

**HUMAN TRAFICKING LAW IN MALAYSIA AS REFLECTED IN
POLICIES AND PRACTICES**

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The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

Human Trafficking is a global phenomenon which represents an obdurate and serious problem in Malaysia, which is a destination, source and transit country for forced labour and sexual exploitation. Human trafficking is difficult to eradicate as were former slavery practices, since it manifests itself in complicated and multi-layered forms, often committed by the clandestine and sophisticated groups of perpetrators. Realising its menace, the international community has taken constructive moves to address the problem by agreeing on a comprehensive international treaty in the form of the Trafficking Protocol 2000 reflecting the 3P paradigm – to prevent, prosecute and protect. The main focus of this research is to critically analyse the Malaysian policy and the legal provision responding to human trafficking in the light of international law. It investigates the human trafficking problems, and the relevant policy, strategy as well as laws in addressing human trafficking in Malaysia based on the premise that the anti-human trafficking strategy and laws should be concurrent with the international treaty. It identifies shortcomings in the implementation in terms of fairness and effectiveness. Such shortfalls are due to various reasons including the lack of empathy, knowledge, training and resources. The problem is aggravated by the practices of corruption, hence creating obstacles in the policy and legal implementation process. While this research aims to review the policy and laws in Malaysia, it also makes some reference to the policy and laws governing human trafficking in England and Wales to identify progressive ideas for Malaysia's adoption. This research also argues that the values of the effectiveness and fairness within the implementation of the policy and laws in Malaysia must be adhered to so as to enable the human trafficking problems to be addressed appropriately in the long run.

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2004

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Europe

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2005

Convention for the Protection of Human Rights and Fundamental Freedoms
1950

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Chapter One

Introduction

1.1. Introduction

This Chapter presents the background of this research and the country setting. It introduces the thesis objectives and aims, the hypothesis, so as to position research questions against unresolved issues towards the creation of a more comprehensive anti-human trafficking framework at the national (Malaysia) level as well as the statement of originality of the thesis. Lastly, this Chapter provides an outline of the contents for this thesis.

1.2. Hypothesis

This thesis provides analyses and critiques of the legal responses to the phenomenon of human trafficking in Malaysia. The hypothesis of this research is as follows:

The anti-human trafficking law in Malaysia is compatible with the UN Trafficking Protocol in providing an anti-trafficking regime aimed at preventing the crime, prosecuting offenders and protecting victims. However, it has yet to address comprehensively the human trafficking phenomenon or to provide effective protection for victims. This is due to failures or shortcomings in strategy, law and enforcement. These shortcomings affect Malaysia's effort to combat human trafficking and to provide a sufficiently victim-centric strategy and law.

1.3 Research Objectives and their Application

This research is undertaken with four main objectives. Firstly, it elucidates the concept and phenomenon of human trafficking by explaining the concept of human trafficking and defining the elements involved in human trafficking issues. It also explains the phenomenon of human trafficking, at a global scale and in Malaysia. Secondly, this thesis discusses the measures taken to counter

the problems of human trafficking in terms of strategy, laws and enforcement mechanisms. In this regard, it analyses the effectiveness and fairness of the measures against the human trafficking phenomenon, through descriptive and evaluative analysis. Next, this research endeavours to widen the scope of study by taking into account data uncovered during the fieldwork. This is because the research should not only be confined to the documentary sources, but it also should consider the fieldwork that has been undertaken. Finally, the researcher will undertake policy transfer from the laws and practices in England and Wales, which can be appropriately applied to Malaysia.

Hence, this research undertakes investigations of the phenomenon of human trafficking in Malaysia. It discusses the domination of the 'push' and 'pull' factors that have caused the migration of people, in the wider setting of the Southeast Asian region that has direct implications on Malaysia. This research elucidates the policy pertaining to human trafficking in Malaysia. Next, this research looks at the legal approaches taken by the authorities, focussing on two approaches: human rights and criminal law approaches. Finally, this research concludes with an evaluation of the effectiveness of the legislation, as enforceable in Malaysia and then provides suggestions for the policy and law to ensure the implementation is effective and fair. Appropriate policy transfer from England and Wales is undertaken to achieve this purpose.

The levels of the application of these objectives involve the following aspects. First, this thesis provides a historical perspective of human trafficking, how it evolves and how it presents problems to law. This thesis also elucidates questions about the definition of trafficking at three levels - international, regional and national and how it is adopted by the national legislation. This thesis also looks at human trafficking as part of migration problems, human rights issues and the limits of the law itself. While looking at the measures of Malaysia's anti-trafficking regime, more often than not, there arises a question of conflation between trafficking and smuggling, making the status of the 'victims' unclear, as there is uncertain boundary delimitation between the two activities. While a State is responsible for rendering protection to the victims of

human trafficking, the State may also apply legal sanctions against the smuggled persons.

Secondly, this thesis elucidates the principles and guidelines introduced by the United Nations in combatting human trafficking, particularly, as enunciated by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol 2000).¹ This represents the first international treaty to provide an agreed definition of human trafficking. It also establishes the main combatting methods in the form of the '3P paradigm' that is to prevent, prosecute and protect, in the efforts to combat human trafficking. The Trafficking Protocol 2000 further acknowledges some of the underlying causes of trafficking, and introduces preventive and post-trafficking measures.

Next, this research encompasses the question of the policy and strategy, and the implementation and enforcement of the anti-trafficking legal provisions in Malaysia, developed from Malaysia's ratification of the United Nations Convention against Transnational Organised Crimes (UN Convention 2000)² on 24 September 2004³ and its accession to the Convention's supplemental Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol 2000) on 26 February 2009.⁴ This incorporation of the anti-human trafficking 3P paradigm is made in Malaysia upon the domestic promulgation of the Anti-Trafficking in Person and Anti-Smuggling of Migrants Act 2007 (ATIPSOM).⁵ The ATIPSOM provides some extensive provisions that seek to ensure appropriate prevention measures

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 December 2000 entered into force 25 December 2003) 2237 UNTS 319.

² United Nations Convention against Transnational Organised Crimes (adopted 15 December 2000 entered into force 29 September 2003) 2225 UNTS 209.

³ United Nations, *Treaty Series*, vol. 2225, p. 209; UN Doc. Doc. A/55/383.

⁴ United Nations, *Treaty Series*, vol. 2237, p. 319; UN Doc. A/55/383.

⁵ ATIPSOM 2007 is the successor to the Anti Trafficking in Persons Act 2007, which was amended and renamed in 2010 to include matters pertaining to the migrant smuggling.

taken to combat human trafficking phenomenon, efforts to prosecute the perpetrators, and sufficient protection to the victims of human trafficking.

Finally, this thesis seeks to investigate and assess the fair and effective implementation of the anti-human trafficking policy and laws in Malaysia. In obtaining results and findings, the research looks at various statutory provisions and case reports in Malaysia as well as incorporating original data uncovered during the fieldwork. This thesis will also undertake a policy transfer analysis from England and Wales, with reference to the legal provisions and related policies in England and Wales which are generally more detailed, debated and resourced than in Malaysia. However, the jurisdiction of England and Wales is not a direct comparator to Malaysia given the gaps in policy and legal implementation against human trafficking between these countries, as well as underlying differences in culture, resources and the nature of the human trafficking phenomenon in each jurisdiction. Therefore, the references to England and Wales are limited to selective instances where a suitable guide to improving implementation of anti-human trafficking legislation and policies in Malaysia, can be derived from English law, policies and practices.

Therefore, this thesis breaks down into discrete but inter-related parts. The first part explores the question of how human trafficking presents problems for the law, involving a further examination of the nature of human trafficking and problems it causes in terms of migration, human rights or crimes. The second part, endeavours to look at the strategies, policies and legal regime, constructed to address the trafficking problems, thus elucidating various anti-human trafficking policy and laws at the international, regional and national levels. The third part focuses on the effectiveness and fairness of the policy and law to address human trafficking in Malaysia.

1.4. The Originality of the Research

The subject of human trafficking is a relatively new academic topic in Malaysia. Despite the presence of recent available research and research in progress on human trafficking, the local research communities have mostly ignored human

trafficking issues as Malaysia is generally a receiving country. This issue will be discussed in Chapter Three and Four.

This research opens a new field in the knowledge of human trafficking, particularly, in the context of Malaysia, despite the difficulties of the restraints for national security.⁶ There are three issues that have inhibited the Malaysian government, at the outset, to address human trafficking as a security threat to the country. First, the earlier emphasis of the government was not human trafficking, but smuggling of migrants. The earlier perception was that human trafficking is an issue of illegal immigrants rather than trafficking victims.⁷ Secondly, there is no term in Malaysian language to precisely describe trafficking. The closest official term that is equivalent to 'trafficking' is '*pemerdagangan*', used interchangeably with '*perdagangan*', which is loosely translated as 'trade', a local word that closely refers to smuggling.⁸ Thirdly, there is a scarcity of statistical data on human trafficking and the international character of the crime.⁹ Since most research focuses on the local issues such as illegal immigrants, studies of human trafficking is 'conspicuous by their absence',¹⁰ with a just small number of research studies conducted on the subject including work conducted by leading academic institutions in Malaysia,¹¹ which will be explained later in this chapter.

Therefore, it is important for the relevant agencies, particularly those directly involved with the issue, to fully understand the relevance of a comprehensive and coordinated approach to address this problem. This research also contributes towards creating new ideas for the government to clearly determine the directions and focus on efforts towards achieving the national goal to prevent and suppress the human trafficking problem.

⁶ Zarina Othman, 'Human (In)security, Human Trafficking, and Security in Malaysia' in Karen Beeks and Delilah Amir (eds), *Trafficking and Global Sex Industry* (Oxford: Lexington 2016) 55.

⁷ *ibid.*

⁸ *ibid.*

⁹ Human Rights Commission of Malaysia (SUHAKAM), *Trafficking in Women and Children - Report of Human Rights Commission of Malaysia* (Kuala Lumpur: SUHAKAM 2004) iii.

¹⁰ Wan NIW Ismail, Raja NR Arifin and Cheaong K Cheok, 'Human Trafficking in Malaysia, Bureaucratic Challenges in Policy Implementation' (2017) 49: 2 *Administration & Society* 212.

¹¹ Nicola Piper, 'A Problem by Different Name? A Review of Research on Trafficking in South East Asia and Oceania' (2005) 43: 1-2 *International Migration* 213.

Next, the few existing publications relating to human trafficking lack details about the Malaysian legal provisions relating to human trafficking. The published materials, which discuss human trafficking in Malaysia, largely concentrate on human trafficking phenomenon,¹² or human trafficking from a security perspective,¹³ or illustrate that Malaysia is largely the destination of trafficking victims mostly from Indonesia,¹⁴ or sexually exploited victims from the Greater Mekong Sub-region.¹⁵ There are also publications focusing on the trafficking of women, but they do not emphasise the anti-human trafficking law in Malaysia, and legal recourse it offers with regards to human trafficking in Malaysia¹⁶ or in other aspects of trafficking such as irregular labour migration.¹⁷ There is a book chapter on human trafficking, but it only discusses about anti-human trafficking constitutional and legal provisions in Malaysia.¹⁸

There are a few published research papers about human trafficking undertaken in Malaysia, by Malaysians or about Malaysia. There are two completed doctoral studies pertaining to human trafficking, but they are distinct from the focus of this research. Such doctoral research involve: First, a research project on the implementation of human trafficking laws in Malaysia¹⁹ appears similar to this thesis. However, that research was undertaken with focus to Malaysia without policy transfer from other countries, and does not cover issues

¹² Rohani Abdul Rahim and others, 'Economic Globalisation and Trafficking of Women in the Southeast Asian Region: A Socio-Legal Study' (2009) *UKM Journal of Law and Society* 206.

¹³ Othman (n 6). See also Pooja T Stanslas, 'Transborder Human Trafficking in Malaysian Waters: Addressing the Root Causes' (2010) 41:4; *Journal of Maritime Law and Commerce* 595; Rashila Ramli and Nor A Idris, *Keselamatan Insan di Malaysia dan Indonesia: Dari Pernerdagangan Manusia ke Pemanasan Global (Human Security in Malaysia and Indonesia: From Trafficking to Global Warming)* (Bangi: UKM Press 2013).

¹⁴ Louise Shelley, *Human Trafficking: A Global Perspective* (New York: CUP 2010) 28.

¹⁵ Susan Kneebone and Julie Debeljak, 'Combating Transnational Crime in the Greater Mekong Subregion: the Cases of Laos and Cambodia' in Leslie Holmes (ed), *Trafficking and Human Rights: European and Asia-Pacific Perspective* (Cheltenham: Edward Edgar 2012) 133.

¹⁶ Rahim and others (n 12).

¹⁷ Azizah Kassim and Ragayah Mat Zin, 'Irregular Migrants and Law' (2011) XXXVIII: 1&2, *Philippines Journal of Development* 87; Mohd Na'em Aziz and Others, 'International Migration and Human Trafficking in Malaysia: A Study on Illegal Immigrants' (2015) 11:25 *Asian Social Science* 124.

¹⁸ Khairil Azmin Mohktar, 'Eliminating Slavery and Combating Human Trafficking in Malaysia: The Relevant Constitutional Provisions and Domestic and International Laws' in Khairil Azmin Mokhtar (ed), *Constitutional Law and Human Rights in Malaysia: Selected Issues* (Kuala Lumpur: IIUM Press 2011).

¹⁹ Zuraini A Hamid, *Anti-human Trafficking Laws and Their Implementation in Malaysia*, (PhD Thesis, International Islamic University Malaysia, 2016).

pertaining to the effectiveness and fairness of anti-human trafficking policy and law in Malaysia. Second, a research project pertaining to the bureaucracy and human trafficking policy implementation which was undertaken within the ambit of public administration studies.²⁰ Two master degrees were also completed, however, the focus was on security rather than human trafficking law.²¹

Although this research makes reference to the existing publications to illustrate the problems of human trafficking in Malaysia, it attempts to further explicate the legal principles underlining the issue of human trafficking, and with an emphasis on looking at the application of the 3P paradigm in Malaysia's anti trafficking regime. This research is therefore distinct from all the above publications and research papers on human trafficking in Malaysia.

Beside the different focus of this research, a further claim of originality is that the fieldwork conducted for this particular research makes it distinct from other researchers in Malaysia. The fieldwork involves respondents from different backgrounds - policymakers, prosecution and defence, enforcement, victim protection and welfare - who provide information from various spectrums. This provides a means of understanding external forces and effects beyond an ambit of purely legal or literature discourse. A review of other fieldwork studies being conducted on the subject revealed that they are more focused on a different research focus, or fieldwork design. Thus, after a review of one hundred academic articles, another scholar found that only a few contained original data, and those works mostly treated 'sources' or 'evidence' from government agencies and international organisations, even though these bodies have consistently failed to reveal their sources.²²

²⁰ Wan NIW Ismail, *Human Trafficking Policy Implementation* (PhD Thesis, University of Malaya, 2014).

²¹ Ebby R Jacquiline, *Security at Risk: Malaysia and Human Trafficking* (MSc Thesis, University of Malaysia Sarawak, 2015) and Shairul A Shaari, *Pemerdagangan Manusia dan Kesannya Terhadap Keselamatan di Malaysia (Human Trafficking and its Effect to Security in Malaysia)* (M.A Thesis, University Utara Malaysia, 2011).

²² Sheldon X Zhang, 'Beyond the 'Natasha' Story: A Review and Critique of Current Research on Sex Trafficking' (2009) 10 *Global Crime* 178.

The policy transfer aspect of this thesis also contributes to the claim of originality. This research refers to the legal positions in England and Wales. Thus far, no academic research has been conducted in that way in this field.

There are limitations to this research. One limitation is due to the scarcity of materials and academic discussion relating to the legal issues related to human trafficking in Malaysia. Most of the debates on human trafficking in Malaysia focus on the sociology and security aspects instead of the law. There is also the problem of getting human trafficking data as it operates as a clandestine, dark crime. Another issue is the limitation of judicial decisions on cases about this topic. Most human trafficking-related cases in Malaysia are heard by subordinate courts, and there are no published law reports of such cases from those courts. So, it is difficult to obtain judicial interpretations on the provisions of the law about human trafficking cases.

There are, however, ample cases from the UK, particularly England and Wales which is the sole focus of this research, as well as cases decided by the European Court of Human Rights (ECtHR). In the UK, the case of *Attorney General's Reference no. 6 of 2004 (R v Plakici)*²³ and *R v. Maka*²⁴ dealt with issues of treatment of sexually exploited victim, and the severity of the offence. While in the case of *R v Lorenc Roci and Vullnet Ismailaj*,²⁵ the court made assessment on the question of 'coercion' upon events and circumstances that took place after they arrived in the UK, although they first arrived to work as prostitutes. In the case of *L & Ors v R*,²⁶ the Court of Appeal made a clear judgement that the trafficked victims, especially children and young people, should not be prosecuted and convicted for criminal acts they were forced to perform. In the case of *Hounga v Allen*,²⁷ the Supreme Court affirmed that the UK is bound to human trafficking international legal instruments, including the Trafficking Protocol. The case also sets a precedent about the payment of the

²³ [2004] EWCA 1275.

²⁴ [2005] EWCA (Crim) 3365.

²⁵ [2005] EWCA (Crim) 3404.

²⁶ [2013] EWCA (Crim) 991.

²⁷ [2014] UKSC 47.

compensation for the trafficked victims. These cases are mostly referred to in Chapter Five.

There is also abundance of cases at the ECtHR. In *Siliadin v France*,²⁸ it was the first time the ECtHR considered human trafficking within the context of Article 4²⁹ of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).³⁰ In *Siliadin*, the ECtHR deliberated on the status of the human trafficking 'victim'. The ECtHR also imposed the state parties with positive obligations to implement ECHR article 4 pertaining to slavery or servitude as well as forced and compulsory labour.³¹ The ECtHR also ruled that limiting compliance with article 4 would be inconsistent with such international instrument and would render it ineffective.³² In *Rantsev v. Cyprus and Russia*³³, the ECtHR has ruled that the State Parties are obliged to adhere to the procedural obligation under the ECHR such as to initiate international cooperation to aid preventing recruitment of women for international sexual trade,³⁴ to conduct effective investigation, as well to put in place legislative and administrative frameworks against trafficking and preventive measure against trafficking. The Court also held that although there is no expression of human trafficking in the ECHR, the scope to the Convention article 4 must be made 'in light of present condition', which is the prevalence of human trafficking phenomenon.³⁵ Further, in *L.E. v Greece*,³⁶ member states must fulfil their obligations under ECHR, article 4, to recognise, properly investigate and prevent victims of human trafficking. These cases and other related cases will be discussed in the later chapters of this thesis.

²⁸ [2006] EHRR 16.

²⁹ ECHR, article 4, is pertaining to the prohibition of slavery and forced labour.

³⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950 entered into force 3 September 1953) CETS No. 5.

³¹ Holly Cullen, 'Siliadin v France: Positive Obligation Under Article 4 of the European Convention of Human Rights' (2006) 6:3 *Human Rights Law Review* 585.

³² *Siliadin* (n 28) para 89.

³³ App. No. 25965/04 ECtHR (2010).

³⁴ Donald Shaver and Leo Zwaak, 'Rantsev v Cyprus and Russia, Procedural Obligations of Third Party Countries in Human Trafficking Under Article 4 ECHR' (2011) 4:1 *Inter-American and European Human Rights Journal* 118.

³⁵ *Rantsev* (n 33) para 277-278.

³⁶ App. No.71545/12, ECtHR (2016).

1.5. Organisation of the Research

This research is divided into seven chapters, including this introduction chapter, and conclusion.

Chapter Two, titled 'Fieldwork Data Collection', primarily discusses the way the fieldwork data was collected, analysed and presented in this thesis. It gives a general overview on why it is important for such a data collection to be undertaken in the study of human trafficking that will relate to the law and the application of the law. In this regard, the chapter concentrates on the qualitative empirical research. Since one important claim to originality involves the empirical fieldwork, a detailed discussion takes place to explain the reasons why qualitative method is used, its importance and connection with the study, the strategies undertaken, the selection of research participants, the interview itself and the expectation of the gains from the data collection. The chapter also discusses the ethical aspects of the fieldwork.

The title of Chapter Three is 'The Human Trafficking Phenomenon', which discusses primarily the detailed historical perspectives of human trafficking issues, right from the era of slavery and white slavery to the more sophisticated activities of international-linked organised crimes. It also discusses the origin of anti-trafficking efforts at the international level which has given impetus towards the conclusion of the UN Convention 2000 and its supplementary Protocols, particularly the Trafficking Protocol 2000, as well as efforts being taken at the international level to combat human trafficking. Elaborations of the obligations of state parties under these treaties also takes place in this Chapter. The discussion includes the repercussions for the state parties of their non-adherence with the treaties. This Chapter also provides the general overview and explanation on the issues of human trafficking in Malaysia. It examines the phenomenon of human trafficking, causes and effects in the country. Since the focus of this research is to investigate the human trafficking problems from two aspects, namely exploitation of woman and forced labour, they become the crux of the issues discussed in this chapter. This involves discussion of the origin of the problems, the push and pull factors that cause trafficking and parties

involved in the trafficking, especially perpetrators and victims from the Malaysian perspective.

The theme of Chapter Four, 'Human Trafficking in Malaysia: Policies and Strategies,' concerns the policies and strategies being implemented by the government of Malaysia to counter human trafficking problems. This chapter analyses whether the strategies and policies are suitably put in place to combat the problem, taking into consideration the compliance of the critical approaches of the 3P paradigm set under the United Nations Trafficking Protocol 2000. This chapter discusses the challenges of putting the policy into concrete and effective action in Malaysia. This is because of dependence on the government bureaucratic delivery system for the relevant Government agencies to respond effectively and work productively with the stakeholders. The discussion of this chapter also evaluates the views of the United Nations Office on Drugs and Crime (UNODC) and the US Trafficking in Persons (TIP) Report that policy implementation continues to be a problem due to the lack of action by most state parties, despite having ratified the Trafficking Protocol 2000,³⁷ focussing on the context of Malaysia. The discussion further evaluates whether Malaysia's main approach in anti-trafficking strategy and policy focuses on the crime control or the trafficking victim's protection.

The title of the Chapter Five is 'Human Trafficking in Malaysia: The Anti-human Trafficking Laws.' It elucidates how Malaysia has sought to adopt the international treaties and thus, whether it has fulfilled the international obligations arising from the said adoption, particularly the Trafficking Protocol 2000. Therefore, the scope of discussion emphasises more on the domestic anti-trafficking law. Since the ATIPSOM 2007 will be the backdrop of this study, it will explicate the provisions of the ATIPSOM 2007 to prevent trafficking, criminalising the perpetrators and protecting the victims. The discussion looks at the relevant 3P paradigm of anti-trafficking efforts and whether all the elements of the 3Ps are well established in the statute. The discussion also

³⁷ UNODC, *Multi-Agency Synopsis of Mandates and Research Activities Related to Combating Human Trafficking* (New York: United Nations 2008).
<www.ungift.org/docs/ungift/Multy-Agency_Synopsis.pdf> accessed 29 October 2014.

concentrates on the statutory provisions pertaining to the setting of powers to the relevant agencies, offences, and institutional process of anti-trafficking efforts. This chapter also describes and analyses relevant sections pertaining to the issue and provides a conclusion as to whether the anti-trafficking law in Malaysia is concurrent with the provisions of the Trafficking Protocol 2000 and its relevant principles and guidelines. At the same time, this chapter also discusses the other relevant laws relating to the anti-trafficking efforts such as the Penal Code, the Child Act 2001, the Immigration Act 1959/63, the Women and Girls Protection Act 1973, and the Anti-Money Laundering and Anti-Terrorism Financing Act 2001.

