Magistrates since it is regarded as a new enforcement. Even though "the principal duty of a court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in to find that intention", but "for this purpose the court may look to the reasons which led to the passing of the enactment in order to properly gather the intention." (See N.S. Bindra's Interpretation of Statutes, Eight Edition, m.s. 428).

Based on this opinion, it is proved that the purpose of introduction of the Act in which one of them is to prevent the crime should be given priority. Therefore, the protection of victim by the government will contribute to the prevention of crime.

2.1.7 Prevention through Compulsory Enforcement of ATIPSOM 2007 by Enforcement Bodies

An excellent implementation of the laws of human trafficking is one of the important benchmark for enforcement officers in determining their success in combating the crime. The responsibility to combat human trafficking has been entrusted to five (5) enforcement bodies in Malaysia which the Royal Malaysian Police is handling a majority number of the trafficking cases. The other bodies are the Immigration Department, the Customs Department, the Malaysia Maritime Enforcement Agency and the Department of Labour. Their roles as enforcement officers for human trafficking case are verified by Section 2 of ATIPSOM 2007.

There are few responsibilities of the officers embodied in the ATIPSOM 2007. They are responsible to investigate the case, to ensure the smooth running of the case from the day which a report of trafficking offence is lodged till the end of day which the case is dissolved. This responsibility includes to save and protect any potential exploited victim. Prompt action should be taken once they received information, complaint or report regarding the victimisation.

All the five (5) enforcement bodies have established their own special units to handle the human trafficking cases. The members of the units are those who can be regarded as the experts and knowledgeable persons in the trafficking cases. Other than enforcing Malaysia legal framework on human trafficking, they are also focusing on having extensive training, cooperation, meeting and utilisation of latest technologies. In 2013, it has been reported that (248) government officers from Royal Malaysian Police, Maritime, Immigration and Labour Department received specialized training related to anti-trafficking. Besides, more than (500) enforcement officers attended numerous additional trainings in the year. All the five (5) bodies have good cooperations in sharing of manpower, knowledge and expertise. These are among the examples showing their commitment in combating human trafficking issues as required by the ATIPSOM 2007.

3 CONCLUSION

The discussion has shown that Malaysia has capability in preventing human trafficking through its legal framework. Its legislative and policy have been proven to be very effective tools in preventing the crime and they have empowered the enforcement officers in taking action to combat the issue which has threatened the world security. However, there is still a need a further research and improvement in Malaysia legal framework. For example, the absent definition in ATIPSOM 2007 on the forms of exploitation has caused hardship to enforcement officers and prosecution in understanding the crime. In most of the cases,

they need to cross-refer to other legislation. This has led them to have their own interpretation which might be erroneous. The officer from the Labour Department of Malaysia would refer to the definition given by International Law Organization in Forced Labour Convention, 1930 (No. 29) in defining “forced labour”. As for the prosecution, they would interpret the Act by referring to the other law books or Malaysia Interpretation Act 1948 and 1967. In regards to this,, Australia is more advance than Malaysia. This is resulted from a comment in TIP report in 2012 which has urged for some amendments to Australia’s legislation to ensure the trafficking crimes are defined in all forms of trafficking in line with UN TIP Protocol 2000. Australia has introduced its Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) 2013 which amended the Criminal Code Act 1995 by inserting separate offences relating to forced labour, forced marriage, organ trafficking and harbouring a victim. Some definitions on a few forms of human trafficking are given in the Act itself including “slavery” and “forced labour”.

Besides, just by having a good legal framework is insufficient without a strong coordination and action among the enforcement bodies. The prevention approach in the Act is seem not effectively prevent the crime when the latest TIP report 2014 produced on 20 June 2014 has downgraded Malaysia to Tier 3 from the previous standing of the Tier 2 Watch List for its failure in complying with Trafficking Victims Protection Act of 2000 minimum standard. Malaysia now is not in an ideal position which it is facing sanction from the U.S government where the latter may withhold or withdraw non-humanitarian and non-trade-related foreign assistance to Malaysia. The reports further detailed out that the major criteria which contribute to Malaysia’s position in Tier 3 in 2014 are due to its laws and policy with regards to trafficking victim and ineffectiveness of enforcement officers in combating the crime. In response to that, Malaysia should not totally depending on its prevention laws but the attention also must be given to the protection of trafficking victims and law enforcement to enhance Malaysia’s position in TIP report, thus curbing the heinous crime.

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REFERENCE LIST

- Anti-Trafficking In Persons and Anti-Smuggling of Migrants Act 2007 (Act 670).
- Australia Criminal Code Act of 1995.
- Criminal Procedure Code [Act 593]
- Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth).
- Fredette, K. (2009). Revisiting the UN Protocol on Human Trafficking: Striking the Balances for More Effective Legislation. 17 *Cardozo Journal of International and Comparative Law* 101, 103.
- Immigration Act 1959/63 [Act 155]
- Milivojevic, S., & Segrave, M. (2010). *Responses to Sex Trafficking: Gender, Boarder and Home*. Edward Elgar Publishing Ltd. 45.
- Ministry of Internal Security. (2008). *The Vienna Forum (United Nations Global Initiative To Fight Human Trafficking)* Vienna, Austria 2008. Retrieved from <http://www.ungift.org/docs/ungift/pdf/vf/statements/Malaysia.pdf>
- New Straits Times Online. (2014). *Wisma Putra disappointed over US Trafficking in Person report 2014*. Retrieved from <http://www.nst.com.my/node/5250>
- PP v Nam Oithanthip [2008] 5 CLJ 285
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001).
- Royal Malaysian Police. (2013). *Organised Crime: Government Initiatives, Laws and Investigation of Human Trafficking in Person and Smuggling of Migrants in Malaysia*. Paper presented at International Conference on Trafficking organized by World Youth Foundation, Malacca.

Siti Rashidah binti Razali & Ors v PP [2011] 6 MLJ 417.

Trafficking Victims Protection Act of 2000

U.S. Department of State. (2014). Trafficking in Persons Report June 2014. Retrieved from <http://www.state.gov/documents/organization/226847.pdf>

U.S. Department of State. (2001). Introduction Trafficking in Persons Report July 2001. Retrieved from <http://www.state.gov/j/tip/rls/tiprpt/2001/3929.htm>

U.S. Department of State. (2013). Trafficking in Persons Report 2013. Retrieved from <http://www.state.gov/documents/organization/210740.pdf>

United Nations Office on Drugs and Crime. (2013). United Nations Convention against Transnational Organized Crime and the Protocols Thereto. Retrieved from <http://www.unodc.org/unodc/treaties/CTOC/>

United States Department of State. (2013). The 3Ps: Prevention, Protection, and Prosecution. Retrieved from <http://www.state.gov/documents/organization/167334.pdf>