Chapter Six, entitled 'Implementation of Anti-human Trafficking Policy and Strategy in Malaysia,' will feature an analysis of the issues of enforcement mechanisms of human trafficking law in Malaysia. It elaborates the relevant agencies' jurisdiction over certain aspects of anti-trafficking efforts, including their effectiveness in combatting trafficking problems and in compliance with the 3P paradigm set by the Trafficking Protocol 2000. It also deliberates upon the collaboration between the government agencies with the stakeholders, particularly the Non-Government Agencies and the Civil Society in Malaysia.

Finally, Chapter Seven, 'Conclusion,' summarises issue of human trafficking in Malaysia in terms of the content of law and the effectiveness of the law in terms of prevention, prosecution and protection, in line with the 3P paradigm. The researcher also provides recommendations believed to be suitable for the Malaysian law. This will include the enhancement of anti-trafficking regime to ensure the implementation of strategies to combat the crime, at the policymaking, legal, and enforcement. The chapter discusses several proposals for policy transfer from the England and Wales' strategies, policies law and enforcement towards possible application of the same, in the Malaysian context.

Chapter Two

Fieldwork Data Collection

2.1. Introduction

The problems, strategy, laws and implementation mechanisms related to human trafficking within its Malaysian context have not been extensively studied. Undeniably, a number of human trafficking-related research projects have been conducted in Malaysia, but they were predominantly focused on the phenomenon of human trafficking in Malaysia within the perspectives of public administration, migration, sociology and security.¹ This thesis is a socio-legal study that explores the text of the law with regards to the prevention of the human trafficking, prosecution of the perpetrators and protection of the victims within Malaysian context. It also aims at policy transfer from the laws and practices in England and Wales.

As mentioned in Chapter One, the focus of this research is on the question on the effectiveness and fairness of the anti-trafficking policy and law within the Malaysian context. This research is undertaken within the ambit of socio-legal studies, an approach to the study of law and legal process,² covering the theoretical and empirical analysis of law as social phenomenon.³ It also refers to the study of the law and legal institutions from the perspective of social scientists,⁴ a study of aspects of 'law in operation', 'context' or 'action' as opposed to just the study of the law in the books'.⁵ This research also refers to the policy, laws and their implementation process between England and Wales as well as Malaysia that leads into potential policy transfer into the Malaysian context. The concept of policy transfer is a process in which knowledge about

¹ See Chapter One.

² Fiona Cownie and Anthony Bradley, 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (London: Routledge 2013) 35.

³ Economic and Social Research Council (ESRC), *Review of Socio-Legal Studies: Final Report* (ESRC: Swindon 1994) 1.

⁴ Donald R Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3:3 *Journal of the Society of the Legal Scholars* 315.

⁵ Anwarul Yaqin, *Legal Research and Writing* (Wadhwa Nagpur: LexisNexis 2008) 7-8.

policies, administrative arrangements, institutions, or laws in one time and/or place is used in the development of policies administrative arrangements and institution in another time and/or place.⁶ The process of policy transfer is broad enough to encompass intended processes such as ‘lesson drawing’ and more structurally influenced notions such as ‘convergence’.⁷ While this chapter primarily deals with fieldwork data collection, the other techniques - doctrinal analyses and policy transfer – are briefly noted here as being part of the modes by which the thesis was researched.

Notwithstanding the above techniques, the remainder of this Chapter will be confined to the fieldwork as the only exceptional (for a law-based study) technique being utilised.

2.2. Social Science Methodology

While the doctrinal legal research investigates the question of ‘what is the law’, it usually makes at least some references to other external factors as well as seeking answers that are consistent with the existing body of rules. Hence, in taking external view of the law, they can be described as research ‘about the law’ rather than research ‘in law’,⁸ because it deals with the actual operations of law and how it effects the people.⁹ Basically, all other legal research outside of the spectrum of doctrinal legal research can be generally grouped within three categories: problem, policy and law reform research based.¹⁰ The categorical elements often include a consideration of the social factors involved and/or social impacts of current law and practice, and deals with the actual operations of law and how they affect the people.¹¹ Therefore, this type of research can be

⁶ David Dolowitz and David Marsh, ‘Who Learns What From Whom, A Review of Policy Transfer Literature’ (1996) XLIV *Political Studies* 344.

⁷ Tim Newburn and Richard Sparks, *Criminal Justice and Political Cultures: National and International Dimension of Criminal Control* (Devon: Willian Publishing 2004) 4.

⁸ Paul Chynoweth, ‘Legal Research’ in Douglas Wood and others (eds), *Law and the Built Environment* (2nd edn, Sussex: Wiley-Blackwell 2011) 30.

⁹ Collin M Campbell and Paul Wiles, ‘The Study of Law in Security in Britain’ (1976) 10:4 *Law and Security Review* 547.

¹⁰ Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press 2012) 19.

¹¹ Campbell and Wiles (n 9).

undertaken by way of using social science methodologies such as surveys, interviews, and questionnaires with the affected or chosen groups or individuals.¹² In this regard, the use of the social science method in the context of the legal research is called socio-legal research.

Since this research relates to the problems of human trafficking and how they are being tackled from the perspectives of strategy, law and implementation, the researcher adopted the social science method with interdisciplinary approaches of history, sociology, economics, culture and policy, which are reflected in the interview schedule(s) in Appendix 1.

2.2.1. Qualitative or Quantitative Research?

Undertaking socio-legal studies, this research used qualitative rather than quantitative methods based on the following reasons.

Qualitative methodology fundamentally depends on watching people on their own territory and interacting with them in their own language, and on their own terms.¹³ Identified with sociology, cultural anthropology, and political science, among other disciplines, qualitative research has been seen to be 'naturalistic', 'ethnographic' and 'participatory'.¹⁴ This approach also allows the researcher to identify issues from the perspectives of the research participants and understand the meanings and the interpretations that they give to behaviour, events, or objects.¹⁵ It also allows the researcher to capture lived experience of the social world and the meaning from people's perspectives.¹⁶

On the other hand, quantitative methods refer in large part to the numerical measurement of the phenomena studied and systematic control of the

¹² Dobinson and Johns (n 10) 19.

¹³ Jerome Kirk and Marc C. Miller, *Reliability and Validity in Quantitative Research* (Beverly Hills: SAGE 1986) 9.

¹⁴ *ibid.*

¹⁵ Monique Hennick and others, *Qualitative Research Methods* (London: SAGE 2011) 9.

¹⁶ Louise Corti and Paul Thompson, 'Secondary Analysis of Archive Data,' in Clive Seale and others (eds), *Qualitative Research Practice* (London: SAGE 2004) 327.

theoretical variables influencing those phenomena.¹⁷ In short, it involves and concerns with the collection and analysis of data in numeric form.¹⁸

The qualitative method is used due to its distinct form. The qualitative method technically identifies the presence or absence of something, in contrast to quantitative method which involves measuring the degree to which some feature is present.¹⁹ Further, this research does not generate on statistical quantification, but attempts to capture and categorize social phenomena and their meaning.²⁰

Qualitative research methods are more often identified with the social sciences and humanities than with the discipline of law. In broad terms, qualitative research is an approach that allows a researcher to examine people's experiences in detail, by using a specific set of research methods such as in-depth interview, focus group discussion, content analysis, visual methods, and life histories of bibliographies.²¹ For a research in law, this methodology encompasses the investigation of law in action, how the law functions in its relations to the authorities and society. Qualitative research also helps to provide a means of understanding external forces and effects beyond an ambit of legal discourse.²² This is commonly referred to as 'law in context'. Hence, to conduct more effective legal research, social science methodology is used so long as it provides substantial insights. In stark contrast to doctrinal analysis focusing on purely legalistic manners, qualitative research views law as a social phenomenon and investigates the movement and practice of law.²³

¹⁷ Martyn Hammersley, 'What is social Research?' in Martyn Hammersley (ed), *Principles of Social and Educational Research: Block 1* (Milton Keynes: Open University Press 2006) 39.

¹⁸ Keith F Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (London: SAGE 2005) 4.

¹⁹ Kirk and Miller (n 13) 9.

²⁰ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M. Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford: OUP 2010) 927.

²¹ Hennick and others (n 15) 9-10.

²² Edward L Rubin, 'Law and the Methodology of Law' (1997) 521:6 *Wisconsin Law Review* 553.

²³ Kirk and Miller (n 13) 9.

Both qualitative and quantitative methods have their advantages and disadvantages respectively. However, the qualitative method is chosen to reach attainable, reliable, dependable and valid findings. It allows the researcher to approach the issue by way of in-depth, face-to-face and semi-structured interviews with the relevant informative individuals in order to achieve the research objectives. The detailed reasons are as follows.

First, the qualitative method provides credibility and trustworthiness to the research. Credibility is comparable to internal validity.²⁴ It also refers to the value of the believability to the findings.²⁵ It scrutinises the matter of 'fit' between what were said by the participants and the representation of these viewpoints by the researchers.²⁶ Credibility is used to determine 'whether the research is genuine, reliable, or authoritative'.²⁷ In other words, credibility testifies that research finding can be trusted. Credibility of qualitative research can also be checked in several ways that include prolonged fieldwork, triangulation, member checking, peer review, and flexibility.

Secondly, its potential findings are transferable. This criterion of transferability refers to the applicability of findings in one study can be applied to other context of situation²⁸ where the interpretations might be transferred. Under this characteristics, the target context must be compared to the research context to identify similarities. The more similar, the more likely it is that the findings will be transferable. Therefore, transferability conveys that the theoretical knowledge obtained from qualitative research can be applied to other similar individuals, groups or situation.²⁹ Transferability of qualitative research findings can be highlighted through sampling strategies and descriptions of research setting.

²⁴ Pranee Liamputtong, *Qualitative Research Method* (4th edn, Melbourne: OUP 2013) 27.

²⁵ Madeline Leininger, 'Evaluation Criteria and Critique of Qualitative Research Studies' in Janice M Morse, *Qualitative Research Methods* (London: SAGE 1994) 115.

²⁶ Pranee Liamputtong, *Research Methods in Health: Foundations for Evidence Based Practice* (Melbourne: OUP 2010) 15.

²⁷ Christine Carpenter and Melinda Suto, *Qualitative Research for Occupational and Physical Therapists: A Practical Guide* (Oxford: Blackwell 2008) 391.

²⁸ Yvonna Lincoln and Egon Guba, *Naturalistic Inquiry* (California: SAGE 1985) 290.

²⁹ *ibid.*

Next, there is a feature of dependability. This standard for judging qualitative studies and refers to the stability or consistency of the inquiry processes, and that another researcher can follow the decision trail used by the researcher.³⁰ In this regard, the researcher can check as to whether he has been careless or made mistakes in conceptualizing the study, collecting the data, interpreting the findings and reporting results. One major technique for assessing dependability is the dependability audit in which an independent person reviews the activities of the researcher such as voice record, note of reports to see how well the techniques for meeting the credibility and transferability standards have been followed.

Fourth, there is a feature of confirmability. It refers to how far the qualitative investigator's findings are supported by the results or the experiences or ideas of the informants, rather than characteristics preferred by the researcher.³¹ Reference to literature and findings by other authors that confirms the researcher's interpretations can strengthen confirmability of the study in addition to information and interpretations by people other than the inquirer from within the inquiry site itself. The confirmability audit can be conducted at the same time as the dependability audit, and the auditor asks if the data and interpretations made by the inquirer are supported by material in the audit trail, are internally coherent, and represent more than 'figments of the (researcher's) imagination.'³²

Generally in qualitative research, the data are usually collected through three main methods, used singly or in combination of direct observation, in-depth interviews and/or analysis of documents.³³ The data may maybe in various forms and may include notes made that provide detailed description of what, where and how the subjects did what they did, their interaction, process and others, or a description of the researcher's observation and reactions to text-

³⁰ Eileen Thomas and Joan K Magilvy, 'Qualitative Rigour or Research Validity in Qualitative Research' (2011) 16:2 *Journal for Specialist Paediatric Nursing* 151.

³¹ Andrew K Shenton, 'Strategies for Ensuring Trustworthiness in the Qualitative Research Projects' (2004) 22 *Education & Information* 63.

³² Egon G Guba and Yvonna S Lincoln, *Fourth Generation Evaluation* (Newbury Park CA: SAGE 1989) 243.

³³ Webley (n 20) 927.

based sources, sounds, video or images. Data may also be in the form of a transcript or verbatim quotes of what the participants and the researcher said, or what was written in the text sources duly examined. Consequently, data is derived from the research participants (especially in the form of quotes) or via the researcher in the form of the reaction to or understanding of what is said or written.³⁴

2.2.2. Face-to-face, In-depth and Semi-structured Interviews

For the purpose of this research, the technique of face-to-face, in-depth and semi-structured interviews with the subject participants was chosen. In-depth interviewing is a technique that involves conducting intensive individual interviews with a small number of respondents to explore their perspectives on a particular idea, phenomenon, or situation.³⁵ In adopting the method, the researcher asks the participants about their experiences and expectations related to the phenomenon, the thoughts they have concerning operations, processes, and outcomes, and about any changes they perceive in themselves as a result of their involvement in the activity. The reason for adopting this method is because the primary advantage of in-depth interviews is that they provide much more detailed information than what is available through other data collection methods, such as surveys. They also may provide a more relaxed atmosphere in which to collect information, in which people may feel more comfortable having a conversation with the researcher-interviewer about the subject matter as opposed to filling out a survey.³⁶

This method is the most commonly known and is likely employed by qualitative researchers and takes specific form of conversation where knowledge is produced through the interaction between an interviewer and the interviewee.³⁷

³⁴ Webley (n 20) 927.

³⁵ Carolyn Boyce and Palena Neale, *Conducting In-depth Interviews: A Guide for Designing and Conducting In-Depth Interviews for Evaluation Input* (Pathfinder International Tool Series 2006) 2

<www2.pathfinder.org/site/DocServer/m_e_tool_series_indepth_interviews.pdf?docID=6301> accessed 25 September 2014.

³⁶ *ibid.*

³⁷ Steinar Kvale, *Doing Interviews* (London: SAGE 2007) xvii.

Although face-to-face or personal interviews are labour intensive, they can be the best way of collecting high quality data, especially when the subject matter is very sensitive, or the questions are very complex, or if the interview is likely to be lengthy.³⁸ This approach helps reconstruct events the researchers have never experienced.³⁹ The researcher can undertake the interviews with individuals and focus groups. Individual interviews are used extensively in order to examine legal phenomena, and perceptions of law.⁴⁰ This should involve those who have special and specific knowledge in the subject matter of a research, particularly on the matter pertaining to the participants' view and experiences in the enforcement and prosecution of the trafficking offenders; and protection of the victims of human trafficking.

The in-depth interviewing method may adopt the format of a semi structured interview. The semi structured is best described as an interview with the purpose of obtaining descriptions of the life world of the interviewee with respect to interpreting the meaning of the described phenomena.⁴¹ The semi-structured interviews also aim to obtain in depth interviews of persons interviewed. On the other hand, semi-structured interviews consist of a list of open-ended questions based on the topic areas the researcher intends to study. The open-ended nature of the questions provides opportunities for both the interviewer and interviewee to discuss certain topics in more detail. During the interview, only a specific and limited number of topics are discussed. Although only a few topics are discussed, they are covered in great detail. The conduct of interviews is helped by way of the usage of information sheet that explains the introduction of the researcher, nature of the research, its objectives and the purpose of the interview. The list of questionnaires is also reproduced together with the information sheet as Appendix 1.

³⁸ Nigel Mathers, Nick Fox and Amanda Hunn, Trent Focus for Research and Development in Primary Health Care: Using Interviews in a Research Project (Trent Focus 1998) 3. <www.researchgate.net/publication/237719072_Trent_Focus_for_Research_and_Development_in_Primary_Health_Care_Using_Interviews_in_a_Research_Project> accessed 25 September 2014.

³⁹ Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Thousand Oaks CA: SAGE 2012) 5.

⁴⁰ Webley (n 20) 9.

⁴¹ Kvale (n 37) 7.

The face to face in depth interview was chosen for the following reasons. First, the term 'in depth', would mean it can explore the insider perspective of an expert individual and on a selected topic under investigation.⁴² This method seeks to build the kind of intimacy that is common to mutual self-disclosure⁴³ because it requires a greater depth of self-expression by the participants than do other interviewing methods.⁴⁴ Second, it is adaptable. The researcher or interviewer can follow up the thoughts, feelings and ideas behind the responses given, in a way that questionnaire completion cannot capture. This is because having the access to the interviewee; the researcher will be able to get some sort of response which can be clarified and expanded on the spot, as well as enable the participants to say more about the answer they have just given.⁴⁵ Further, in-depth interviews allow for more exploration and understanding of meanings. Finally, due to the interactive in nature, the material is generated by the interaction between the researcher and the interviewer. The researcher will normally ask initial questions as a way for the interviewee to talk freely when answering questions⁴⁶ and the next intervention is normally determined by the participant's answers. This will enable the researcher to venture deeply into the opinions and perception of the participant in the given subject and situation.

In undertaking this method, the questions are designed in a clear and concise manner that is designed to take around 45 minutes to one hour. The interviews were conducted over a period of three months in Kuala Lumpur, Putrajaya and Sabah in Malaysia. The choice of the aforesaid locations was made due to the fact that most of the offices of the targeted subject participants are located in the same area being the capital city and the administrative capital of Malaysia. Further, the researcher's choice of Sabah was to be able to conduct his interviews with the people working on the ground, particularly the enforcement

⁴² Clare Taylor, 'Interviewing' in Immy Holloway (ed), *Qualitative Research in Healthcare* (Maidenhead: Open University Press 2005) 39.

⁴³ John M Johnson and Timothy Rowlands, 'The Interpersonal Dynamics of In-depth Interviewing' in Jaber F Gubrium and others (eds), *The SAGE Handbook of Interview Research: The Complexity of the Craft* (2nd edn, Thousand Oaks: SAGE 2012) 99.

⁴⁴ *ibid* 100.

⁴⁵ Liamputtong *Qualitative Research Method* (n 24) 57.

⁴⁶ Robin Legard and others, 'In-depth Interviews' in Jane Ritchie and Jane Lewis, *Qualitative Research Practice: A Guide of Social Science Students and Researchers* (London: SAGE 2003) 141.

agencies. This is because the incidences of forced labour particularly in the plantation area that involves Indonesian migrants are reported to mostly occur in Sabah. At the same time, Sabah hosts the largest number of undocumented migrants from the Southern Philippines, whose lives are vulnerable to trafficking and exploitation.

2.3. The Sampling Strategy

In conducting the in-depth, face to face and semi-structured interviews, this thesis adopted a 'purposive sampling strategy', whereby each sample element is selected for a purpose. This is because the logic and power of purposeful sampling lies in selecting information rich cases for study in depth. Information-rich cases are those from which one can learn a great deal about issues of central importance to the purpose of research, thus the term 'purposive sampling'.⁴⁷ This is due to the unique position of the sample participants, as they are the key informants who have professional and expert knowledge about the issues under the investigation or pertaining to researcher's question.⁴⁸ The participants were also selected according to criteria by the relevant agency.⁴⁹ In designing the sample strategy, three guidelines for selecting participants were observed: first, the participants' knowledge about the professional arena or situation or experience being studied; second, their willingness to talk; and third, the representation of the range of points of view.⁵⁰ However, two tests must be passed prior to selecting the interviewees. The first is completeness. This the need to gather an overall sense of the meaning of a concept, theme or process.⁵¹ The second is saturation, where the researcher gained confidence that he was learning something new from subsequent interview(s).⁵²

⁴⁷ Micheal Patton, *Qualitative Research and Evaluative Methods* (3rd edn, Thousand Oaks: SAGE 2002)169.

⁴⁸ Ronet D Bachman and Russel K Schutt, *The Practice of Research in Criminology and Criminal Justice* (Los Angeles: SAGE 2011) 129.

⁴⁹ Irene Hall and David Hall, *Evaluation and Social Research: Introducing Small-Scale Practice* (Houndmills: Palgrave Macmillan 2004) 132.

⁵⁰ Rubin and Rubin (n 39) 72.

⁵¹ *ibid.*

⁵² *ibid* 73.

However, this purposive sampling method did not produce a sample which could be claimed as representing a larger population, but produced exactly what was needed in a case study of an organisation, a community, or some other clearly defined as relatively limited group.⁵³ The purposive sampling was suitable for a study of human trafficking in this research because the researcher sought to take the views and learn from people's experiences (as his samples) who are involved professionally in the policy making, enforcement, prosecution and protection of victims.

The purposive sampling was adopted because the researcher targeted only people with experience, personal knowledge, expertise and professional information related to human trafficking issues, based on their own perspective of work or duties. The method of obtaining permission to meet with the participants from various government agencies, organisations and NGOs as listed in Tables 2, 3, 4 and 5 of this Chapter, were made by obtaining official support letters from the main supervisor addressed to the relevant Malaysian relevant government bureaucracy and organisations to assist the researcher. Further, the researcher made a follow up action by writing to these agencies and organisations.

2.3.1. The Application of the Sampling Strategy

The application of the sampling strategy began with the identification of those professionals involved with human trafficking issues in Malaysia. The research categorises the subject and participants into a different sector of their responsibilities, among others, the policy makers, the enforcement agency, the prosecution and defence, and those who are involved with the protection of victims.

In applying the strategy, 31 subject participants were chosen, comprising a mixture of officers and representatives of various government agencies, organisations and NGOs who are directly involved in the anti-trafficking

⁵³ Bachman and Schutt (n 48) 131.

strategy, investigation and enforcement, prosecution as well as protection of trafficking victims. They were specifically chosen based on their knowledge and involvement with human trafficking issues in Malaysia. Table 1 illustrates the overall number and details of these subject participants.

Table 1 : Categories and Total Number of Subject Participants

No.	Type of Sampling	No. of Participants
1.	Policymaking	9
2.	Enforcement	8
3.	Prosecution/Defence	6
4.	Victim Protection and NGOs	8

2.3.2. Policymakers Sampling

The ATIPSOM 2007 mandated the policymaking responsibilities to the Malaysia's Council for Anti-Trafficking in Persons (MAPO). MAPO's roles and functions among others are to coordinate the implementation of the Act, formulating policies and programmes to prevent and combat the human trafficking problem⁵⁴ as well as having other responsibilities relating to human trafficking in Malaysia.⁵⁵ With the powers vested by ATIPSOM 2007 section 10, the Malaysian Government has established a Secretariat for MAPO in 2008, as well five Committees undertaking the role and functions of Legislation, Enforcement, Victim Protection and Rehabilitation, Media and Publicity, and a Special Committee to Study the Issues of Labour Trafficking in 2008 under the purview of the Ministry of Home Affairs.⁵⁶

The interviews took place with selected MAPO Secretariat officers as well as officers from the officers from the respective Committees in MAPO as shown in Table 2. The objective of the interviews was to understand in depth MAPO's policy perspectives pertaining to the anti-trafficking framework in Malaysia.

⁵⁴ Ahmad SP Mohamed and others, 'The Phenomenon of Human Trafficking Activities in Southeast Asia' (2011) 1:13 International Journal of Humanities and Social Science 171.

⁵⁵ ATIPSOM 2007 s 7.

⁵⁶ Ministry of Home Affairs, MAPO: Background <www.moha.gov.my/index.php/en/majlis-antipemerdagangan-orang/latar-belakang> accessed 11 January 2017.

Table 2 : Policy Makers Sample

Department/Agency	Function(s)
MAPO Secretariat	Performing overall secretariat duties for all MAPO meetings and programs and the related committees; and 2. Assisting MAPO in coordinating the implementation of the ATIPSOM 2007.
Attorney General Chambers	Chair of the Legislation Committee
Royal Malaysian Police	Chair of the Enforcement Committee.
Ministry of Women, Family and Community Development	Chair of the Victim Protection and Rehabilitation Committee.
Ministry of Human Resources	Chair to Special Committee to Study the Issues of Labour Trafficking
Ministry of Foreign Affairs	1. Multilateral Security Division – dealing with the political security aspect and represents the ministry in the MAPO. Dealing with international organisations and foreign embassies on human trafficking issues. 2. ASEAN National Secretariat – regional security involving human trafficking issues.
Ministry of Communication and Multimedia	Chair of Media and Publicity Committee.
Department of Information	Media and Publicity Committee.

2.3.3. Enforcement Sampling

The enforcement jurisdiction against human trafficking activities in Malaysia lies with the Royal Malaysian Police, the Department of Immigration, the Royal Customs Department, the Malaysian Maritime Enforcement Agency and the Department of Labour as shown in Table 3.⁵⁷ Interviews with officers from these agencies were conducted to gather information about their roles and functions, to examine the understanding of human trafficking among law enforces, to provide an overview they respond to human trafficking incidences and cases, and highlight the implications of these responses for trafficking victims.⁵⁸ The interviews also sought to understand the implementation of the Standard

⁵⁷ ATIPSOM 2007, s 27.

⁵⁸ Heather Clawson and others, *Law Enforcement Response to Human Trafficking and the Implications for Victims: Current Practices and Lessons Learned* (Washington DC: Caliber 2006) 1.

Operating Procedures (SOP), which was launched by the Ministry of Home Affairs on 23 November 2013⁵⁹ and its effectiveness in the enforcement of the anti-trafficking efforts.

Table 3 : Enforcement Sample

Department	Function(s)
Royal Malaysian Police – Anti Trafficking in Persons Unit	Investigation and enforcement of the law.
Department of Immigration	Anti-human Trafficking Unit (Headquarters, Selangor and Sabah)
Malaysian Maritime Enforcement Agency	Maritime border control, intercept ships and detain criminals
Department of Labour (Peninsular Malaysia)	Special task unit on labour exploitation

2.3.4. Prosecution Sampling

The Attorney General of Malaysia is bestowed with the powers of prosecution by Federal Constitution, article 145(3), and the Deputy Public Prosecutors (DPPs) are the alter egos of the Attorney General as Public Prosecutor.⁶⁰ The interviews were conducted with the specialist DPPs in trafficking cases. The interviews were to enable the understanding of complexity of the human trafficking cases in Malaysia particularly the process of gathering sufficient evidence to successfully prosecute the suspects. In addition to the DPPs, three defence lawyers were interviewed. The purpose of interviewing defence lawyers was to get their views about the effectiveness and fairness of the anti-trafficking law. The total sample is listed in Table 4.

⁵⁹ Wan Junaidi Tuanku Jaafar, Deputy Ministry of Home Affairs Malaysia, 'Keynote Address' (Launching of the Standard Operating Procedures for the Enforcement Agencies Under the Anti-Trafficking in Person and Anti-Smuggling of Migrants Act 2007, Putrajaya 23 November 2013) <www.moha.gov.my/index.php/en/teks-ucapan-menteri> accessed 24 March 2014.

⁶⁰ Criminal Procedure Code (Act 593 of 1999), s 376.

Table 4 : Prosecutor Sample

Department	Function
Attorney General's Chambers	Coordinating and managing and manage human trafficking cases and attending court cases. Three DPPs from Putrajaya, Selangor and Sabah were interviewed.
Defence lawyers	Defending cases under the ATIPSOM 2007. Three defence lawyers from Selangor, Kuala Lumpur and Sabah were interviewed.

2.3.5. Protection Sampling

The interviews were focused on the protection part of the anti-trafficking effort. In this regard, participants included the officers from the Department of Welfare who are in-charge of the protection functions of the trafficking victims under the ATIPSOM 2007, section 43. The said legal provision is about the appointment of the Social Welfare Officers or any public officers to exercise the powers and duties as Protection Officers who have control over and responsibility for the care and protection of the trafficked persons.⁶¹

At the same time, interviews were made with the NGOs to learn their perception about the protection efforts offered under the ATIPSOM 2007. This is to enable investigation about the allegation that the government provided minimal basic services to those staying in its shelters; NGOs, with no financial support from the government, provided the majority of rehabilitation and counselling services.⁶² The total sample population is presented in Table 5.

⁶¹ ATIPSOM 2007, s 43.

⁶² US DoS, Trafficking in Persons Report 2014: Malaysia 261
<www.state.gov/documents/organization/226847.pdf> accessed 22 June 2014.

Table 5 : Protection Sample

Agency/Organisation	Function
Department of Welfare	Manages the shelter home for human trafficking victims.
Tenaganita (Woman Force)	Leading NGO on women and migrant rights.
Coalition to Abolish Modern Day Slavery in Asia (CAMSA)	Local chapter of an international NGO.
National Council of Women Organisation (NCWO)	An NGO set up as a consultative and advisory body to raise the status of women and their participation in the national development.
Good Shepherd Welfare Centre	An NGO that provides services to the shelter homes for trafficking victims.
Association of Women Lawyers	An NGO that provides pro bono legal services to human trafficking victims.
Human Rights Commission of Malaysia (SUHAKAM)	A Commission set up under the Human Rights Commission of Malaysia Act 1999.
The Malaysian Bar Council	Statutory body established under the Legal Profession Act 1976 representing practising lawyers in Malaysia.

2.3.6. Interview Schedule

The interview schedules⁶³ were prepared with specification to each sample population cohort representing policymaking, enforcement, prosecutor and defence as well as victim protection and NGOs. Six sets of questionnaires were devised for different cohorts of respondents such as policymaking, enforcement, prosecuting officers, defence lawyers, victim protection and NGOs. The interview schedules were divided into six sections, except for the policymakers, as the section on human trafficking victims was omitted.

Section one (demographic and profile) is about the background of the respondent and their personal experience in the human trafficking issues. In section two (human trafficking situation) the researcher asked the participants to describe the situation, problems, reasons and actors in human trafficking. Section three (human trafficking policy and strategy) is pertaining to the organisation's role, interpretation of human trafficking, and its perception of the human trafficking strategy, policy and law in Malaysia. In section four

⁶³ Appendix.1.

(implementation of policy and strategy) the questions leads to the assessment on the implementation of policy and law. In section five (human trafficking victims) the questions are about the organisation's roles, activities, challenges and hopes with regards to human trafficking victims, while the section six, the conclusion of the interview, is about respondent's overall view on phenomenon, problems, policy and law as well as their overall perception on implementation.

2.3.7. Data Analysis

The key purpose of a qualitative interview is to elicit the experiences, perceptions and feelings of the participants by way of conversation or dialogue. But the participants' responses must be analysed to ensure a reliable conclusion. Reliability determines the truth and accuracy of the participants' responses as well as the way the researcher developed the interpretation.⁶⁴ The objective of analysing qualitative data is to determine the categories, relationships and assumptions that inform the respondents' view of the world in general, and of the topic in particular.⁶⁵ Qualitative analysis involves a process of reviewing, synthesizing and interpreting data to describe and explain the phenomena of the social worlds being studied. The procedure towards data analysis can be grouped into content, discovery and meaning-focused approaches. The rigour of the analytical procedures depends on their adequacy and transparency.⁶⁶ This section briefly discusses the way data analysis was being undertaken.

2.3.7.1. Record Keeping

All interviews, with the consent by the participants, were tape-recorded. One commentator said, 'as a good hammer is essential to fine carpentry, a good tape recorder is indispensable to fine fieldwork,'⁶⁷ therefore a good quality

⁶⁴ Uwe Flick, *An Introduction to Qualitative Research* (London: SAGE 2006) 370.

⁶⁵ Tehmina N Basit, 'Manual or Electronic? The Role of Coding in Qualitative Data Analysis' (2003) 45:2 *Educational Research* 143.

⁶⁶ Ellie Fossey and others, 'Understanding and Evaluating Qualitative Research' (2002) 36 *Australian and New Zealand Journal of Psychiatry* 717.

⁶⁷ Patton (n 47) 380.

audio-recording is useful to obtain permanent information and completely accurate comments during the interviews, and later be reevaluated by the researcher or assessed by other researchers.⁶⁸ Written notes were also taken during or immediately after the interviews, because at certain circumstances, field notes provide relevant information that tape recording unable to capture, such as the location, the atmosphere of the interview, body language, clues behind intent statement and non-verbal comments.⁶⁹ Upon gathering information through the tape records and field notes, the researcher transcribed anything relevant to the research to help the understanding, reflections and analysis into Microsoft Word. At times, notes of observation (which may not be captured by audio record) were put in the transcription. With the combination of tape record, field note and transcription, the researcher produced a record that was used in the data analysis subject to ensuring confidentiality of the participants' identities, data protection, and meeting the requirements of privacy laws.⁷⁰ A great effort was made to transcribe and to translate the relevant and important parts of the interviews from Malay to language as some interviewees chose to reply to the questions in their native language. The task was undertaken to ensure the researcher understand, reflect, and analyse the data duly collected, and to add value to the research for it to be original.

2.3.7.2. Manual Coding

Upon completing the record, raw data were obtained. However, they could not help the understanding of the social world under scrutiny and the way the participants view it, unless such data have been systematically analysed to illuminate an existent situation.⁷¹ Therefore, coding is important for the research. By definition, a code in qualitative inquiry would mean 'a word or short phrase that symbolically assign a summative, silent, essence-capturing, and/or evocative attribute for portion of language-based or visual data.'⁷² In

⁶⁸ Fossey and others (n 66).

⁶⁹ Sophie Tessier, 'From Field Notes, to Transcripts, to Tape Recordings: Evolution or Combination?' (2012) 11:4 *International Journal of Qualitative Methods* 446.

⁷⁰ Jennifer Mason, *Qualitative Researching* (London: SAGE 1996) 107.

⁷¹ Basit (n 65).

⁷² Johnny Saldana, *The Coding Manual for Qualitative Researcher* (London: SAGE 2009) 3.

undertaking this task, the researcher used manual coding because this study is his first empirical and a small-scale study. In such a circumstances, the manual coding is used first before a computer programme⁷³ such as the NVivo. It is also due to the lack of technological expertise on the part of the researcher. However, that would not mean the researcher has zero knowledge on the NVivo. The manual coding was preferred instead of NVivo due to the fact that because there is no large database, and some participants chose to speak in Malay language thus the researcher has taken time to transcribe the interviews in order to ensure the data is fresh in his mind. In this regard, the researcher may not get valuable answers to the interviews by loading the data in the computer software.

The manual coding derived from the typed transcription of the interviews. Then the researcher highlighted the relevant information to the answer the research questions, and discussed in the relevant chapters. The information was used to support the research arguments by way of quotation and explanation in the body of thesis.

It is to be noted that apart from manual coding, the researcher could easily recall the point discussed during the interviews (because he transcribed it) and he could easily find the issues using a very simple 'find' button in the Microsoft Words. The researcher also did the coding by himself by referring to the interview. There two factors that the researcher based upon while undertaking the coding exercise. First then researcher pays attention to the 'variables' that relate to material according to the relevant chapters or research objectives in the thesis. Secondly, he looks for the 'vector' that relate to the type of respondents who said certain things during the interviews.

2.3.8. Ethics

This thesis undertakes in depth research with humans and the social world, where information is derived from their perceptions, feelings and opinions.

⁷³ Saldana (n 72) 22.

Therefore, ethical considerations are crucial, and research must be conducted with integrity, and issue of voluntariness and consent for respondents' participation is emphasised.⁷⁴ There are eight rules⁷⁵ with respect to the ethical requirements as follows: first, no parties should be involved without prior knowledge or permission and informed consent; second, no attempt should be made to force people to do anything unsafe, or do something unwillingly (e.g. have their voice tape-recorded); third, relevant information about the nature and purpose of the research should always be given; fourth, no attempt should be made to deceive the participants; fifth, there is a need to avoid invading participants' privacy or taking too much of their time; sixth, benefits should not be withheld from participants or disadvantages imposed upon others; seventh, all participants should be treated fairly, with consideration, with respect and with honesty; and eight, confidentiality and anonymity should be maintained at every stage, especially in publication. The rules are illustrated in sub-sections 2.3.9, 2.3.10 and 2.3.11 of this thesis.

In this regard, the University of Leeds' policy statement on research integrity and good conduct has been fully observed.⁷⁶ The research is also reflects the British Society of Criminology Code of Ethics (BSC).⁷⁷

The fieldwork proposal and ethical considerations have gone through an approval process as required by the University of Leeds. Hence certain requirements in the ethical field have been audited and fulfilled. In this regard, the research followed the University of Leeds procedure with regard to the ethical review with the approval reference number AREA 14-188 dated 14 August 2015.⁷⁸ The research ethical approval is attached in Appendix 2.

⁷⁴ Paul D Leedy and Jeanne E Ormrod, *Practical Research: Planning and Design* (8th edn, New Jersey: Pearson Merrill Prentice-Hall 2005) 38.

⁷⁵ Jerry J Wellington, *Educational Research: Contemporary Issues and Practical Approaches* (London: Continuum 2000) 57.

⁷⁶ University of Leeds, 'Good Research Practice' (Research and Innovation Service Leeds 2014) <<http://ris.leeds.ac.uk/GoodPracticePolicies>> accessed 25 June 2014.

⁷⁷ British Society of Criminology, 'Code of Ethics for Researchers in the Field of Criminology' (London 2006) <www.britisoccrim.org/docs/CodeofEthics.pdf> accessed 25 June 2014.

⁷⁸ University of Leeds, 'Ethics' Research and Innovation Service Leeds, 2014) <<http://ris.leeds.ac.uk/info/70/ethics>> accessed 25 June 2014.

As for the research participants, most of them are employed in professional occupations such as administrative officers, prosecutors, legal advisors, police and other enforcement officers, welfare officers and representatives of NGOs. Accordingly, this research did not deal with vulnerable people like victims, prisoners, the under aged or disabled. The participants were informed of the researcher, the purpose of this research, its financier, how and why it is being undertaken, and how the findings to be used and disseminate. The researcher also sought the participants' permission to audio record the conversation prior to the interview session.

2.3.9. Informed Consent

Informed consent was obtained from every participant by way of their signature on the consent form at the outset of the interviews, and recorded. In achieving this aim, participants were given clear information about the thesis aims, the risks and benefits, and the nature of their involvement. They were given sufficient time to reflect upon any information, and the researcher satisfied that this information has been fully understood. The participants' rights to withdraw within two weeks after the interviews took place, without giving reason, were clearly explained. In no circumstances coercion, disproportionate payment or inducement or the expectation of any other inappropriate advantage will be used to influence the consent.

Further, the subject participants were not pressured to take part in the interview given the researcher's previous position as fellow government official or colleague. This is because the researcher undertook the fieldwork interviews as an independent researcher from the University of Leeds. The above matter was contained in the Information Sheet that states the background of the researcher and the research, its purpose, the use of the information gained during the fieldwork, the rights to withdraw. The inform consent form is attached as Appendix 3.

2.3.10. Monitoring of Research

This research has been carefully and meticulously monitored to ensure compliance with principles of good practice. Records have been kept for inspection by the appropriate and competent authorities such as the supervisors, Faculty Research Ethics Committee (FREC) and the University Research Ethics Committee (UREC). During his absence from the University to undertake in fieldwork in Malaysia, the researcher kept his supervisors updated about his progress, by way of a progress report, at least once a month.

2.3.11. Confidentiality, Data Protection and Retention Strategy

Confidentiality of subject-participants data has been assured, including through adequate anonymisation. The storage and use of data were in compliance with the Data Protection Act 1988, Human Rights Act 1988 and the University of Leeds' Code of Practice on data Protection, as well as Personal Data Protection Act (Malaysia) Act 2010. There are eight principles provided under the Data Protection Act, which state that personal data must, first, be obtained and processed fairly and lawfully and shall not be processed unless specified conditions are met; second, be obtained for a specified and awfully purpose and shall not be processed in any manner incompatible with that purpose; third, the data are adequate, relevant and not excessive for those purpose; fourth, be accurate and kept up to-date; fifth, not be kept for longer than is necessary for that purpose; sixth, be processed in accordance with the date subject's rights; seventh, be kept safe from unauthorised access, accidental loss or destruction; and eighth, not be transferred to a country outside the European Economic Area, unless that country has equivalent levels of protection for personal data.⁷⁹

On the issue of disclosure of the research, it is potentially possible for the researcher to uncover information relating to illegal activity, intent towards illegal activity, or information about topics that are sensitive or may carry a legal or

⁷⁹ Data Protection Directive 95/46/GC art 25 (soon to be replaced by Data Protection Directive 2016/680 Chapter V and regulation 2016/679.

unethical obligation to consider disclosure to the appropriate authorities (such as the case of potential harm to children and vulnerable adults). In this regard, the researcher paid attention to three basic principles.

First, there should not be any mention of personal wrongdoing by the subject participant, but the discussion and information should emphasis the 'wrongdoings of others'. Second, if the person being interviewed has disclosed personal illegal activities or wrongdoings, then the researcher would have the obligation to report it to authorities. Third, in the event that the subject participant was at the point of disclosing any illegal activity or wrongdoing, the researcher would, at that juncture, give him strong/extra oral warning that the matter would be reported to the authorities.

It is also the researcher's obligation to ensure confidentiality of data and proper data management with full adherence to the policy of safeguarding data, storage, backup, and encryption in accordance with the Policy on Safeguarding Data-Storage, Backup and Encryption. This is contained and has been an integral part of the University of Leeds' Information Security Management System (ISMS). The data management framework takes into consideration of data accuracy, the permitted level of disclosure to others, good data storage and backup, and the setting of a timescale of data destruction when the information is no longer required. In this regard, all data were encrypted using the available software called 'Cryptainer'. The data then were transmitted and stored in the University of Leeds' network which is accessible even outside University.

The stored data were retained by the researcher throughout his research, including initially the original interview schedules and audio tapes of interviews. However, tapes were wiped when transcriptions had been completed and were stored securely. These data would be destroyed three years after completion of the research and a PhD has been awarded.

2.6. Conclusion

This chapter has detailed the research methods used in meeting the research objectives as outlined in Chapter One. In achieving this, the researcher has primarily concentrated upon the use of social science methodology, though other techniques (doctrinal analysis and policy transfer) are also important to the production of the thesis. The empirical data of this methodology were collected by way of using the qualitative research approach from 31 selected samples of relevant respondents. In doing so, the researcher has undertaken face to face, in-depth and semi-structured interviews that have generated valuable information on the topic from key informants, particularly from the perspective of four main categories of individuals representing agencies/bodies involved in anti-trafficking efforts such as the policymaking, the prosecution, the enforcement and victim protection. The participation of various subject participants who are key informants in their own area of knowledge and experience in proving the credibility of the research findings. While implementing this research method, the researcher fully observed the ethical aspects of research according to the prescribed standards of the University of Leeds and the British Society of Criminology.

Chapter Three

The Human Trafficking Phenomenon

3.1. Introduction

Human trafficking is an obdurate problem. It is intertwined with the long history of slavery and is difficult to solve. Arguably, slavery has become more prevalent in its modern forms, such as human trafficking. Since slavery has been in existence for centuries, it has become adaptable to adverse situations and takes many guises. There is no single solution to addressing the human trafficking problem because it can exist in different forms and perspectives, and differs according to places and circumstances.

The effort to address the problem and phenomenon of human trafficking involves different techniques in different jurisdictions. It involves a wide spectrum of actions: to put in place policies and strategies, to create sufficient laws to ensure appropriate punishment against the perpetrators, and to provide for the welfare and to protect the rights of the victims. Stern legal action in the form of harsh punishment against the perpetrators alone may not be the definitive way to address human trafficking.

Pursuant to the research objectives set in Chapter One, this Chapter elucidates the concept and phenomenon of human trafficking by explaining the concept of human trafficking and defining the elements involved in human trafficking issues. This is undertaken by explaining and analysing the human trafficking from its historical perspective, its current phenomenon and causes at the global and national scales. This chapter also explains how the anti-human trafficking law has been initiated at the international level. The deliberations of this chapter also include how the international law is translated and transformed at the regional and national level.

3.2. Global Phenomenon of Human Trafficking

Human trafficking has been an increasingly important phenomenon, as it is currently growing in magnitude. At least rhetorically, there is a global consensus that trafficking is a moral evil and states have a duty to prevent this phenomenon and protect the trafficked victims.¹ It is part of the non-military security threats, and becoming more prominent on the world's security agenda.² This is because the crime of human trafficking involves the prominent violation of a range of individual civil liberties including the prohibition against slavery, servitude, forced labour, as well as liberty and security of persons and, potentially, life.³ Human trafficking is also a complex phenomenon, and it is accelerated by various and developments in economics, politics, social, history, and geography.⁴ Human trafficking equally affects Malaysian internal security.⁵ It causes problems for many sectors including the local labour market and economy⁶ as well as public health.⁷

Human trafficking can be traced to the practices of slavery. Being the earliest form of unfree labour, slavery is of ancient origin. The earliest known system of law, the Babylonian Code of Hammurabi, contains some reference to slavery.⁸

¹ Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 *American Journal of International Law* 609.

² Nicole Jackson, 'Security' in Peter Burnell, Lise Rakner and Vicky Randall, *Politics in Developing World* (4th edn, Oxford: OUP 2014) 289-90.

³ Lorna McGregor, 'Applying the Definition of Torture to the Acts on Non-State Actors: The case of Trafficking in Human Beings' (2014) *Human Rights Quarterly* 210.

⁴ Ralf Emmers, 'Globalization and Non-Traditional Security Issues: A Study of Human and Drug Trafficking in East Asia' (2004) Working Paper No. 62., Institute of Defence and Strategic Studies, Nanyang Technological University, Singapore, 3/2004, 16 <http://dr.ntu.edu.sg/bitstream/handle/10220/4461/RSISWORKPAPER_66.pdf?sequence=1> accessed 20 February 2014.

⁵ Zarina Othman, 'Human (In) Security, Human Trafficking and Security in Malaysia' in Karen Beeks and Delila Amir (eds), *Trafficking and Global Sex Industry* (Lanham: Lexington 2006) 47.

⁶ Syerleena A Rashid (2014), 'Why Malaysians should be worried about human Trafficking' *ALIRAN* (Penang, 1 July 2014) <<http://aliran.com/thinking-allowed-online/2014-ta-online/malaysians-worried-human-trafficking/>> accessed 22 February 2017.

⁷ Sex trafficking victims are more susceptible to sexual transmitted diseases such as HIV/AIDS. More often they are exposed to unsafe sex as well as the injected with drugs using contaminated tools. See Jay G Silverman and others, *A Regional Assessment of Sex Trafficking and STI/HIV in Southeast Asia: Connections between Sexual Exploitation, Violence and Sexual Risks* (Colombo: UNDP 2009).

⁸ John Picarelli, 'Historical Approach to the Trade of Human Beings' in Maggy Lee (ed), *Human Trafficking* (Devon UK: Willian Publishing 2007) 28.

During the Graeco-Roman era, chattel slavery was rooted in conquest and booty and debt slavery.⁹ Some scholars also traced the origins of modern abolitionists' movements to the Greek philosophers Antisthenes and Epictetus.¹⁰

3.2.1. Contemporary Slavery from Historical Perspectives

While the practices of slavery can be traced to ancient history, the earliest phenomenon of trafficking in human beings with intensive physical work for slaves of any gender known in the era of contemporary nations' history relates to the era of Transatlantic slavery.¹¹

The Transatlantic slavery was practiced due to ideological and economic reasons. Some European countries that authorised the slave trade adopted an ideology justifying the forceful enslavement of Africans.¹² This is because they had the military superiority to impose bondage over the natives of other countries, especially after the Spain defeated the Moors in 1492.¹³ Some Europeans also denied the fact that Africans were able to rule themselves, and they claimed that the latter were just barbaric and uncivilised.¹⁴ They also stereotyped and justified black slavery based on religious pretexts,¹⁵ which viewed slavery as a way to help the black slaves to attain a civilised condition and the improvement of their physical, moral and intellectual conditions.¹⁶

⁹ Junius P Rodriguez (ed), *The Historical Encyclopedia of Worlds Slavery* (Vol I, Oxford: ABC-CLIO 997) 551.

¹⁰ Roger Sawyer, *Slavery in the Twentieth Century* (London: Routledge and Kegan Paul 1986) 24.

¹¹ Paul E Lovejoy, *Transformation in Slavery: A History of Slavery in Africa* (2nd edn, Cambridge: CUP 2012) 25.

¹² Patricia M Muhammad, 'The Transatlantic Slave Trade: A Forgotten Crime Against Humanity as refined by International Law' (2003) 19:4 *American University International Law Review* 884.

¹³ David Coleman, *Creating Christian Granada: Society and Religious Culture in an Old World Frontier City 1492-1600* (Ithaca: Cornell University Press 2003) 3.

¹⁴ Edward W Bovill, *The Golden Trade of Moors* (London: OUP 1958) 95.

¹⁵ Hugh Thomas, *The Slave Trade: The Story of the Atlantic Slave Trade: 1440-1870* (New York: Simon and Schuster 1997) 147.

¹⁶ US Senate, Remarks of Mr. John C Calhoun, of South California, on the Reception of Abolition Petitions, February 1837.

<<https://catalog.hathitrust.org/Record/009563422>> accessed 1 February 2017.

From the economic perspective, the African slavery initially started as a small commercial system based on the exchange of European materials such as guns and silk¹⁷. However, the opening of the 'New World' in the American continent proliferated the enslavement of Africans in the Americas.¹⁸ The Africans were preferred because the European settlers believed that the indigenous people, the so called the Indians or Native Americans, 'were unable to withstand gruelling work in the New World.'¹⁹ Slaves were captured for a price, whereby African Rulers sold fellow Africans to the Europeans.²⁰

3.2.1.1 Anti-Slavery in the United Kingdom

In the UK, the campaigns to abolish slavery practices were begun in 1760s²¹ arising out of various factors including economic changes, Enlightenment philosophy and religious revival movements.²² In 1806, led by William Wilberforce, the abolitionists tactically used the reasons of the renewed war with France, and the inclusion of many cabinet ministers who were in support for the abolition, to secure the passage of the Foreign Slave Trade Act 1806.²³ The 1806 Act prohibited British subjects from participating with France and its allies in the slave trade. After the 1806 Act, the campaigns progressed further and resulted into the passage of the Abolition of the Slave Trade Act 1807,²⁴ which put a ban on British people in the United Kingdom and the British colonies from participation in the slave trade.²⁵ Among the provisions of this law are the prohibition and a declaration of unlawfulness of any activities of 'the African

¹⁷ Babacar M'Baye, 'The Economic, Political and Social Input of the Atlantic Slave Trade in Africa (2006) 11:6 *European Legacy* 607.

¹⁸ *ibid.*

¹⁹ Edward Reynolds, 'Human Commerce' in Beverly McMillan (ed), *Captive Passage: The Transatlantic Slave Trade and the Making of the Americans* (London: Smithsonian Institute Press 2002) 13.

²⁰ Thomas (n 15) 68.

²¹ The British National Archives, 'How Did the Abolition Acts of 1807 and 1833 Affect the Slave Trade?' <www.nationalarchives.gov.uk/education/resources/slavery/> accessed 11 November 2014.

²² Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (New York: OUP 2012) 17.

²³ William Hague, *William Wilberforce: The Life of the Great Anti-Slave Trade Campaigner* (London: Harper Collins Publishers 2007) 331, 339.

²⁴ Abolition of the Slave Trade Act 1807 47 Georgii III, Session 1, cap. XXXVI.

²⁵ Martinez, *The Slave Trade and the Origins of International Human Rights Law* (n 22) 12.

Slave Trade, and all manner of dealing and trading in the purchase, sale, barter, or transfer of slaves, or of Persons intended to be sold, transferred, used, or dealt with as Slaves, practised or carried on, in, at, to or from any part of the Coast or Countries of Africa'.²⁶ The 1807 Act also enabled the forfeiture of vessels involved in the Slave Trade,²⁷ prohibition of the King's subjects from carrying and receiving slaves,²⁸ and other provisions related to slavery. The 1807 Act, however, only prohibited slave trading, but the practices of slavery and harsh treatment of existing slaves were still rampant within the British Empire.

There were significant developments after the 1806 and 1807 Acts. Both laws were passed during the Napoleonic Wars. With the passage of the 1807 Act, Britain enforced its military power unilaterally to suppress the trading of slaves. The 1807 Act was executed by exercising its rights under the law of nations to search ships on the high seas to determine whether they were enemy ships or, whether they were violating principles of neutrality such as carrying contraband for the enemy or running a blockade, if they were neutral ships.²⁹ Britain then continued negotiations to ban slavery with several countries, which resulted in a treaty with Netherlands in 1814.³⁰ Negotiations ensued with Portugal, Spain and Netherlands that allowed for mutual rights to search and establish mixed courts to try and condemn captured slave ships³¹ and resulted in the Anglo-Portuguese Treaty on 28 July 1817, the Anglo-Spanish Treaty on 23 September 1817 and the Anglo-Dutch Treaty on 4 May 1818.³²

Further anti-slavery efforts ensued with the passage of the Slave Trade Consolidation Act 1824.³³ The 1824 Act consolidated prior statutes relating to

²⁶ Abolition of the Slave Trade Act 1807 art. I.

²⁷ *ibid* art. II.

²⁸ *ibid* art. III.

²⁹ Martinez, *The Slave Trade and the Origins of International Human Rights Law* (n 22) 24.

³⁰ *ibid* 30.

³¹ Jenny S Martinez, 'Antislavery Courts and the Dawn of International Human Rights Law' (2008) 117 *Yale Law Journal* 550.

³² *ibid*.

³³ Royal Naval Museum, Timeline, What Happened After 1807.

<www.royalnavalmuseum.org/visit_see_victory_cfexhibition_timepost1807.htm> accessed 25 July 2014.

the abolition of the slave trade.³⁴ The Act declared illegal all activities relating to slavery, including the 'purchase, sale or contract, of slaves; fitting out of vessels, making loans or guarantees for the trade of slaves.'³⁵ However, the 1824 Act did not abolish slavery, but only prohibited British ships being involved in slavery.

These developments paved the way for the passage of the Slavery Abolition Act 1833,³⁶ which provided for the abolition of slavery throughout the British Empire in particularly in its colonies in West Indies, Canada, and the Cape of the Good Hope³⁷ as from 1834.³⁸ The 1833 Act re-designated slaves in the British colonies to be registered as 'apprentices',³⁹ a status which was ended in two stages. The first stage involved those who worked as labourers in the non-agriculture sector on 1 August 1838,⁴⁰ and followed by a later stage for those involved in agriculture sector on 1 August 1840.⁴¹ The 1833 Act also freed slaves below six years old in the colonies⁴² and set for compensation for slave owners who lost their 'properties' due to this law.⁴³ However, it was argued that the 1833 Act did not entirely abolish slavery in the British Empire because it excluded the territories under the possession of the British East India Company, Ceylon and St Helena.⁴⁴

While the 1833 Act was promulgated to abolish slavery, the British Parliament further amended the 1824 Act by way of Slave Trade Acts 1843 and 1873. Section 2 of the 1843 Act designated the debt servitude as slavery, while section 10 extended and applied the prohibition of slave trade to only British subjects, wherever they are, whether in the UK or British Overseas Territory. The 1843

³⁴ Graham McBain, 'Modernising the Slave Acts 1824, 1843 and 1873' (2015) 4:1 *International Law Research* 24.

³⁵ Marika Sherwood, 'Britain, the Slaves Trade and Slavery, 1808-1843' (2004) 46 (2) *Race and Class* 54; Slave Trade Consolidation Act 1824 preamble.

³⁶ Slavery Abolition Act 1933 3° & 4° Gulielmi IV cap. LXXIII.

³⁷ British National Archives (n 11).

³⁸ Slavery Abolition Act 1933 preamble.

³⁹ *ibid.*

⁴⁰ *ibid* art VI

⁴¹ *ibid* art V.

⁴² *ibid* art XIII.

⁴³ *ibid* art XXIV.

⁴⁴ *ibid* art LXIV.

Act also extended the application of 1824 Act to British subjects in foreign countries. This application was confirmed in the case of *R v Zulueta*.⁴⁵

The 1873 Act further included, in section 1, a provision pertaining to the authorisation for the authorities to visit and seize vessels suspected of being engaged in or fitted out for the slave trade.

There were some developments pertaining to slavery in the UK after the 1873 Act, however such developments were related to the indirect forms of slavery such as trafficking of women and young girls for sexual exploitation or 'white slavery'. This issue is discussed in other part of this chapter.

The UK enacted the Anti-Slavery Act 2010, specifying an Anti-Slavery day to be commemorated on 18 October each year. The purpose of Anti-slavery day is, among others: to acknowledge that millions slavery victims have been deprived of basic human dignity;⁴⁶ to raise awareness of the dangers and consequences of slavery, human trafficking and exploitation,⁴⁷ and to draw attention to the progress made by the United Kingdom government and those working to combat the said scourges.⁴⁸

In 2015, the UK Parliament passed the Modern Slavery Act (MSA) 2015 as a single anti-modern slavery legislation. The MSA 2015 includes human trafficking, and a number of measures to combat slavery and human trafficking in the UK including introducing the offence, the power of enforcement and the matters pertaining to the protection of the trafficked victims. Discussions about MSA 2015 will take place in section 3.8 of this thesis.

⁴⁵ [1843] Car & K 215.

⁴⁶ Anti-Slavery Day Act (UK) 2010 s 2 (a).

⁴⁷ *ibid* s 2 (b).

⁴⁸ *ibid* s 2 (c).

3.2.1.2. Anti-Slavery Movements in other Parts of the World

Despite the widespread anti-slavery movements in the late 18th century, Britain was not the only pioneer of slavery abolition.⁴⁹ Another notable slavery abolition attempts took place in the US with the passage of the Slave Trade Act 1794 regulating slave trade.⁵⁰ But despite the 1794 Act, slavery practices were still ongoing when South Carolina reversed the ban on international slave trade in early 1800s,⁵¹ and Georgia, which only temporarily acceded to federal slavery ban in 1808, reversed the ban due to persistent support for slavery by the planters.

The reopening of slave trade in both states was due to the demand of manpower as slave masters were apathetic with labour saving methods or technological innovations.⁵² The demand for slaves also due to three shaping forces: the urbanisation, industrialisation and emigration. This is because with such factors, the southern states would remain as backwater.⁵³ The political pressure also caused the reversal of the southern governments from the abolition. For example, the political leadership in the south depended on their supporters, who eventually depended on the slaves to toil on the plantations and industry.⁵⁴ Based on estimation, the period 1800-1825 was the heyday of the US slavery shipments with the transportation of 109,545 slaves.⁵⁵

While the Emancipation Proclamation of 1862 was issued to free the slaves,⁵⁶ it was deemed insufficient to achieve its aim until the passage of the

⁴⁹ Philippa Levin, *The British Empire: Sunrise to Sunset* (Harlow: Pearson-Longman 2007) 23.

⁵⁰ Paul Finkelman, 'Suppressing American Slave Traders in 1870s' (2004) 18:3 *OAH Magazine of History* 51.

⁵¹ *ibid.*

⁵² Donald L Grant, *The Way it was in the South: The Black Experience in Georgia* (Athens: University of Georgia Press 2001) 30.

⁵³ *ibid.*

⁵⁴ Jed H Shugerman, 'The Louisiana Purchase and South Carolina's Reopening Slave Trade in 1803' (2002) *Journal of the Early Republic* 263.

⁵⁵ The Trans-Atlantic Slave Trade Database

<www.slavevoyages.org/assessment/estimates> accessed 14 April 2017.

⁵⁶ Paul Lagasse, *The Columbia Encyclopaedia* (6th edn, New York: Columbia University Press 2016).

<https://search.credoreference.com/content/entry/columency/emancipation_proclamation/0> accessed 13 April 2017.

Constitutional 13th Amendment, aiming at constitutionally end slavery. The 13th Amendment, however, did not abolish segregation, but it sparked the Reconstruction period beginning with the passage of the Civil Rights Act 1875.⁵⁷ Notwithstanding these efforts, the Reconstruction period was marred by resistance in the South,⁵⁸ as well as with the enforcement of the 'Jim Crow' laws preserving the doctrine of 'equal but separate.'⁵⁹ This doctrine was tested and upheld in the case of *Plessy v Ferguson*⁶⁰ until it was challenged and repudiated by the case of *Brown v. Board of Education*.⁶¹ The *Brown* case can be depicted as a foundation to end the segregation that paved the way for the passage of the Civil Rights Act 1964.⁶² The 1964 Act prohibits discrimination in key areas and creates monitoring mechanisms to advance and enforce the protection of equal rights for all the people in the US.⁶³

Notwithstanding the abolition, slavery in many other forms continues to be a problem worldwide. It can arise in various forms such as human trafficking. Slavery may also be in the form of forced labour, the definition of which includes 'all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily',⁶⁴ or in the form of debt bondage and serfdom.

⁵⁷ Civil Rights Act (US) 1875 18 Stat. 335-337.

⁵⁸ Paul A Kimbala and Randall M Miller, *The Freedmen's Bureau and Reconstruction: Reconsideration* (New York: Fordham University Press 1999) 322.

⁵⁹ Michael J Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press 2004) 10.

⁶⁰ [1896] 163 U.S. 537.

⁶¹ [1954] U.S. 483.

⁶² Civil Rights Act 1964 Public Law 88-352 (78 Stat. 241).

⁶³ Henry L Chambers Jr., 'Civil Rights Act of 1964' in David S Tanenhaus (ed), *Encyclopaedia of the Supreme Court of the United States* (Vol 1 A-C, New York: MacMillan 2008) 328.

⁶⁴ Convention Concerning Forced or Compulsory Labour (Convention 29), article 1 <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029> accessed 26 June 2014; Convention No. 29 however provides for certain exceptions with respect to work of a purely military character, 'normal' civil obligations, work as a consequences of a conviction in a court of law and carried out under the control of public authority, work in emergency situations such as wars or natural calamities, and minor communal services (art. 2.2). It is also to note that the Convention concerning the Abolition of Forced Labour 1957 (Convention 105) further specifies that forced labour can never be used as a means of political coercion or education or as punishment for expressing political views or for participating in strike action, as labour discipline, as racial, national or religious discrimination, or for mobilising labour for economic development purposes (art 1).

The wider notion of slavery is defined international instruments, such as the League of Nations Slavery Convention 1926⁶⁵ as the 'status or condition of a person over whom any or all of the power attaching to the right of ownership are exercised,'⁶⁶ including involuntary domestic servitude. This is a unique form of forced labour where workers, abuses as confiscation of travel documents, withholding of wages, confinement, no time off, isolation from the community and all family and friends, physical and sexual abuse, degrading treatment, and threats of harm, including the threat of arrest and summary deportation as an undocumented migrant.⁶⁷

Apart from the above, these new forms of slavery also include forced child labour defined under the Convention Concerning Minimum Age for Admission to Employment 1973 (ILO Convention No. 138),⁶⁸ and the Worst Forms of Child Labour Convention 1999 (ILO Convention No. 182),⁶⁹ as work that harms children's well-being and hinders their education, development and future livelihoods. A form of child slavery also includes the use of child soldiers, which is defined as 'a child associated with an armed force or armed group ... below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes'.⁷⁰

3.2.1.3. Other Types of 'Slavery'

There are also other indirect or types of coercive forms of slavery. For example, the US case of *Bailey v State of Alabama*,⁷¹ the Supreme Court was of the view

⁶⁵ Slavery Convention 1926 (adopted 25 September 1926 entered into force 9 March 1927) LNTS No.1414 art. 1 (1).

⁶⁶ *ibid* art. 1.

⁶⁷ US DoS, 'Democracy and Global Affairs, Involuntary Domestic Servitude' (2010) 1 <www.state.gov/documents/organization/144601.pdf> accessed 5 July 2014.

⁶⁸ ILO Convention 138 1973 (adopted 26 June 1973 entered into force 19 June 1976) UNTS 1015 UNTS 297.

⁶⁹ ILO Convention 182 1999 (adopted 17 June 1999 entered into force 19 November 2000) 2133 UNTS 161.

⁷⁰ UN, Office of the Special Representative of the Secretary General for Children and Armed Conflict. <<https://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/child-soldiers/>> accessed 30 October 2014. The definition of child soldiers is contained in The Principles and Guidelines on Children Associated with Armed Forces and Armed Groups.

⁷¹ [1911] 219 U.S. 219.

the prohibition against slavery and involuntary servitude also includes 'peonage', the voluntary or involuntary service or labour in liquidation of any debt or obligation.⁷² Similar view is also found in the *Clyatt v. United States*,⁷³ the Supreme Court was of the US Constitution prohibited the involuntary or involuntary service, including peonage or holding another in peonage.⁷⁴

Likewise, human trafficking is nothing new as it has been described as a diverse form of trade that is 'as old as trade itself', even though there is great diversity in what is trafficked.⁷⁵ It has always existed in various forms, but human trafficking received renewed attention first and foremost in relation to the trade in women being associated with the phenomenon of the 'white slave trade'.⁷⁶ It seems that while the analogy of transatlantic slave trade is persistently invoked, the precursors of the dominant framework in the modern human trafficking have been the efforts to combat the white slavery of the late 19th and 20th centuries.⁷⁷

The notion of 'white slavery' could simply refer to white people who have been enslaved, such as white Europeans during the time of Barbary corsairs operating from Algiers, Tunis and Morocco in the sixteenth to nineteenth centuries.⁷⁸ Between 1672 and 1682, the Algerians were said to have taken no fewer than 353 British ships, and captured between 290 and 430 British slaves every year.⁷⁹ These slaves were not limited to only British but also included other European nationals. A recent study on Mediterranean slavery estimates that between one to 1.5 million European Christians were enslaved on the

⁷² *Bailey* (n 71) 241.

⁷³ [1905] 197 U.S. 207.

⁷⁴ *ibid* 208.

⁷⁵ Maggie Lee, 'Understanding Human Trafficking' in Maggie Lee (ed), *Human Trafficking* (Cullompton: Willian Publishing 2007) 1.

⁷⁶ Annusca Derks, 'Combating Trafficking in South Asia: A Review of Policy and Programme Responses' (2000) 2/2000 International Organisation for Migration <www.unesco.org/most/migration/ctsea.pdf> accessed 24 February 2014.

⁷⁷ Picarelli (n 8) 210.

⁷⁸ Robert C Davis, *Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, the Barbary Coast and Italy 1500-1800* (New York: Palgrave Macmillan 2004) 3.

⁷⁹ Philèmon de la Motte, *Several Voyages to Barbary* (London: Gale ECCO 2010) 59.

Barbary Coast alone between 1530 and 1780.⁸⁰ These slaves were traded as the chattels of whosoever chose to buy and would be utterly without rights or protection.⁸¹

The 'white slavery' could also refer to the British policy of penal transportation to its colonies during the 18th century. The transportation of felons became Great Britain's foremost criminal punishment, mostly to those who committed petty offences.⁸² It was so developed that by 1775 it had become a major ingredient of English criminal law and economic development policy.⁸³ For example, the preamble to the Transportation Act 1718 declared that its purpose was both to 'deter criminals and to supply the colonies with labour,' as 'in many of His Majesties colonies and plantation in America there is a great want of servants, persons convicted of grand or petit larceny of any felonious stealing or taking of money or goods and chattels, either from the person, or the house of any other'.⁸⁴ Even a 1731 pamphleteer characterised the primary aim of British penal policy as 'draining the Nation of its offensive rubbish, without taking away their lives' and 'sending annually abroad certain people, who only hurt people at home'.⁸⁵ In America, most transported criminals were sold as indentured servants.⁸⁶ Those transported constituted the second largest body of immigrants compelled to go to America, next to African slaves.

The transportation to America was halted in 1775 due to the revolution in American colonies. They were to remain at home unless the British Government could find some other destination for them.⁸⁷ At that point of time, crime rates escalated across Britain, while large numbers of people moved away from rural

⁸⁰ Eric R Dursteler, *Venetians in Constantinople, Nations, Identity and Coexistence in the Early Modern Mediterranean* (Maryland: John Hopkins University Press 2006) 72.

⁸¹ Davis (n 78) 69.

⁸² Roger Ekirch, 'Bound for America: A Profile of British Convicts Transported to the Colonies, 1718-1775' (1985) 42:2 *William and Mary Quarterly* 184.

⁸³ Alan George and Lewers Shaw, *Convicts and the Colonies: A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London: Faber and Faber 1966) 25.

⁸⁴ Leon Radzinowicz, *History of English Criminal Law and its Administration from 1750* (London: CUP 1948) 56.

⁸⁵ Ekirch (n 82).

⁸⁶ *ibid.*

⁸⁷ George and Shaw (n 83) 38.

areas to the increasingly industrialised cities where unemployment ran high as machines replaced manpower.⁸⁸ Thus the local prisons became overcrowded. Then the British authorities decided to transport prisoners to the new British colony in New South Wales in 1788.⁸⁹

In Australian penal colonies, the convicts were transferred to a colonial penal institution for initial processing and labour assignment.⁹⁰ They then were assigned to build the infrastructure and settlement for the penal colony, as well as being the domestic and rural labourers in outer areas where the free settlers opened up the land. The women convicts were assigned to households both within the urban and the rural areas.⁹¹ This assignment system was pragmatic, serving to enable Britain to expand within Australia relatively quickly.⁹² The transportation was said to be a mercantilist device for providing any likely colonial venture with a sufficiency of labour. It was argued that the assignment of works to the convicted labourers amounted to slavery as it was essential in the colony, which had not yet learned to respond to wage incentives.⁹³ When the penal transportation to Australia ended in 1868,⁹⁴ the total number of transported convicts stood at around 162,000 men and women, and involved 806 shipments.⁹⁵

Next, the notion of 'white slavery' was adopted by activists' intent on abolishing prostitution in Europe. It served to distinguish 'female sexual slavery' from the enslavement of the Africans, while at the same time serving to draw a moral comparison between the two different types of exploitation,⁹⁶ as 'comparing the

⁸⁸ Sue Ballyn, 'The British Invasion of Australia. Convicts: Exile and Dislocation' in Martin Renes (ed), *Lives in Migration: Rupture and Continuity* (University of Barcelona: Centre for Australian Studies 2011) 17.

⁸⁹ *ibid* 16.

⁹⁰ Eleanor C. Casella, 'Prisoner of His Majesty: Postcoloniality and the Archaeology of British Penal Transportation' (2005) 37:3 *World Archaeology* 453.

⁹¹ Ballyn (n 88) 21.

⁹² *ibid*.

⁹³ Kenneth M Dallas, 'First settlement of Australia; Considered in Relation to Sea-power in World Politics' 1952 *Tasmanian Historical Research Association, Proceeding* 4.

⁹⁴ Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787–1868* (London: Harvill Press 1996) 579.

⁹⁵ Government House West Australia, 'End of Transportation of Convicts' <www.govhouse.wa.gov.au/australia.html> accessed 14 October 2014.

⁹⁶ Anne T Gallagher, *The International Law of Human Trafficking* (New York: CUP 2010) 55.

taking of the black slaves for labour with the enslavement of the white women for the sexual purposes, the commentators generally placed a higher value on the suffering of the women'.⁹⁷ While in the UK, the law pertaining to the prostitution may initially come in the form of Vagrancy Act 1824, a law compelling the wandering poor to return to their place of settlement. Vagrancy, to certain extent at the material time, forced upon the unattached women and prostitutes as the only way to survive.⁹⁸

The term 'white slavery' in the UK first appeared in the mid-19th century during the Liberals' campaign for the repeal of four laws known as Contagious Disease Acts (CDAs) 1864, 1866 and 1869.⁹⁹ The purpose of these laws was an attempt to reduce venereal disease in the armed forces, and gave the authority to the police officers to arrest any woman suspected to be prostitute. These CDAs also provided for identification and registration of prostitutes in military depots in southern England and Ireland, and mandated regular speculum examination of these prostitutes for venereal disease.¹⁰⁰ If a woman was found or suspected to have been infected, she would be put in specially designated wards called 'pseudo medical prisons for whores'.¹⁰¹

The campaigns to repeal these CDAs were spearheaded by a social reformer Josephine Butler and a Liberal MP for Cambridge, William Fowler. The Liberals argued that the CDAs, by implication at least, condoned prostitution and made the public believe that prostitution has been legalised.¹⁰² Butler went further to contend that the CDAs, which permitted women to be arrested and committed to hospital for several months, were contrary to the basic rights of freedom without trial guaranteed under the articles 39 and 40 of Magna Carta.¹⁰³

⁹⁷ Mary Anne Irwin, *'White Slavery' as Metaphor Anatomy of a Moral Panic* (Vancouver: San Francisco State University 1998) 5.

⁹⁸ Helen J Self, *Prostitution, Women and the Misuse of the Law: The Fallen Daughters of Eve* (London: Frank Cass 2003) 36.

⁹⁹ Margaret Hamilton, 'Opposition to the Contagious Disease Act, 1864-1869' (1978) 10:1 *Albion: A Quarterly Journal Concerned with British Studies* 14.

¹⁰⁰ Irwin (n 97) 3.

¹⁰¹ Kathleen Barry, *The Prostitution of Sexuality: the Global Exploitation of Women* (New York: New York University Press 1995) 93.

¹⁰² Hamilton (n 99) 18.

¹⁰³ *ibid* 17.

The CDAs were finally repealed with the passage of the Contagious Disease Repeal Act 1886. However, the campaign against the prostitution continued, particularly for the elimination of prostitution of girls and young women. This campaign first erupted in July 1885 when the Pall Mall Gazette published a series of salacious articles entitled 'The Maiden Tribute to Babylon'. The articles were filled with lurid details of violations against young girls.¹⁰⁴ The series also exposed the juvenile prostitution rings in London and the organised group to traffic young English girls supplying brothels across Europe.¹⁰⁵ The report, written by William Stead, was intended to convey an image of child prostitutions as a 'veritable slave trade.' The series caused panic across England and forced an official response to the report.¹⁰⁶ Stead's endeavour has also been assumed to be the guiding force for the passage toward the Criminal Law Amendment Act 1885, raising the age of sexual consent to sixteen.¹⁰⁷ The 1885 Act was promulgated due to the motivating concerns for the protection of the innocent white children and women from abduction, transportation and detention for the purpose of prostitution.¹⁰⁸

The efforts to address prostitution and exploitation of young girls and women ensued with the passage of the Vagrancy Act 1898 to suppress the prostitute's tout or bully by means of making 'living on the earnings of prostitution'.¹⁰⁹ The parliament also passed the Criminal Law Amendment (White Slave Traffic) Act 1912 which amended the Criminal Law (Amendment) Act 1885 and the Vagrancy Act 1898.

The notion of 'white slavery' continued to be debated in the US. In 1910, the Congress passed the White Slavery Traffic Act 1910 (known as the 'Mann Act'). The supporter of the Mann Act had used the words 'white slavery', by promoting the vision of women held in bondage against their will, helpless girls being drugged or abducted, and of mysterious disappearances of innocent and naïve

¹⁰⁴ Self (n 98) 41.

¹⁰⁵ Deborah Gorham, 'The Tribute of Modern Babylon Re-Examined: Child Prostitution and the Idea of Childhood in Late Victorian England' (1978) 21:3 *Victorian Studies* 353.

¹⁰⁶ Irwin (n 97) 1.

¹⁰⁷ Gorham (n 105) 354.

¹⁰⁸ Self (n 98) 42.

¹⁰⁹ Vagrancy Act 1898 s 1; See also Self (n 98) 42.

immigrants forced into lives of prostitution and vice.¹¹⁰ However, the term 'white slave' in the Mann Act is a misnomer, as it makes no distinction as to the race or colour of the female whose transportation is a violation by the law.¹¹¹ By the second half of the 19th century, the concept of 'white slavery' was associated with recruitment for prostitution by force or fraud.¹¹² The campaign against white slavery has been described as an early example of a 'moral panic' and has triggered media attention, exaggerated public concern, anxiety, fear and anger to social order.¹¹³

Eventually, this campaign led to various international legal mechanisms, as discussed under section 3.5 of this chapter.

3.3. Causes of Human Trafficking

The contemporary era of globalisation has resulted in an unprecedented flow of capital, goods and services, as well as labourers into every continent and into every part of the world. While movement of people is easier, issues of human trafficking and human smuggling are becoming major factors that could destabilise not only the individual state, but also affect international and regional security.¹¹⁴ Globally, the magnitude of human trafficking is increasing and has transformed from being synonymous with the campaign against white slave trade and prostitution into a multifaceted problem¹¹⁵ such as forced labour, child labour, debt bondage, forced marriage and commercial sexual exploitation of children and adults. Despite the existence of an array of international legal instruments and human rights protections, these problems have remained prevalent.¹¹⁶

¹¹⁰ Marlene D Beckman, 'The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women' (1993) 72 *Georgetown Law Journal* 1111.

¹¹¹ *ibid.*

¹¹² Ethan A Nadelman, 'Global Prohibition Regimes: the Evolution of Norms in International Society' (1990) 44:4 *International Migration* 479.

¹¹³ Irwin (n 97) 12.

¹¹⁴ UNODC, *The Globalisation of Crime: A Transnational Organised Crime Threat Assessment* (Vienna: UN 2010) 39, 55.

¹¹⁵ Irwin (n 97) 13.

¹¹⁶ Gallagher, *The International Law of Human Trafficking* (n 96) 2.

Therefore, there is a need to examine the root causes for the human trafficking problems. They may differ from one country to another, and are influenced by numerous factors such as the greed of criminals, economic pressures, political instability and transition, social, and culture of different states. These factors have been further aggravated by the lack of employment opportunities, poverty, economic imbalances among regions, corruption, decline of border control, gender and ethnic discrimination, and conflicts.¹¹⁷ More often, the trafficker groups are involved in other transnational crimes, and trafficking in humans arises, in part, because it seems to be a very highly profitable trade. This is because unlike the other 'commodities', human trafficking activities can be said as highly profitable with slightly lower risks, and the victims can be used repeatedly and do not really require high capital investment and maintenance.¹¹⁸

3.3.1. Political and Economic Factors

Human trafficking incidences may occur in the situation where the country of origin experiences political instability, militarism, civil unrest, internal conflicts or natural disasters.¹¹⁹ The destabilisation and displacement of people due to these incidences increase vulnerability of the population towards exploitation and abuse through human trafficking and forced labour.¹²⁰ This is because traffickers identify and target individuals who are characteristically vulnerable.¹²¹ As an example, in Europe, the end of the Cold War has contributed towards the proliferation of human trafficking in region. The social and economic dislocation and the opening of borders have abetted this phenomenon. With the demise of the USSR and the emergence of new states, parts of larger states such as Chechnya in Russia, Nagorno-Karabagh in the Caucasus, and states in the Balkans have experienced instability. Apart from these conflicts, more than sixty national and regional conflicts have occurred since the early 1990s, leaving

¹¹⁷ Louise Shelley, *Human Trafficking: A Global Perspective* (New York: CUP 2010) 37.

¹¹⁸ Kevin Bales, 'What Predicts Human Trafficking' (2007) 31:2 *International Journal of Comparative and Applied Criminal Justice* 271.

¹¹⁹ *ibid*

¹²⁰ *ibid*.

¹²¹ Michele A Clark, 'Trafficking in Person: An Issue of Human Security' (2003) 4:2 *Journal of Human Development* 247.

widespread devastation and many individuals vulnerable to exploitation by the traffickers.¹²² For example, some observations revealed that soon after the downfall of the Eastern bloc, the capital cities in the Western Europe became flooded with young women from Eastern Europe.¹²³

The economic factor sometimes is intertwined with the political and security factors which also contribute to the push of the population to seek for a better place for a new livelihood. Extreme poverty, for example, is a primary cause of the poor community's entry into servitude and slavery, either with full knowledge that they traded their freedom for minimal food and shelter, which turns out to involve false promises.¹²⁴

In the case of Malaysia, the economic push and pull factors exacerbate human trafficking activities. The pull factor is due to the perceived economic opportunities as Malaysia becomes more attractive and economically prosperous as compared to its impoverished neighbours, while the push factor relates to the disparity in economy, violence, ethnic conflict, as well as security and political instability in source countries¹²⁵ such as Myanmar, Laos, the Philippines, Thailand and Indonesia. In addition, the relative porousness of land and sea borders (4,675 kilometre-long coastline and 2,669 kilometre-long land border)¹²⁶ has also contributed to the pull factor towards Malaysia. Some parts of the Malaysian coastline remain permeable, ill defined, and in dispute with its neighbours, and are often difficult to monitor. These factors have prompted the easy entrance of migrants as well as being open for the crime syndicates.¹²⁷

¹²² Shelley (n 117) 38.

¹²³ Nick Davies, 'Prostitution and Trafficking – The Anatomy of Moral Panic' *The Guardian* (London, 20 October 2009) <<http://www.theguardian.com/uk/2009/oct/20/trafficking-numbers-women-exaggerated>> accessed 6 January 2014.

¹²⁴ The findings by the UN Special Rapporteur on Slavery show that slavery and domestic servitude often occur to the hardcore poor who are the most vulnerable people in Africa. See UNGA, Human Rights Council 27th Session, Report of the Special Rapporteur on Contemporary Slavery Including its Causes and Consequences, Gulnara Shainian UN Doc A/HRC/27/53/Add3.

¹²⁵ Pooja T. Stanslas, 'Transborder Human Trafficking in Malaysian Waters: Addressing the Root Causes' (2010) 41:4 *Journal of Maritime Law and Commerce* 595.

¹²⁶ Central Intelligence Agency, 'World Factbook – Malaysia' <www.cia.gov/library/publications/the-world-factbook/geos/my.html> accessed 7 January 2015.

¹²⁷ Stanslas (n 125).

The cause of human trafficking can also be attributed to economic factors on the part of the traffickers. Historically, the European powers exploited colonies such as the 'New World'.¹²⁸ In replacing the indigenous inhabitants of the American land who fell prey to the colonists' depredation, disease and labour demands, the transatlantic African slavery and slave trade became dominant¹²⁹ with an estimation of around 9.5 million African slaves shipped and used in all aspects of economic activities.¹³⁰

3.3.2. Government Policy

The cause of human trafficking can be attributed to the policy of the relevant governments at the time. For instance, the passage of the UK's Transportation Act 1718 was, among others, to address the overcrowding problem of criminals in the prisons, and to deter criminals as well as to supply the colonies with labourers where there was a great demand.¹³¹ At the same time, the transportation of criminals was to purify the country from the 'offensive rubbish, without taking away their lives' especially those who could have hurt people in the UK.¹³²

This is also a case of a few states in the US. For example, the Virginia General Assembly passed the Virginia Slave Codes 1705 that stated '...all servants imported and brought into the Country... who were not Christians in their native Country... shall be accounted and be slaves. All Negro, mulatto and Indian slaves within this dominion... shall be held to be real estate...'

Another example is the former British colony of South Carolina. The Commons House of Assembly passed the Negro Act 1712 that reads:

¹²⁸ Karen E Bravo, 'Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade' (2007) 25 *Boston University International Law Journal* 207.

¹²⁹ David B Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World: The Rise and Fall of Slavery in the New World* (OUP: New York 2006) 84.

¹³⁰ *ibid.*

¹³¹ Leon Radzinowics, *History of English Criminal Law and its Administration from 1750* (London: CUP 1948) 56.

¹³² Roger Ekrich, 'Bound for America: A Profile of British Convicts Transported to the Colonies 1718-1775' (1985) 42:2 *William and Mary Quarterly* 184.

‘...that all negros, mulattoes, mestizo's or Indians, which at any time heretofore have been sold, or now are held or taken to be, or hereafter shall be bought and sold for slaves, are hereby declared slaves; and they, and their children, are hereby made and declared slaves....’

3.3.3. Social and Cultural Factors

The social and cultural practices in some countries also proliferate human trafficking. Some countries permit the devaluation of women and girls among the members of the society or the practice of entrusting poor children to more affluent friends or relatives.¹³³ Further, the issue of discrimination against a certain population group based on religion, social standing or ethnicity can also be another contributing factor. As an example, the prostitution in South Asia is a social problem based on underdevelopment and discrimination.¹³⁴ In India, women of low caste receive less status than victims of higher caste. This shows that many victims who fall prey to the traffickers are those who are most disadvantaged in their own country particularly those who have poor job skills and little chance of being successful in the home country.¹³⁵ Some of them are promised by the marriage syndicates to leave their country and marry foreigners. There is a pattern where the young women from Viet Nam were recruited to China or Taiwan for the purposes of marriage. Instead, they were sold to the prostitution rings and exploited.¹³⁶

Nevertheless, the lower economic or societal background of victims may not be the only reason for the exploitation. Some instances of the exploitation are due to ethnic animosity or misrepresentation of religious injunctions. The Rotherham child sexual exploitation scandal in the UK shows that the abuse and exploitation of white young female were driven by the hatred and contempt by

¹³³ Bales (n 118).

¹³⁴ *ibid.*

¹³⁵ Alexis A. Aronowitz, ‘Smuggling and Trafficking in Human Beings: The Phenomenon, the Market that Drive it and the Organisation that Promote it’ (2001) 9 *European Journal on Criminal Policy and Research* 163.

¹³⁶ Alexis A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings*, (Maryland: The Scarecrow Press 2013) 55.

some Asian and Muslim males.¹³⁷ In a House of Commons report,¹³⁸ the Home Affairs Committee revealed that these perpetrators used bigoted religious reasons to justify their criminal actions. The report also revealed that the victims, mostly white young women and children had been treated as though they were worthless and beyond respect just because they were said to be 'unbelievers'.¹³⁹ Unfortunately, this 'sexist behaviour of the perpetrators went unchallenged by their peers or community elders'¹⁴⁰ despite the teachings of Koran, and rejection by the religious leaders and scholars.¹⁴¹

3.3.4. Corruption

The growth of public sector corruption has also correlated closely with the rise in human trafficking. Corruption is observed to take place at the time of recruitment of the trafficked victims such as at the time of documentation or during their transport,¹⁴² perpetrators to enjoy impunity and victims to be protected.¹⁴³ Further, corruption secures an easy movement of the victims within the country or across borders. Even upon the discovery of human trafficking, corruption sometimes results in the legal and judicial processes being hampered.¹⁴⁴ As corruption lingers, perpetrators hide their profits derived from illicit activities through money laundering activities.¹⁴⁵

¹³⁷ Alexis Jay, 'Independent Inquiry into Child Sexual Exploitation in Rotherham' 1997-2013 (*Rotherham Metropolitan Borough Council*, 21 August 2014) 94.

<www.rotherham.gov.uk/downloads/file/1407/independent_inquiry_cse_in_rotherham> accessed 17 December 2014.

¹³⁸ House of Commons, 'Child Sexual Exploitation and the Response to Localised Grooming', Second Report of Session 2013-14, HC68-I, 5 June 2013, 53. <www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/68/68i.pdf> accessed 20 December 2014.

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² UNODC, *The Role of Corruption in Trafficking in Persons: Issue Paper* (Vienna: UN 2011) 6.

¹⁴³ UNGIFT, 'Transparency International: Corruption and Human Trafficking' (2011) 3/2011 Working Paper. <www.ungift.org/doc/knowledgehub/resource-centre/CSOs/TI-Working_Paper_Human_Trafficking_28_Jun_2011.pdf> accessed 6 January 2015.

¹⁴⁴ Sakiko Fukuka-Parr, 'New Threat to Human Security in the Era of Globalisation' (2003) 4:2 *Journal of Human Development* 167.

¹⁴⁵ Craig Fagan, 'Evidence of Illegal Cross-Border Flows in South Asia and Their Impact on Corruption; U4 Expert Answer (Berlin, Germany: U4 and Transparency International, 28 April 2011).

3.3.5. Globalisation

As the world becomes more globalised, human trafficking steadily becomes a cross-border phenomenon that is driven by the human pursuit of wealth. As such, human interactions become more intertwined in their cultural, economic, social and political dimensions that formed a strong force that spurs the proliferation of human trafficking.¹⁴⁶ It is seen that the human trafficking activities occur due to various causes. As the trafficking is naturally low-cost, low risk and with high profit, it allures many parties to this crime to gain profit through inhuman exploitation.

3.4. Scale of Human Trafficking Problems

The problem of human trafficking is undisputedly serious in nearly every continent,¹⁴⁷ but how serious is the problem? Based on UN estimation in 2014, 20.9 million people are being trafficked,¹⁴⁸ while an estimation of human trafficking business is more than £22 billion annually.¹⁴⁹ At its current rate, trafficking is tied with arms dealing as the second fastest transnational organised criminal industry in the world,¹⁵⁰ just below drug trafficking.

The growth of human trafficking has been most apparent in the past two decades. The UN also estimated that out of 20.9 million trafficked victims, 18.7 million are exploited in private economy, comprising 14.2 million as forced

www.transparency.org/files/content/corruptionqas/282_Illegal_cross_border_flows_in_South_Asia.pdf> accessed 5 January 2015.

¹⁴⁶ Girish Mishra, 'Human Smuggling and Trafficking in the Era of Globalisation' (2007) ZNET www.zmag.org/content/showarticle.cfm?ItemID=12760> accessed 26 March 2014. (noting that increased demands for labour and decreasing availability to obtain work visas into producing nations encourages human smuggling and trafficking)

¹⁴⁷ Alexis A Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (London: Prager 2009) 15.

¹⁴⁸ ILO Convention 138 1973 (n 68) 7.

¹⁴⁹ Hugo Swire, 'Keynote Address: Combating Human Trafficking: Business and Human Rights' (The Government of the United Kingdom 2013)

www.gov.uk/government/speeches/combating-human-trafficking-business-and-human-rights> accessed 15 March 2014.

¹⁵⁰ UNHCR, 'Conference Puts Focus on Human Trafficking, Fastest Growing Criminal Industry' (Geneva 11 October 2010)

www.unhcr.org/4cb315c96.html> accessed 23 March 2014.

labourers and 4.5 million as sexually exploited victims.¹⁵¹ This level of activity has caused many experts on human trafficking to agree that the problem is significant and increasing as both demand and supply for people is rising.¹⁵² There is a need for reliable and standardised data to measure human trafficking.¹⁵³ Yet collecting information on trafficking is very difficult due to the following reasons.¹⁵⁴ First, most of the populations relevant to the research on human trafficking such as sex workers, victims or perpetrators constitute so-called 'hidden population', second, the clandestine and illegal nature of trafficking conduces against measurement; third, the lack of anti-trafficking mechanism and legislation hamper assessment in many countries; fourth, victims are reluctant to report their experiences to the authorities; and fifth, government commitment to the data collection and research is lacking.

Notwithstanding the lack of reliable official data, human trafficking has become a subject for much empirical research, academic debate and advocacy in diverse disciplines.¹⁵⁵

It can be summarised that the phenomenon and scale of human trafficking is so immense that prompt the international community to take action. However, international action may be hampered without clear international legal instruments such as will be elucidated next.

3.5. Initiation of Anti-Trafficking Laws at the United Nations

As for collective responses of nations, human trafficking has a lengthy legal, social and political history that sets it apart from many contemporary

¹⁵¹ ILO Convention 138 1973 (n 68) 7.

¹⁵² Shelley (n 117) 37.

¹⁵³ IOM, 'Global Human Trafficking Database' <www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ct/iom_ctm_database.pdf> accessed 26 May 2014.

¹⁵⁴ Guri Tyldum and Anette Brunovkis, 'Describing the Unobserved: Methodological Challenge in Empirical Studies on Human Trafficking in Frank Laczko and Elzbieta Gozdiak (eds), *Data and Research on Human Trafficking: A Global Survey* (Geneva: IOM 2005) 18.

¹⁵⁵ Frank Laczko, 'Enhancing Data Collection and Research on Trafficking in Persons' in Ernesto U Savona and Sonia Stefanizzi (eds), *Measuring Human Trafficking: Complexities and Pitfalls* (New York: Springer 2007) 37.

international legal issues.¹⁵⁶ There were two contrasting views of the emergence of broad awareness of human trafficking producing the international consensus to combating it. On the one hand, it was argued that growing international appreciation of, and concern regarding the scope, complexity, and criminality of, modern trafficking in humans was the impetus for the development and adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol 2000),¹⁵⁷ which is the key international document.¹⁵⁸ There are six factors that contributed to the development of the Trafficking Protocol 2000. First, NGOs worldwide lobbied governments on behalf of trafficking victims. Second, the number of trafficking victims continues to rise. Third, nations viewed trafficking as not only a human rights issue, but also as another transnational organised crime that requires a global response. Fourth, due to absence of anti-trafficking law, governments found difficulties in prosecuting trafficking cases. Fifth, the then body of international trafficking law was inadequate in terms of international legal instruments to effectively combat trafficking.¹⁵⁹ Sixth, states had a growing realisation of, and concern regarding, the threats to their sovereignty presented by modern trafficking in humans¹⁶⁰ such as the widespread states' concern about the threat of illegal and unregulated immigration.¹⁶¹

¹⁵⁶ Gallagher, *The International Law of Human Trafficking* (n 96) 13.

¹⁵⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 December 2000 entered into force 25 December 2003) 2237 UNTS 319

¹⁵⁸ Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8:2 *Human Rights Brief* 30.

¹⁵⁹ *ibid.*

¹⁶⁰ Diana Wong, 'The Rumor of Trafficking: Border Controls, Illegal Migration, and the Sovereignty of the Nation-State' in Willem van Schendel and Itty Abraham (eds), *Illicit Flows and Criminal Things* (Bloomington, IN: Indiana University Press 2006) 76.

¹⁶¹ Anne T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 976.

3.5.1. International Agreements Prior to the Trafficking Protocol 2000.

As mentioned in sub-section 3.2, the origin of the contemporary anti-human trafficking law originated from the concern about the 'white slavery' phenomenon with a focus on prostitution. Through the various international agreements, the emphasis narrowed, first to the prostitution and then exclusively to cross-border prostitution. Between 1904 and 1933, four different yet related international legal instruments were concluded by nations in dealing with the traffic of woman and girls,¹⁶² including the International Agreement for the Suppression of the 'White Slave Traffic' 1904 (Agreement 1904),¹⁶³ International Convention for the Suppression of the White Slave Traffic 1910 (Convention 1910),¹⁶⁴ International Convention for the Suppression of Traffic in Women and Children 1921 (Convention 1921),¹⁶⁵ and International Convention for the Suppression of the Traffic in Woman Full of Age 1933 (1933 Convention).¹⁶⁶

Although these international agreements deal with the exploitation of women and girls, the Agreement 1904 covers only the situation in which women were forced or deceived in prostitution or 'debauchery' in foreign countries.¹⁶⁷ Further, the Convention 1910 moved its emphasis from social concern to provide for the criminalisation of the perpetrators in situations involving enticement and procurement not necessarily involving force, and within as well as across national boundaries.¹⁶⁸ Under the Convention 1921, the reference to 'white slavery' was avoided. The Convention 1921 applied new notion of 'immoral trafficking' to individuals of both sexes under the age of twenty-one, or women over that age so long that the elements of constrained or deceived to

¹⁶² Gallagher, *The International Law of Human Trafficking* (n 96) 57.

¹⁶³ International Agreement for the Suppression of the 'White Slave Traffic' 1904 (adopted 18 May 1904 entered into force 18 July 1905) 1 LNTS 83.

¹⁶⁴ International Convention for the Suppression of the White Slave Traffic 1910 (adopted 4 May 1910 entered into force 5 July 1920) 8 LNTS 278.

¹⁶⁵ International Convention for the Suppression of Traffic in Women and Children 1921 (adopted 30 September 1921 entered into force 15 June 1922) 8 LNTS 278.

¹⁶⁶ International Convention for the Suppression of the Traffic in Woman Full of Age 1933 (adopted 11 October 1933 entered into force 24 August 1934) 150 LNTS 431.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

the victim were established. Finally, the Convention 1933 expands the type of exploitation of human trafficking not only limited to prostitution but also to include all sexual and immoral purposes. Under the 1933 Convention, the notion of 'consent' is eliminated. That would mean, at least in the relation to cross-border cases, force or coercion were no longer the most vital element of trafficking for either adults or children.¹⁶⁹ Furthermore, all the above agreements require states parties to protect victims and to exchange information with each other.

In 1949, these agreements were consolidated as the Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others 1949 (Convention 1949)¹⁷⁰ based on an earlier draft made in 1937.¹⁷¹ The aims of the 1949 Convention are to provide for criminalisation of those involved in the practices of trafficking, procurement and exploitation for the purpose of prostitution, whether internal or cross border, and irrespective of the victims' age or consent. It also provides for the inter-state cooperation in exchange of information as well as extradition of offenders. The preamble of the Convention 1949 declares trafficking and prostitution to be 'incompatible with the dignity and worth of the human being' and a danger to 'the welfare of the individual, the family and the community'. The Convention 1949 also has criminal elements of human trafficking, as it requires state parties to punish the offenders.¹⁷² The Convention further enables victims of prostitution and human trafficking to be a party to the proceedings irrespective whether they are nationals of the state where the proceeding takes place or otherwise.¹⁷³ The Convention also requires cross border cooperation as an important tool to fight against immigrant prostitution and trafficking.¹⁷⁴

¹⁶⁹ Gallagher, *The International Law of Human Trafficking* (n 96) 58.

¹⁷⁰ Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others 1949 (adopted 21 March 1950 entered into force 25 July 1951) 96 UNTS 271.

¹⁷¹ *ibid* preamble.

¹⁷² *ibid* art. 1 and art. 2.

¹⁷³ *ibid* art 5.

¹⁷⁴ *ibid* arts. 13, 14, 15 and 18.

The Convention 1949 only covers the victims of prostitution and does not cover other forms of sexual exploitation nor does it provides protection for the coerced or fraudulent movement of individuals in other sectors.¹⁷⁵ The Convention 1949 was criticised in 2000 by the Special Rapporteur on Violence against Women since it has 'proved to be ineffective in protecting the rights of trafficked women and combating trafficking'.¹⁷⁶ Further, the Special Rapporteur commented that the Convention 1949 'does not take a human rights approach because it does not regard women as independent actors endowed with rights and reason. Instead, the Convention 1949 views women as vulnerable beings in need of protection from the 'evils of prostitution'.¹⁷⁷ As such, the Convention 1949 failed to protect women from exploitation and lacked remedies for the human rights violations committed in the course of trafficking. The Special Rapporteur concluded that the lack of human right approach in the Convention 1949 had increased trafficked women's marginalisation and vulnerability to human rights violations.¹⁷⁸ Therefore there was a need for a more concrete legal mechanism in the form of the Trafficking Protocol, which was first debated in 1998, and materialised in 2000.

Despite the various international instruments pertaining to human trafficking and exploitation of women, and although discussion about anti-trafficking measures had intensified since the 1990s, there was no common definition to what is termed as 'trafficking in person' or 'human trafficking'. This is due to various complexities such as differences of opinion pertaining to the ultimate end result of trafficking; the constitutive acts, and their relative significance; and the connection between human trafficking and related phenomena such as prostitution and irregular migration.¹⁷⁹

¹⁷⁵ Laura Reanda, 'Prostitution as a Human Rights Question' (1991) 12 *Human Rights Quarterly* 202.

¹⁷⁶ UNCHR, 'Report of the Special Rapporteur, Ms. Radhika Coomaraswamy, on Violence against Women, its Causes and Consequences, on Trafficking in Women, Women Migration and Violence against Women' (UN Doc. E/CN.4/2000/68, 29 Feb 2000) 22.

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 *Anti-Trafficking Review* 14.

The topics high on the international agenda in the late 1990s were aimed at combating and preventing transnational organised crimes including human trafficking and smuggling of migrants.¹⁸⁰ In December 1998, the UNGA established an intergovernmental, *ad-hoc* committee and charged it with developing a new international legal regime to fight transnational crime.¹⁸¹ After eleven sessions participated in by 120 UN member states, known as the Vienna Process, the ad-hoc committee concluded its work,¹⁸² with the United Nations Convention against Transnational Crimes (UN Convention 2000).¹⁸³ The UN Convention 2000 is supplemented by three treaties (protocols) dealing with smuggling in migrants, trafficking in persons and trafficking in firearms. The UN Convention 2000, the Trafficking Protocol 2000 and Smuggling of Migrant 2000 were adopted by the UNGA on November 2000¹⁸⁴ and opened for signature a high-level intergovernmental meeting in Palermo, Italy in December 2000,¹⁸⁵ hence are called the 'Palermo Protocols'.

The Vienna Process was a serious attempt by the international community to invoke international law in the battle against the transnational organised crimes.¹⁸⁶ The collaborative action in the Vienna Process was driven by two factors: due to human rights concerns arising from the exploitation of human beings particularly in human trafficking, and due to sovereignty/security issues. This is because wealthy states became increasingly concerned that human trafficking activities interfered with orderly migration and facilitated the circumvention of national immigration restrictions.¹⁸⁷ Further, evidence of the

¹⁸⁰ Aronowitz, 'Smuggling and Trafficking in Human Beings: the Phenomenon, the Markets that Drive it and the Organisation that Promote it' (n 135).

¹⁸¹ UNGA, 'Resolution Adopted by the General Assembly: Transnational Organised Crimes', UN Doc. A/RES/53/111.

¹⁸² UN, 'Report of the Ad-Hoc Committee on the Elaboration of a Convention against Transnational against Organised Crimes on the Work of its First to Eleventh Session', UN Doc. A/55/383.

¹⁸³ (adopted 15 December 2000 entered into force 29 September 2003) 2225 UNTS 209

¹⁸⁴ UN, 'Resolution Adopted by the UNGA 55/25 on 10 November 2000', UN Doc. A/RES/55/25.

¹⁸⁵ See Trafficking Protocol 2000 art 12.

¹⁸⁶ Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (n 161).

¹⁸⁷ *ibid.*

organised crimes' involvement in human trafficking provided the affected states with incentives to lobby for international response.¹⁸⁸

3.5.2. The Trafficking Protocol 2000.

The Trafficking Protocol 2000 is a watershed in galvanising the global movement against human trafficking.¹⁸⁹ It provides a framework for the development of national responses to human trafficking in the state parties and must be read *mutatis mutandis* with the UN Convention 2000. The main intention of the Trafficking Protocol 2000 is to 'prevent and combat' human trafficking and facilitate international cooperation against it. Further, the Protocol deals with the 'prevention, investigation and prosecution' of offences stated therewith, but only where these are 'trans-national in nature' and involved an 'organised criminal group',¹⁹⁰ as those terms are defined in the Convention.¹⁹¹ In this regard, member states are obligated to attack human trafficking and be willing to address the problem in any and every form it takes.¹⁹² This is because at some point the crime is committed by individual criminals and not just organised criminal groups, and does not always involve trafficked victims crossing national borders.

The Trafficking Protocol 2000 does not preclude the phenomenon of trafficking within national frontiers, contrary to the definition of smuggling in migrants that requires the element of cross-border movement. The discussions about the inclusion of movement of trafficked person within national borders can be traced to the drafting history of the treaty. In relation to Trafficking Protocol 2000, all earlier drafts contained the term 'international trafficking'.¹⁹³ At the outset of the

¹⁸⁸ *ibid.*

¹⁸⁹ Joy N Ezello, 'Achievement of the Trafficking Protocol: Perspective from the Former UN Special Rapporteur on Trafficking in Persons' (2015) 4 *Anti-Trafficking Review* 144.

¹⁹⁰ Trafficking Protocol 2000 art 4. See also the first draft of the Trafficking Protocol as it is entitled as 'Draft Protocol to Combat International Trafficking in Women and Children', UN Doc A/AC.254/4/Add3.

¹⁹¹ Bales (n 118).

¹⁹² *ibid.*

¹⁹³ Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54:2 *International and Comparative Law Quarterly* 445.

drafting, many delegates felt the necessity for this terminology in order to make the Protocol compatible with the Convention 2000.¹⁹⁴ Nevertheless, the delegates viewed that the inclusion of the term 'international' would limit the scope of the instrument to international cross-border trafficking, and so would not protect all exploited, trafficked persons. The latter view prevailed, as the final version of the Protocol 2000 does not contain the term 'international'. This in effect recognises that people can also be trafficked internally.¹⁹⁵

As of January 2017, 117 countries had signed the Trafficking Protocol 2000.¹⁹⁶ Malaysia ratified the UN Convention 2000 on 24 September 2004 and acceded to the Trafficking Protocol on 26 February 2009.¹⁹⁷

Following the adoption of the Trafficking Protocol 2000, the United Nations High Commissioner for Human Rights to the Economic and Social Council (ECOSOC) introduced a supplemental legal and policy instrument in 2002 called the Recommended Principles and Guidelines on Human Rights and Human Trafficking (UN Trafficking Principles and Guideline).¹⁹⁸ This document aims at policy makers at the international, national, and local levels, and it reflects careful analysis of the challenges of protecting the human rights of trafficking victims.¹⁹⁹ The UN Trafficking Principles and Guidelines emphasise the 'primacy of human rights which shall be the centre of all efforts to prevent and combat trafficking and to protect, assist and redress trafficked victims.'²⁰⁰ Further, principle 2 reaffirmed the '3P' anti human trafficking paradigm, that provides for the state parties shall have the responsibilities under international

¹⁹⁴ Obokata (n 193).

¹⁹⁵ *ibid.*

¹⁹⁶ UN, 'Signatories to the CTOC Trafficking Protocol' (Treaty Collection, 2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-12-a&chapter=18&clang=_en> accessed 19 January 2017.

¹⁹⁷ *ibid.*

¹⁹⁸ UN, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking, Addendum to the Report of the United Nations High Commissioner for Human Rights, U.N. Doc. E/2002/68/Add.1 (2002).

¹⁹⁹ Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Framework for Conceptualising and Combating Trafficking' (2002-2003) 24 *Michigan Journal of International Law* 1143.

²⁰⁰ UN, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 198) Principle 1.

law to act with due diligence to 'prevent' trafficking,²⁰¹ investigate and 'prosecute' traffickers including providing effective and legal remedies to trafficked victims,²⁰² and to assist and 'protect' trafficked persons.²⁰³ These Principles are further elaborated in the Guidelines, which seek to address the matters mentioned by the principle 2 that follows the said 3P paradigm. They seem to impose a higher standard on States Parties compared to the Trafficking Protocol.²⁰⁴

3.5.3. United Nations' Special Rapporteur on Human Trafficking

During the Commission of Human Rights' 60th session held in 2004, the Commission adopted 120 resolutions, decisions and the Chairperson's statement on both country specific situations and crosscutting human rights issues.²⁰⁵ These Commission's decisions were endorsed by the ECOSOC in its decision 2004/228. One of these decisions was to establish a Special Rapporteur on Trafficking in Persons, Especially Woman and Children on a three-year mandate whose main focus is on the human rights aspects of the victims of human trafficking.²⁰⁶ In the same decision, the Special Rapporteur is requested: to submit an annual report together with recommendations on measures required to uphold and protect the human rights of the victims;²⁰⁷ to respond effectively to reliable information on possible human rights violations with a view to protecting the human rights of actual or potential victims of trafficking;²⁰⁸ to cooperate with other relevant special rapporteurs and UN bodies, regional organisation, human trafficking victims and their representatives;²⁰⁹ as well as to invite governments and international

²⁰¹ UN, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (n 198) principles 4 to 6.

²⁰² *ibid* principles 12 to 17.

²⁰³ *ibid* principles 7 to 11.

²⁰⁴ Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' (2008) 18 *International Criminal Justice Review* 318.

²⁰⁵ UNGA, Report of the High Commission for Human Rights (2004) Supp. 36 UN Doc. A/59/36.

²⁰⁶ OHCHR, 'Decision 2004/110 Special Rapporteur on Trafficking in Persons, Especially in Women and Children' UN Doc. E/CN.4/DEC/2004/110.

²⁰⁷ *ibid* decision (b).

²⁰⁸ *ibid* decision (c).

²⁰⁹ *ibid* decision (d) and (e).

organisations to cooperate fully with the special rapporteur.²¹⁰ The key principles of the mandate are that the effort to combat human trafficking must focus on the human rights of trafficked persons; and human rights and dignity of trafficked persons should not be adversely affected by the anti-trafficking measures.²¹¹

The work of numerous UN special rapporteurs whose mandate relate directly or indirectly with human trafficking is important here. The Special Rapporteur on Contemporary Forms of Slavery, its Causes and Consequences; the Special Rapporteur on Sale of Children, Child Prostitution and Child Phonography, the Special Rapporteur on Violence against Women, for instance, are the other UN appointees who deal with issues akin to human trafficking. Although there are some links or similarities in terms of the area of works, they work on their own special mandates.²¹² The human trafficking special rapporteur is mandated directly to deal with human rights issues in human trafficking and such area of mandate is self-explanatory to differentiate between the human trafficking and other UN appointees.

Based on the guidance given by the UN Human Rights Council (UNHRC) in its resolutions 8/12²¹³ and 17/1,²¹⁴ there are four approaches that the special rapporteur shall take, as follows. First, the special rapporteur will seek and receive information from states, human rights bodies and other relevant sources and respond effectively to such information. Second, the special rapporteur will recommend practical solutions with regard to the implementation of relevant rights. Third, the special rapporteur is tasked to examine the human rights impact of anti-trafficking measures with a view to proposing adequate

²¹⁰ OHCHR, Decision 2004/110 Special Rapporteur on Trafficking in Persons, Especially in Women and Children (206) decision (f).

²¹¹ OHCHR, *First Decade of the Mandate of the Special Rapporteur on Trafficking in Persons, Especially Women and Children* (Geneva: OHCHR 2014) 5.
<www.ohchr.org/Documents/Issues/Trafficking/FirsDecadeSRon_%20trafficking.pdf>

²¹² Ramona Vijeyrasa, *Sex, Slavery and the Trafficked Women: Myth and Conception about Trafficking and its Victims* (London: Routledge 2015) 30.

²¹³ UNHRC, Resolution 8/12 (2008) UN Doc. A/HRC/RES/8/12.

²¹⁴ UNHRC, Resolution 17/1(2011) UN Doc. A/HRC/RES/17/1.

responses. Finally, the special rapporteur is tasked to work closely with other mechanisms of the UNHRC, the UN and other partners.²¹⁵

Throughout their mandates, at the time of writing, the special rapporteurs have undertaken ten thematic studies and presented thematic reports on various issues on human trafficking issues. So far, they have undertaken 25 country visits²¹⁶ with their main focus on the nature of the trafficking problem, the key human rights issues and the effectiveness of institutional, legal, judicial, administrative and other mechanisms.²¹⁷ As per the requirements of the mandate, the Special Rapporteurs have submitted their reports to the United Nations Human Rights Council detailing their observations and recommendations.

Based on the Human Rights Council Resolution 8/12,²¹⁸ the governments are requested to cooperate and respond with the visit requests of the special rapporteur and to provide with all the necessary information pertaining to the issues and problems of human trafficking. A visit to Malaysia was undertaken on 23-28 February 2015.²¹⁹ In the Southeast Asian region, the closest Malaysian neighbours visited by the special rapporteur are Thailand (2011) and the Philippines (2012). Some observations and recommendations by the special rapporteur on her visit to Malaysia are discussed in Chapters Five and Six of this thesis.

In addition to the established 3P paradigm as the overall strategic direction for the anti-trafficking efforts pursuant to the Trafficking Protocol 2000 and the UN

²¹⁵ OHCHR, *First Decade of the Mandate of the Special Rapporteur on Trafficking in Persons, Especially Women and Children* (n 211) 6.

²¹⁶ OHCHR, Special Rapporteur on Trafficking in Persons, Especially Woman and Children: Country Visits
< www.ohchr.org/EN/Issues/Trafficking/Pages/visits.aspx> accessed on 18 January 2017.

²¹⁷ OHCHR, *First Decade of the Mandate of the Special Rapporteur on Trafficking in Persons, Especially Women and Children* (n 211) 8.

²¹⁸ OHCHR, Resolution 8/12 on Special Rapporteur on Trafficking in Persons, Especially Women and Children, para 7.

<http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_8_12.pdf> accessed 28 October 2014.

²¹⁹ UNGA, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro: Mission to Malaysia UN Doc A/HRC/29/38/Add1 (2015).

Trafficking Principles and Guidelines, Special Rapporteur Ezeilo proposed for the expansion of such strategies to include an additional eight: first, an additional two 'Ps' would focus on criminal justice involving punishment of perpetrators and non-punishment for the trafficked victims, as well as the promotion of international cooperation; second, there would be an introduction of three victim-centred 'Rs' that include redress, rehabilitation and reintegration and third, the inclusion of three 'Cs' - capacity, coordination and cooperation was proposed.²²⁰

The special rapporteurs have also identified five major areas of focus and concern. First, the focus must be on the rights of victims to assistance, protection and support. Second, the focus should be in the rights of victims to remedies. Third, there is a concern pertaining to human rights in the criminal justice response. Fourth, the focus must be on the prevention of trafficking by identifying the core strategies. Fifth, the special rapporteur urged states to emphasise on the trafficking in persons for the removal of organs.²²¹

Following these points, the special rapporteurs have raised their concerns about the failure of criminal justice systems in identifying and treating the trafficking victims. They have viewed that the emphasis of the anti-trafficking law as leaning toward criminalising the perpetrators yet lacks the victim centric approaches. Often, victims are criminalised for entering the country and working illegally, or being involved in prostitution.²²² They also reported that 'victims are simply treated as criminals and are arrested and deported with no opportunity to be identified and provided with the necessary assistance as trafficked victims'.²²³ In this regard, the special rapporteurs have advocated more thorough and collaborative approaches to victim identification and greater cooperation between victim support agencies and front line officers of the state

²²⁰ UNGA, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo' para 34, UN Doc A/HRC/26/37 (2014).

²²¹ OHCHR, *First Decade of the Mandate of the Special Rapporteur on Trafficking in Persons, Especially Women and Children* (n 211) 8.

²²² UNGA, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo' (2012) UN Doc. A/HRC/20/18, paras 23 and 24.

²²³ UNGA, 'Trafficking in Persons, Especially Women and Children, Note by the Secretary-General' (2009) UN Doc. A/64/290, para 91.

parties.²²⁴ They have also highlighted the significant growth in the understanding of the nature and scope of trafficking, which has expanded to include various other trafficked persons including male victims, in addition to women and children. In this regard, they have embraced this comprehensive understanding of all the elements of the victims of trafficking and the relevant framework of the wide range of exploitative conducts.²²⁵

In furtherance of their work, the special rapporteurs have proposed the harmonisation of the international law and the practice of the state parties. For example, Special Rapporteur Ezeilo referred to the legal doctrine requiring the state to 'remedy a wrong where an act or omission are attributed to that state and constitute a breach of its obligations'.²²⁶ This is because although the state is not the direct source of the harm of trafficking, it may not absolve itself of legal responsibilities. Accordingly, the obligation to provide remedies, or least access to provide remedies the Trafficking Protocol 2000 provides that 'each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.'²²⁷ Regional instruments such as the Council of Europe Convention on Action against Trafficking in Human Beings²²⁸ (COE Trafficking Convention), article 15, provide the same principle. This principle was adopted in the case of *Siliadin v France*,²²⁹ where the European Court of Human Rights (ECtHR) imposes the state with positive obligation to adhere with the Convention for the Protection of Human Rights and Fundamental Freedoms 1950²³⁰ (ECHR), article 4, and provides protective measures to the human trafficking victims.

²²⁴ UNGA, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo' (n 220) para 45.

²²⁵ *ibid* paras 35 and 36.

²²⁶ UNGA, Trafficking in Persons, Especially Women and Children, Note by the Secretary-General (n 223) para 95.

²²⁷ Trafficking Protocol, art 6 (6).

²²⁸ CETS No. 197.

²²⁹ Application No. 73316/01, [2005] EHRR 16.

²³⁰ CETS No. 5.

The establishment of the special rapporteur came at the time when the international human rights standard-setting process reached a mature level with the abundance of international legal instruments. Accordingly, the UN human rights process has moved to the subsequent phase of development and implementation assessment by way of reporting, monitoring, and enforcement of the norms.²³¹ However, the role of special rapporteurs does not involve enforcement of human rights norms, but primarily seeks to supervise, consult, advice, or monitor functions²³² of the human rights activities of the UN and its member states. The special rapporteurs also promote and protect human rights as the independent UN expert through the primary tasks of fact finding and reporting²³³ as well as standard setting.²³⁴ The special rapporteur has been handling thematic special procedure to handle human rights violations committed anywhere in the world since the establishment of the Working Group on Enforced or Involuntary Disappearances in early 1980s.²³⁵ The uniqueness of the special procedures system in the UN is especially valuable for its independent, periodic, on-the-ground scrutiny of a country's record of adherence and respect for human rights.²³⁶

The role of special rapporteur has helped to enhance the effectiveness of the strategy, law and enforcement in compatibility with the norms set by the international law, in particular the Convention 2000 and Trafficking Protocol 2000. Therefore, the mechanism of UN special rapporteur may also be a useful model to be translated at the national level, particularly on the part of Malaysia. The establishment of an independent officer would enable the duty to monitor, criticise and report on the strategy, law and enforcement of the law against human trafficking in Malaysia. It would provide a check and balance to the role

²³¹ Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33:1 *Human Rights Quarterly* 202.

²³² *ibid.*

²³³ Ingrid Nifosi, *The UN Special Procedure in the Field of Human Rights* (Antwerp: Intersentia 2005) 8.

²³⁴ Subedi (n 231).

²³⁵ Marc J Bossuyt, 'The Development of Special Procedures of the United Nations Commissions of Human Rights (1985) 6 *Human Rights Law Journal* 179.

²³⁶ Ted Piccone, 'The Contribution of the UN Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15:2 *International Journal of Human Rights* 206.

played by the government institutions, particularly the Anti-Trafficking in Persons Council (MAPO). This issue is elaborated in Chapter Five.

3.5.4. Overall Picture

It seems that the UN has taken various steps in tackling the issue of the exploitation of human beings in the form of human trafficking by way of promulgating various international agreements that are set for the criminalisation of offenders and protection of the victims. This is reflected through the agreement to many international legal instruments, of which the Trafficking Protocol 2000 is the current most comprehensive international treaty addressing human trafficking. Further, the establishment of the special rapporteur mechanism has helped to further enhance the international community's efforts to ensure that the strategy, law and law enforcement are well observed by the state parties. The same steps should also be taken by the state parties. The establishment of a national special rapporteur can serve as a check and balance, and may aid efforts made by the government toward the effectiveness and fairness in the policies and laws against human trafficking. Legislative responses are also required, for international treaties will not be effective as long as member states do not take serious steps to adapt them at the domestic level. The next heading will elaborate on the municipal law responses to human trafficking.

3.6. Trafficking Protocol 2000 and the Municipal Law Responses to the Human Trafficking Problem

The Trafficking Protocol 2000 emphasises the need for municipal law enforcement provisions.²³⁷ This is because the foremost problem in anti-trafficking efforts was that governments had failed to prosecute trafficking due to absence of a definition of human trafficking and specific law on human trafficking.²³⁸ Article 5 obligates the state parties to adopt legislative and other

²³⁷ Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children' (n 158) 31.

²³⁸ *ibid.*

measures to establish trafficking as criminal offence, as well as those who attempted trafficking, participated as an accomplice, and organising and directing others to commit trafficking. The words 'shall adopt such legislative and other measures' stated in Article 5 (2) carry a strong obligation to the state parties to pass their own national legislation to combat trafficking. Article 10 requires the state parties to cooperate in exchanging information pertaining to the border crossing or attempted border crossing and the documents used by the traffickers and potential traffickers. It also provides for the requirement for the training for the law enforcement to prevent trafficking as well as methods of prosecution and victim protection. Part II of the Trafficking Protocol 2000, particularly articles 6, 7 and 8, requires state parties to include in their national legislation provisions regarding the victim protection, while Part III provides for the matters pertaining to prevention, cooperation and other measures to combat trafficking.

Notwithstanding that the Trafficking Protocol 2000 successfully establishes a framework for addressing human trafficking, many criticisms of the Protocol exist.²³⁹ This is because like many international laws, the Trafficking Protocol is couched in inspirational terms rather than hard obligations.²⁴⁰ It lacks adequate enforcement capabilities and measures. Nevertheless, the accession of states parties to the Trafficking Protocol 2000 may not only be due to its attempted consideration of the trafficking problems, but may also be due to the symbolic denunciation and the mobilization of political agenda to ensure that states are seen as reputable and responsible.

At the same time, there is no internal mechanism or tool to assess whether state parties have fully adhered to, or have implemented the requirements mandated by the Trafficking Protocol 2000. Another problem is that the Protocol is deficient on human rights aspects for victims.²⁴¹ It appears that the states parties over-

²³⁹ Mary C Hendrix, 'Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting Change in India and China' (2010) 173 *Cornell International Law Journal* 173.

²⁴⁰ Janie A Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (2006) 27 *Michigan Journal of International Law* 448.

²⁴¹ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford: OUP 2008) 82.

emphasise the prosecution of offenders, thus possibly disregarding the human rights of their victims.²⁴² Hence there is a need for mechanisms to monitor as to whether the provisions of the Trafficking Protocol 2000 are being implemented and enforced by the state parties. The special rapporteur is of course one important mechanism. In addition, but what is really needed is a UN-based assessment mechanism to assess regularly each state's strategy, legal and enforcement compliance to the Trafficking Protocol 2000. In its absence, the only available state assessment system at present is operated by the US Department of State (US DoS) through the Trafficking in Persons Report (TIP Report). However, the TIP Report has some drawbacks as it can be affected by the politically construed sentiment on the part of the US. Many states fear that the assessment made by the US may be politically biased and lacking sufficient ability to investigate and check facts.

Yet, one commentator has argued that the TIP Report serves as a global anti-human trafficking assessment tool.²⁴³ This is because the Trafficking Protocol 2000 developed alongside the US human trafficking legal regime, perhaps because the US was among the proponents of the Trafficking Protocol 2000, when it was under negotiation in 1999.²⁴⁴

The anti-human trafficking efforts had intensified in the US in 1998 when the Clinton Administration issued a Directive to establish an anti-human trafficking strategy based on the prevention, protection and prosecution (3P strategy). Such a strategy was coded in the United States' Victim of Trafficking and Violence Protection Act (TVPA 2000). Coincidentally, the Trafficking Protocol 2000 was adopted in November 2000.²⁴⁵ The TVPA 2000 is among the earliest form of national anti-trafficking law corresponding to the Trafficking Protocol 2000. It is comprehensive, and in mandating the TIP Report, the TVPA 2000

²⁴² Hendrix (n 239).

²⁴³ Manpavan Kaur, 'The Implications of the US Anti-Human Trafficking Strategy for National Policies: The Case of Malaysia' (2011) 2 *NTS Alert* <www.rsis.edu.sg/nts/HTML-Newsletter/alert/NTS-alert-aug-1101.html> accessed 20 April 2014.

²⁴⁴ Amy Friedricha and others, *The Trafficking in Persons Report: Strengthening a Diplomatic Tool* (UCLA Luskin School of Public Affairs 2006) 9
< http://164.67.121.27/files/pp/APP/06_Trafficking.pdf> accessed 17 March 2014.

²⁴⁵ Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (n 240) 437.

serves as the prime assessment tool of other governments' anti-human trafficking efforts; the failure to adhere with the standards set up by the TVPA 2000 can result in economic sanctions by the US.²⁴⁶

The TVPA 2000, section 108(a), provides that the TIP Report assesses countries, and records their tier position, based on their adherence to the 'minimum standards'. The elements contained in the minimum standard for the elimination of trafficking applicable to the governments that are places of origin, transit, or destination for a significant number of victims or severe number of trafficking²⁴⁷ are as follows: First, the TVPA evaluates as to whether the government prohibits severe forms of human trafficking and provide laws to punish acts of such trafficking.²⁴⁸ Secondly, the TVPA also assess as to whether such laws prescribe punishment for the human trafficking commensurate with other grave crimes, such as forcible sexual assault or any act of sex exploitation involving force, fraud, or coercion, or if the victim is a child incapable of giving meaningful consent, or if such trafficking includes rape or kidnapping or which causes a death. Thirdly, the government is also required to prescribe stringent punishment to deter those acts.²⁴⁹ Fourth, the government should make serious and sustained efforts to eliminate severe forms human trafficking.²⁵⁰

The fourth 'minimum standard' element is worth elaborating. In order to determine the elements that meet the requirement of 'serious and sustained efforts to eliminate serious forms of trafficking, the TVPA 2000, sections 108(a)(4) and 108(b) provide seven factors. First, the government must make vigorous investigation and prosecution on the cases of human trafficking. The second factor is that the TVPA 2000 requires the government to ensure the protection of the trafficked victims, and to encourage them to assist in the investigation and prosecution of such trafficking, as well as the government must ensure that there will be no criminalisation of any sort against the victims.

²⁴⁶ Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (n 240); See also TVPA 2000 s 110(d).

²⁴⁷ TVPA 2000 s 108 (a).

²⁴⁸ TVPA 2000 s 108 (a) (1).

²⁴⁹ TVPA 2000 s 108 (a) (2) to (3).

²⁵⁰ TVPA 2000 s 108 (a) (4).

Third, the government must undertake measures to prevent human trafficking such as by educating the public and potential victims about the causes and consequences of trafficking. Fourth, the government should ensure inter-governmental cooperation to investigate and prosecute trafficking. Fifth, there must be legal provision pertaining to the extradition of persons charged with trafficking. Sixth, the TVPA 2000 requires the government to monitor immigration and emigration patterns, and the responses of the enforcement agencies to the evidence of trafficking patterns. The seventh factor is that the government must address acts of corruption such as to investigate and prosecute public officials who participate in, or facilitate, human trafficking acts.²⁵¹

The TIP Report also provides four classifications criteria in measuring the fulfilment of the minimum standard underlined by section 108 TVPA 2000, that is tiers 1, 2, 2 Watch List and 3. They indicate the following. First, Tier 1 is where the country is in full compliance with the TVPA 2000 minimum standard to eliminate trafficking. Secondly, Tier 2 is where the country whose government is not yet in full compliance as per Tier 1 but is making significant efforts to do so. The third category is Tier 2 Watch List, is similar to Tier 2, but the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing, or there is a failure on the part of the government to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, or some proof of commitments that such a country is making significant efforts to comply with the TVPA 2000's minimum standards over the next year. The fourth and final category is Tier 3. This category is for the country whose government is not in compliance with the minimum standard as prescribed by the TVPA 2000 and has not made significant efforts to comply. Countries under this category can be sanctioned, by being unable to receive any non-humanitarian, non-trade assistance from the US for the subsequent year until significant effort is made to comply with the minimum standard prescribed by the TVPA 2000 or unless the sanction is

²⁵¹ TVPA 2000, s 108 (b) (1) to (7).

waived by a Presidential decree.²⁵² Upon amendments in 2008,²⁵³ the TVPA 2000 also included a provision to downgrade a country has been on the Tier 2 Watch List for two consecutive years to Tier 3, unless the United States President has waived the standard.²⁵⁴

The importance of the TIP Report is enhanced due to the fact that the US anti-human trafficking strategy is based on the 3P paradigm enshrined in the TVPA, which is similar to the Trafficking Protocol 2000.²⁵⁵ Moreover, the TIP Report is thus far the only assessment mechanism to tie government's anti-human trafficking efforts to sanctions by the US Government.²⁵⁶ It is also widely acknowledged as the most comprehensive and influential assessment of global anti-trafficking efforts, and a potentially powerful advocacy and campaigning tool for anti-slavery groups working both in country and internationally.²⁵⁷ This is because the Trafficking Protocol 2000, which supplements the UN Convention 2000, has no mechanism for oversight or enforcement. Although the UN Convention 2000 established a Conference of Parties with the power to review implementation of the Convention, and make recommendation to improve the Protocol and its implementation,²⁵⁸ a commentator criticised that 'the reporting rates are low and the information received is uneven, shallow and often ambiguous...there is no opportunity to seek clarification from, or for dialogue with, state parties'.²⁵⁹ Hence the adherence to the TIP Report seems important to many countries, including Malaysia, in their own assessment of their anti-human trafficking strategy, law and enforcement.

Therefore, in the absence of other authoritative substantive determinations of the actions to be undertaken in a given anti-trafficking regime, this research

²⁵² TVPA 2000, s 110.

²⁵³ William Wilberforce Trafficking Victims Protection Reauthorisation Act (TVPRA) 2008.

²⁵⁴ TVPA 2000, s 107.

²⁵⁵ Francis T Miko, *Trafficking in Women and Children: The US and International Response* (Congressional Research Service Report for Congress 18 March 2002) 8 <<http://fpc.state.gov/documents/organization/9107.pdf>> accessed 25 June 2014.

²⁵⁶ *ibid* 439, 442.

²⁵⁷ Annie Kelley, 'How NGOs are Using the Trafficking in Persons Report' *The Guardian* (London, 21 June 2013) <www.theguardian.com/global-development-professionals-network/2013/jun/21/ngos-using-trafficking-persons-report> accessed 25 March 2014.

²⁵⁸ UN Convention 2000, art 32(1).

²⁵⁹ Gallagher, *The International Law of Human Trafficking* (n 96) 469.

argues that application of the TVPA 2000's minimum standards are suitable in measuring anti-trafficking efforts domestically.

As a signatory to the UN Convention 2000 and a country which acceded to the Trafficking Protocol 2000, Malaysia is also bound to the requirements set by the international treaties. The following discussions will elaborate the issues of human trafficking in Malaysia, as well as a snapshot of the efforts taken by the Malaysian government to address the problem.

3.7. Phenomenon of Human Trafficking in Malaysia

3.7.1. Human Trafficking as a Problem to Malaysia

In June 2014, together with Thailand and Venezuela, Malaysia was downgraded to Tier 3 of the TIP Report 2014. The TIP Report concluded that the Malaysia government was not in full compliance with the expected minimum standards prescribed by the TVPA 2000. Malaysia had been granted a waiver in the 2012 and 2013 Trafficking in Persons Reports on the basis of a written plan to bring itself into compliance with the minimum standards for the elimination of trafficking.²⁶⁰ Malaysia was criticised for failure in prosecution, as according TIP Report 2014, due to lacking interaction between the prosecution and the enforcement agencies. Another problem was the absence of refugee status in Malaysia, as Malaysia has not yet signed the United Nations Convention Relating to the Status of Refugees 1951 or its Protocol Relating to the Status of Refugees 1967. Thus, Malaysia lacks a sufficient legislative and administrative framework to address refugee matters, including the absence of work rights for refugees, in particular women and children, which exposes them to be at a high risk of exploitation and children with no rights of access to Government schools.²⁶¹

²⁶⁰ US DoS, TIP Report 2014: Malaysia 260

www.state.gov/documents/organization/226847.pdf accessed 22 June 2014.

²⁶¹ UNHCR, '2014 UNHCR Country Operations Profile – Malaysia' (Geneva: UNHCR 2014) www.unhcr.org/pages/49e4884c6.html accessed 20 June 2014.

On the issue of victim protection, the TIP Report 2014 stated that the Malaysian government made limited efforts to improve its 'flawed' victim protection regime. It further stated that Malaysian authorities continued to detain trafficking victims in government facilities for periods of time that sometimes exceeded a year; and the victims had limited freedom of movement and were not allowed to work outside the facilities. The government provided minimal basic services to those staying in its shelters; NGOs, with no financial support from the government, provided the majority of rehabilitation and counselling services.²⁶²

In responding to the TIP Report 2014, the Malaysian Government, through the Ministry of Foreign Affairs, issued a statement²⁶³ that Malaysia was committed to addressing the issue of human trafficking and migrant smuggling. The commitment was manifested through the significant efforts undertaken to improve the existing mechanisms and to effectively combat trafficking, and highlighted that US DoS had made its findings based on flawed information. In addition, the Malaysian government emphasised the migration problems that it faced due to the availability of various economic opportunities for the foreign workers. On the protection of trafficked victims, the Malaysian government stated that it has established a shelter home, as a pilot project, and would continue to provide protection to the victims, including allowing victims of labour trafficking, that do not require further care and protection at shelter homes, to work and reside in Malaysia.²⁶⁴ The Malaysian Government also claimed that it was cooperating with the relevant NGOs in managing these shelter homes,²⁶⁵ with a seed funding in the sum of RM801,000.²⁶⁶ At the same time, the Government of Malaysia admitted that there are obstacles in its efforts to

²⁶² US DoS, TIP Report 2014: Malaysia (n 260) 260.

²⁶³ Ministry of Foreign Affairs Malaysia, 'Statement by the Minister of Foreign Affairs on the US State Department Trafficking in Persons Report 2014' (Ministry of Foreign Affairs Malaysia, 22 June 2014) <<http://www.kln.gov.my/web/guest/home>> accessed 24 June 2014.

²⁶⁴ *ibid.*

²⁶⁵ Ministry of Home Affairs of Malaysia, Media Statement (in Malay) entitled 'Laporan Tahunan Jabatan Negara Amerika Syarikat Mengenai Pernerdagangan Orang' (Annual Report on Trafficking in Persons by the US State Department) 23 June 2014. <www.moha.gov.my/index.php/en/kenyataan-media-akhbar/1777-kenyataan-media-berhubung-laporan-tahunan-jabatan-negara-amerika-syarikat-mengenai-pernerdagangan-orang-us-tip-report-tahun-2014> accessed 25 July 2014.

²⁶⁶ Estimated value in British Pound is GBP144,000 based on the currency exchange rate of GBP0.18 per RM1 (estimation on 9 February August 2017).

combat human trafficking under the ATIPSOM 2007, and the need to further amend the law.²⁶⁷ The statement did not explain what obstacles had hindered its efforts to combat trafficking nor what precise reforms were contemplated.

The downgrade to Tier 3 put Malaysia in a vulnerable position. Tier 3 means Malaysia became comparable to Syria, North Korea and Yemen, among others, and also comparable with the UN list of least-developed nations, at war or considered to be under dictatorship.²⁶⁸ The naming and shaming of the countries placed under the Tier 3 has brought huge embarrassment and can be a focus of criticism from local critics and the international fora. Malaysia is also exposed to the possibility of US sanctions as provided by its TVPA 2000 including in the form of the removal or denial of non-humanitarian, non-trade related foreign assistance.²⁶⁹ However, the US sanctions may not impact Malaysia due to its significant level of bilateral relationship and strategic partnership in various areas including political, trade and investments, security, education and cultural matters.²⁷⁰

However, some significant improvements were made in the TIP Report 2015. Malaysia's ranking was elevated back to Tier 2 Watch List,²⁷¹ recognising that the Malaysian Government did not fully meet the TVPA 2000 minimum standards but has made significant efforts to do so.²⁷² The upgrade reflected an acceptance by the US Department of State that Malaysian Government had undertaken a consultation with the civil society stakeholders to draft and propose amendments for the ATIPSOM 2007.²⁷³ Nevertheless, this upgrade was marred with the criticism that it was only granted to enable Malaysia to

²⁶⁷ Ministry of Home Affairs of Malaysia (n 265) para 12.

²⁶⁸ David Brunnstrom, 'U.S. says Thailand, Malaysia, Venezuela Among Worst Human Trafficking Centre, Report Published on 20 June 2014' *Reuters* (Washington, 20 June 2014) <www.reuters.com/article/2014/06/20/us-usa-trafficking-sanctions-idUSKBN0EV19S20140620> accessed 16 July 2014.

²⁶⁹ TVPA 2000 s 110 (d) (1), s 110(d) (1).

²⁷⁰ Malaysia is U.S. 24th largest trade partner since 2012, and the U.S is Malaysia's 4th biggest trade partner. At the same time, the U.S remains the largest foreign investor to Malaysia with both investments in 2013 and stocks. See United States Department of State, 'US Relations with Malaysia' <www.state.gov/r/pa/ei/bgn/2777.htm> accessed on 17 July 2014.

²⁷¹ US DoS, TIP Report 2015: Malaysia (Washington DC: US DoS 2015) 234.

²⁷² *ibid.*

²⁷³ *ibid.*

participate in the US-initiated Trans-Pacific Partnership Agreement (TPPA).²⁷⁴ This is because a country on Tier 3 is theoretically barred from fast-tracked trade deals with the US.²⁷⁵ Besides that the TPPA, Malaysia and the US have been close partners in various pragmatic and strategic agendas, particularly trade and security which arguably take primacy over human rights in bilateral relations.²⁷⁶ However, Malaysia's upgrade can positively be perceived as an explicit recognition that Malaysia has taken several positive measures to tackle human trafficking, including the clamping down suspected illegal trafficking camp site in Malaysia's northern border with Thailand.

Malaysia was also ranked in Tier 2 Watch List in 2016. The outcomes of these TIP Reports show that the human trafficking problem in Malaysia is not significantly improving despite various efforts being made, including by the promulgation of the ATIPSOM 2007.

3.7.2. Categories/Types of Human Trafficking in Malaysia

According to the TIP Reports, Malaysia is not only a destination but also a transit and source country for victims subjected to forced labour and sex trafficking.²⁷⁷ The traffickers are reportedly individual business people and organised crime syndicates.²⁷⁸

Malaysia is reported to be a destination for a significant number of trafficked men, women, and children from Indonesia, Thailand, the Philippines, Cambodia, Vietnam, Burma, China, India, Nepal, Bangladesh, and Pakistan for sexual and labour exploitation.²⁷⁹ The TIP Reports also indicated that many

²⁷⁴ Jason Szep and others, 'Exclusive: US Upgrades Malaysia in Annual Human Trafficking Report, *Reuters* (Washington, 8 July 2015). <www.reuters.com/article/us-usa-malaysia-trafficking-exclusive-idUSKCN0PJ00F20150709> accessed 25 January 2017.

²⁷⁵ *ibid.*

²⁷⁶ David GX Han, 'US-Malaysia Relations: Strategic Imperatives over Human Rights' (2015) 159 *RSIS Commentary* <www.rsis.edu.sg/wp-content/uploads/2015/07/CO15159.pdf> accessed 12 March 2017.

²⁷⁷ US DoS, TIP Report 2015: Malaysia (n 271) 234.

²⁷⁸ *ibid.*

²⁷⁹ *ibid* 235.

trafficked victims voluntarily migrated to Malaysia to find job opportunities in various sectors such as in production, construction and agriculture, or as housemaids, but are later coerced or tricked into debt bondage or involuntary servitude.²⁸⁰ A Malaysian NGO reported that around 65% of the trafficking victims in Malaysia are forced labourers.²⁸¹ Hence, the human trafficking phenomenon in Malaysia is not confined to sexually exploited victims, as they are just a component of the large illegal foreign work force.²⁸² A small number of Malaysian women and children, primarily of Chinese ethnicity, are trafficked for sexual exploitation in Singapore, Macau, Hong Kong, Taiwan, Japan, Australia, Canada, and the United States.²⁸³

Historically, Malaysia has seen an influx of foreign migrants to meet the increasing demand for workers in various sectors, particularly tin mining (in the past) and nowadays rubber plantations. The large ethnic Chinese migration to Malaysia (during the colonial times as 'Malaya') developed after 1850 at the beginning of the industrial development of Malaya, especially the tin industry.²⁸⁴

Next, the invention of pneumatic tyres in 1888 propelled the growth of the rubber industry in Malaysia.²⁸⁵ This rubber plantation expanded which by 1940 covered over 2 million acres.²⁸⁶ The rubber plantation owners comprised of predominantly European large estates and Chinese medium and small estates, and smallholdings held by the peasantry.²⁸⁷ The successful development of rubber plantation during the era relied upon the availability of cheap labourers. However, the planters experienced problems in recruiting the local native Malay labourers, who were generally uninterested in plantation work and rejected its oppressive nature that involved monotonous work, low wages, high mortality

²⁸⁰ US DoS, TIP Report 2015: Malaysia (n 271).

²⁸¹ Interview with NGO 5.

²⁸² Othman (n 5) 99-100.

²⁸³ Human Trafficking Org, 'Malaysia' <www.humantrafficking.org/countries/malaysia> accessed 23 April 2014.

²⁸⁴ Wilfred L Blythe, 'Historical Sketch of Chinese Labour in Malaya' (1947) XX:I *Journal Malayan Branch Royal Asiatic Society* 65.

²⁸⁵ Palianasamy Ramasamy, 'Labour Control and labour Resistance in the Plantations of Colonial Malaya' (1992) 19:3-4 *Journal of Peasant Studies* 87.

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

rate, regimented life, and other negative features.²⁸⁸ At the same time, efforts to recruit Javanese labourers were unsuccessful due to the emigration restrictions by the Dutch colonial authorities.²⁸⁹

To meet the demands for labourers, the only alternative then was to bring in foreign labourers. For the Chinese workers who could afford to pay their own expenses for the journey to Malaya, they could find suitable jobs without any hindrances. However, for those who could not afford to finance their passage to Malaya, they had to resort into the credit-ticket system where the brokers in southern ports in China working in association with the brokers in Singapore or Penang would first finance the journey of these immigrants.²⁹⁰ Upon arrival, the brokers would find job for them. Sometimes they were 'sold' to other brokers who worked with the employers, who paid the workers' salary through these brokers. The workers would serve as indebted labourers until the debts were paid off.²⁹¹ Such relationship is 'debt bondage'. They were required to toil until they had discharged their debts.²⁹² In some extreme cases, the workers were kidnapped and shipped to Malaya by unscrupulous brokers and were sold to the employers for quick profits.²⁹³

Among European planting circles, South Indian labourers, particularly the low caste *Madrasis*, were considered the most satisfactory and ideal for plantation work. This is because they were able to perform light, simple repetitive jobs and were highly submissive.²⁹⁴ The European planters first brought Indians labourers to Malaya under the indenture system, where the employer and employees were tied in a contract. But it was an unusual contract, because it bargained away the labourers' personal freedom for an extended period,²⁹⁵

²⁸⁸ Ramasamy (n 285).

²⁸⁹ Kernal S Sandhu, *Indians in Malaya: Some Aspects of their Immigration and Settlement* (Cambridge: CUP 1969) 56.

²⁹⁰ Blythe (n 284) 69.

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ Ramasamy (n 285).

²⁹⁴ Sandhu (n 289) 56-57.

²⁹⁵ *ibid* 76.

usually for three to five years.²⁹⁶ Often emigration under this system was a result of ignorance on the part of the employees, or they were coerced or tricked by the employers or agents.²⁹⁷ The indenture was then replaced by the '*kangani*' system. The word *kangani* is the anglicised form of the Tamil word of '*kankani*' meaning 'overseer' and 'foremen'. Under this system, an employer requiring labourers sent a *kangani*, himself an Indian immigrant, to India, and the man returned with workers, paid for in advance.²⁹⁸ These workers were compelled to work until their debts arising from the advanced expenses were fully settled.²⁹⁹ This system is also argued to be a variant of indenture system as in effect the debt bondage also existed although indirectly.³⁰⁰

The expanding economy in Malaysia has attracted a large number of foreign immigrants seeking job opportunities in various newly proliferating industries. Contemporary Malaysian government policies concerning the management of foreign labour can be traced back to the 1970s, when the demand for cheap labourers grew significantly as a result of the government efforts to restructure the economy. During the time, acute labour shortage in key economic sectors, such as plantations, manufacturing and construction, prompted the policy to allow an inflow of migrant workers, primarily from Southern Thailand, Indonesia and the Philippines.³⁰¹ The government tacitly approved this flow, as it served to reduce the pressure on real wages, as well as to fill gaps in labour supply.³⁰² Taking Indonesian foreign workers as an example, the liberal migration policy allowed the employers either to hire Indonesians who were already domiciled in the country or to bring them in from Indonesia through private labour brokers, for the plantation and construction sectors.³⁰³

²⁹⁶ Prakash C Jain, *Racial Discrimination Against Overseas Indians* (New Delhi: Concept Publishing Company 1990) 14.

²⁹⁷ Sandhu (n 289) 76.

²⁹⁸ Jain (n 296) 16

²⁹⁹ Amarjit Kaur, *Wage Labour in Southeast Asia Since 1840 – Globalisation, the International Division of Labour and Labour Transformation* (Hampshire: Palgrave Macmillan 2004) 68.

³⁰⁰ Ponniah Arudsothy, 'The Labour Force in A Dual Economy: Problems of its Growth and Structural Change for Economic Development with Special Reference to Malaysia' (PhD Thesis, University of Glasgow 1968) 75.

³⁰¹ Alice M Nah, 'Globalisation, Sovereignty and Immigration Control: The Hierarchy of Rights for Migrant Workers in Malaysia' (2012) 40 *Asian Journal of Social Science* 489.

³⁰² Patrick Pillai, 'The Malaysian State's Response to Migration' (1999) 14:1 *SOJOURN* 181.

³⁰³ Amarjit Kaur, 'Labor Crossings in Southeast Asia: Linking Historical and Contemporary Labour Migration' (1999) 11 *New Zealand Journal of Asia Studies* 276

The migration of foreign labourers is affected by varying labour market opportunities in the different countries such as the availability of higher wage and lower unemployment rate.³⁰⁴ In the case of Indonesian labour migration to Malaysia, the income disparity and unemployment rate in Indonesia has become one of the main push factors for them to search for job opportunities in Malaysia.³⁰⁵ The same conditions are also applicable to the Filipino³⁰⁶ and Pakistani³⁰⁷ workers migrating to Malaysia.

In furtherance of addressing on-going labour shortages, Malaysia signed memoranda of understanding in the mid-1980s with Bangladesh, Indonesia, the Philippines and Thailand to supplement demands for migrant workers in the construction and plantation sectors and as domestic helpers.³⁰⁸ However, unscrupulous recruitment agencies and employers took advantage of the economic expansion by illegally importing foreign workers who now make up almost 20% of the country's workforce.³⁰⁹ Many of them could be trafficked victims,³¹⁰ particularly Indonesians migrants who have been working illegally in Malaysia often subject to labour exploitation.³¹¹ The irregular migration revealed itself as a problem only in the early eighties, when the Malaysian economy began to slow down. This was evidenced by the 1985-86 recession when rising unemployment in Malaysia witnessed a turning point in public sentiment towards migrants, invoking a state response to guard and control its borders.³¹²

³⁰⁴ Roel Jennissen, 'Economic Determinants of Net International Migration in Western Europe' (2003) 19:2 *European Journal of Population* 171.

³⁰⁵ Fariastuti Djafar and Mohd Khairul H Hassan, 'Dynamics of Push and Pull Factors of Migrants Workers in Developing Countries: The Case of Indonesian Workers in Malaysia' (2012) 4:12 *Journal of Economics and Behaviour Studies* 703.

³⁰⁶ Frank W Agbola and Angelto B Acupan, 'What Drives International Labour Migration in the Philippines?' (2010) 34:4 *Economics System* 386.

³⁰⁷ Nisar Ahmad and others, 'Macroeconomic Determinants of International Migration' (2008) 46(2) *Pakistan Economic and Social Review* 85.

³⁰⁸ Azizah Kassim, 'Integration of Foreign Workers and Illegal Employment in Malaysia' in OECD, *International Migration in Asia: Trends and Policies* (Paris: OECD Publications 2001) 113.

³⁰⁹ Manpavan J Kaur and PK Hangzo, 'Recasting the Human Trafficking Debate'(NTS-Asia Sustainability working Group Discussion', S. Rajaratnam School of International Studies, Nanyang Technological University Singapore, 25-26 November 2010).

³¹⁰ Kaur 'Labor Crossings in Southeast Asia: Linking Historical and Contemporary Labour Migration' (n 303).

³¹¹ Shelley (n 117) 163.

³¹² Vijayakumari Kanapathy, *Controlling Irregular Migration: The Malaysian Experience* (Bangkok: ILO 2008) 1.

Malaysia is now the home to a large undocumented migrant population, consisting of temporary labour migrants, refugees and displaced persons, and victims of trafficking, as well as a large documented migrant labour workforce.³¹³ In October 2015, the Malaysia government stated that it had recorded a total of 2.1 million documented foreign workers, but did not state the number of the illegal ones.³¹⁴ The total number of illegals is still unknown, but Malaysian Employees Federation (MEF) estimated the ratio of 2:1, meaning that there are two illegal immigrants for every legal worker.³¹⁵ Regardless of their migration status, a significant number of these migrants arrived on falsified and fake documents and faced a range of exploitative practices that include confinement and restricted freedom of movement, bonded labour and debt bondage, deception, violence and abuse, poor working conditions, and non-payment of wages.³¹⁶

According to an interview participant, trafficking victims in Malaysia are mostly foreign workers who migrated willingly from Indonesia, Nepal, India, Thailand, China, the Philippines, Burma, Cambodia, Bangladesh, Pakistan, and Vietnam in search of better opportunities.³¹⁷ Many of them were tricked or coerced to become forced labourers or in debt bondage at the hands of their employers, employment agents, or informal labour recruiters. An NGO also estimated that 65% of the trafficked victims in Malaysia are in conditions of forced/bonded labour.³¹⁸ These trafficking activities are commonly perpetrated by employers

³¹³ Michele Ford, 'After Constructing Legality: The Management of Irregular Labour Migration in Thailand and Malaysia' in Marcel van der Linden, (ed) *Labour History Beyond Borders: Concepts and Exploration* (Leipzig: Akademische Verlagsantalt 2010) 177.

³¹⁴ Parliament of Malaysia, House of Representatives, *Hansard* (DR. 23.10.2013) 2.

³¹⁵ Pook Ah Lek, 'The Dilemma of Having Foreign Workers in Malaysia' *The Straits Times* (Singapore 2016). <www.straitstimes.com/opinion/the-dilemma-of-having-foreign-workers-in-malaysia> accessed 12 January 2017.

³¹⁶ Diana Wong and Gusti Saat, 'Trafficking of Filipino Women to Malaysia: Examining the Experiences and Perspectives of Victims, Governmental and NGO Experts'(United Nations Global Programme against Trafficking in Human Beings, Universiti Kebangsaan Malaysia) 4. <www.unodc.org/pdf/crime/human_trafficking/Exec_Summary_IKMAS.pdf> accessed 7 September 2014.

³¹⁷ Interview with Policy 3.

³¹⁸ Interview with NGO 3.

and migration agents. However, some unscrupulous government officers, including customs, immigration and police officers have also been implicated.³¹⁹ While the total labour force in Malaysia as of October 2016 stood at 14.73 million,³²⁰ the documented foreign labour Malaysia stood at 2.1 million,³²¹ mostly low skilled workers, and represents about 14.2% of the total workforce in Malaysia. This number is slightly below the limit of 15% on the employment of low skilled migrants from the total workforce targeted by the Malaysian government by the year 2020.³²²

Aside from the MEF estimation, there are no credible statistics on the undocumented workers in Malaysia, but the government was able to register a total of 1.3 million undocumented migrants during the implementation of the 6P Amnesty Programme that ended in August 2013.³²³ They were mainly from Indonesia (50.9%), Bangladesh (17%), Nepal (9.7%), India (6.3%) and Vietnam (4.2%) working in Peninsular Malaysia, while the large inflow of foreign workers into Sabah and Sarawak are from the nearest neighbours, such as the Philippines and Indonesia's Kalimantan.

This migration is largely due to political and economic factors in their home countries. For example, Sabah's proximity to the Southern Philippine accounts for the concentration of the Filipinos in Sabah compared to the rest of the country. The shared borders between Sarawak and Kalimantan in Indonesia continue to facilitate the inflow of many irregular foreign workers as well as cross-border workers from the latter state who commute to work on a daily basis.³²⁴ These modern factors reflect past history. During the colonial period,

³¹⁹ Michael Eilenberg, 'Trafficking on Malaysia-Indonesia Border' in Michele Ford and others (eds), *Labour Migration and Human Trafficking in Southeast Asia: Critical Perspective*, (Oxon: Routledge 2012) 177.

³²⁰ Department of Statistics, 'Key Statistics of Labour Force in Malaysia, October 2016' <www.statistics.gov.my/dosm//index.php?r=column/ctHEMEByCat&cat=124&bul_id=VIrOFVJNG9JL0c0Wjh3ODgxVIZkZz09&menu_id=U3VPMldoYUxzVzFaYmNkWXZteGduZz09> accessed 12 January 2016.

³²¹ Parliament of Malaysia (n 314).

³²² Economic Planning Unit Prime Ministers Department, *Eleventh Malaysia Plan 2016-2020* (Putrajaya: EPU 2015) Chapter 5 p. 18.

³²³ ILO, *Review of Labour Migration Policy in Malaysia* (Bangkok: ILO 2016) 15.

³²⁴ The World Bank, Institute of Labor Market Information and Analysis (ILMIA), 'Immigration in Malaysia: Assessment of its Economic Effects, and a Review of the Policy and System' *Report Completed in Collaboration with ILMIA—Ministry of Human Resources of Malaysia* (2012) xiii.

Sabah, (then known as 'British North Borneo') experienced a wave of immigrants through the British 'importation' of foreign labour to fuel the growing economy.³²⁵ In the 1970s and onwards, fighting between Muslim separatists and the Philippine government forces in Mindanao was a major impetus to the influx of migrants in Sabah. Notwithstanding that Malaysia is not a signatory of the Convention relating to the Status of Refugees 1951³²⁶ (Refugee Convention 1951), most of those who escaped to Sabah during the conflict were given *de facto* refugee status on humanitarian grounds and allowed to remain in the state, but with limited access to employment, social services and public amenities.³²⁷

Amnesty International reported that, in principle, most migrant workers are covered by the appropriate employment laws in Malaysia but, in practice, enjoy no safeguards from abuse due to lack of effective enforcement and their over-dependence on their employers and recruitment agents.³²⁸ Moreover, domestic workers have even less legal recourse when their rights are violated. This is because Malaysian labour law systematically excludes them from labour protection,³²⁹ and therefore exposes them to possible abuse by the employers. This is evidenced from various cases that have been brought to court, where most of the cases³³⁰ are involved with the prosecution of physical violence by employers rather than labour related infringements.

<<http://psu.um.edu.my/images/psu/doc/Recommended%20Reading/Immigration%20in%20Malaysia.pdf>> accessed 24 August 2014.

³²⁵ Bilson Kurus, 'Migrant Labour: The Sabah Experience' (1998) 7:2-3 *Asian And Pacific Migration Journal* 281.

³²⁶ Convention relating to the Status of Refugees 1959 (adopted 28 July 1951 entered into force 21 April 1954) 189 UNTS 150.

³²⁷ Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future' (2009) 47:1 *Southeast Asian Studies* 52.

³²⁸ Amnesty International, 'Trapped: The Exploitation of Migrant Workers in Malaysia' <www.refworld.org/pdfid/4bb05b812.pdf> accessed 26 August 2014.

³²⁹ *ibid.*

³³⁰ Recent case of a Malaysian couple Fong Kong Meng and Teoh Chin Yen were sentenced to death being guilty of starving their Indonesian maid, Isti Komariyah, to death. See The STAR Online, 'Couple to hang for maid's murder', BERNAMA, (Kuala Lumpur, 6 March 2014)

<<http://www.thestar.com.my/news/nation/2014/03/06/couple-to-hang-maid-murder/>> accessed 26 August 2014; another landmark is the case of Nirmala Bonat, also an Indonesian maid, who were severely injured by her employer and has caused uproar in Indonesia. See The Malay Mail, 'Appellate court rules abused maid Nirmala Bonat to receive increased sum of damages, BERNAMA, (Kuala Lumpur, 7 September 2015)

<www.themalaymailonline.com/malaysia/article/appellate-court-rules-abused-maid-nirmala-bonat-to-receive-increased-sum-of#sthash.qxJhiv3y.dpuf> last accessed 12 November 2016.

The most striking example of the Malaysia's bilateral arrangement pertaining to migrant workers is the MOU signed with Indonesia on domestic workers in 2006. However, due to the lapse of the MOU and due to delayed attempts to negotiate a new agreement as well as because of various incidences of exploitation and violence against these workers, Indonesia placed a moratorium on migrants to Malaysia beginning 26 June 2009.³³¹ This led to a significant labour shortage in Malaysia, which, prior to it, was estimated at 300,000.³³² During the period, arrivals of domestic workers fell from 1,000 a month prior to the ban to just 200 a month by January 2011, leading to a situation in which up to 35,000 Malaysian families were awaiting domestic workers, with the 'waiting list' averaging seven months.³³³

The number of cases relating to abuses of domestic maids, particularly those from Indonesia, had been increasing in Malaysia, with notorious examples including the severe physical abuse of Nirmala Bonat³³⁴ and the murder by starvation of Isti Komariyah³³⁵ by their respective Malaysian employers. Maid abuses in Malaysia had been sensationalised by the Indonesian media, and served as a flash point for an anti-Malaysia campaign.³³⁶ When the moratorium was implemented, the Indonesian Government emphasised how this action reflected not only the problem of violent abuse against domestic workers, but also the need for better protection and pay rates for these workers more generally.

³³¹ Hannah Andrevski and Samanta Lyneham, 'Experiences of Exploitation and Human Trafficking Among a Sample of Indonesian Migrant Domestic Workers' (2014) No. 471 *Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology* 8 <www.aic.gov.au/publications/current%20series/tandi/461-480/tandi471.html> accessed 30 September 2014.

³³² The Jakarta Post, 'RI-Malaysia MoU Fails to Provide Needed Safeguards for Migrant Workers' *The Jakarta Post* (Jakarta, 1 June 2011) <www.thejakartapost.com/news/2011/06/01/ri-malaysia-mou-fails-provide-needed-safeguards-migrant-workers.html> accessed 10 September 2014.

³³³ AsiaOneNews, 'Malaysia Needs Maids Urgently', *AsiaOne News* (Singapore, 11 January 2011) <<http://news.asiaone.com/News/AsiaOne+News/Malaysia/Story/A1Story20110111-257475.html>> accessed 10 September 2014.

³³⁴ BBC, 'Maid Abuse Case Shocks Malaysia' *BBC News* (Kuala Lumpur 20 May 2004) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/3732241.stm>> accessed 4 April 2017.

³³⁵ BBC, 'Malaysia Couple Charged over Indonesian Maid's Death' *BBC News* (Kuala Lumpur 16 June 2011) <www.bbc.co.uk/news/world-asia-pacific-13789631> accessed 4 April 2017.

³³⁶ Khadijah M Khalid and Shakila Yacob, 'Managing Malaysia-Indonesia Relations in the Context of Democratisation: the Emergence of Non-State Actors' (2012) 12:3 *International Relations of the Asia-Pacific* 355.

Malaysia then negotiated with Cambodia as an alternative source to address its shortage of domestic workers. However, in October 2011, Cambodia suspended the despatch of domestic workers to Malaysia after a raft of reports of abuse of domestic workers by both Malaysian employers and Cambodian recruitment agencies.³³⁷ Negotiations were halted due to Cambodia's assertion that Malaysia rejected its proposal to include a provision that employers should 'respect the basic human rights of the domestic workers'.³³⁸ These two examples give an impression that many employers in Malaysia practise slave-like treatment toward domestic workers.

The Indonesian moratorium, however, did not entirely halt the arrival of prospective Indonesian domestic workers. Employment agencies in Malaysia exploited loopholes in the rules regulating worker migration in order to bypass their Indonesian counterparts and bring workers on tourist visas,³³⁹ and then legalise them through registration at the relevant government agencies upon their arrival. These activities took place alongside the moves by the Malaysian government in 2011 to deal with the issue of high number of undocumented migrants by regularising the status of many undocumented workers and providing amnesty for those wishing to return home.

At the same time, other factors also contribute towards the high volume of arrivals of Indonesian migrant workers to Malaysia. This is due to the fact that Malaysia is the closest neighbour to Indonesia, sharing land and sea borders, with majority people professing the same religion (Islam) as well as cultural and language similarities. For Indonesians living in the common border areas in Sabah and Sarawak, they rely on Malaysia heavily for their living because accessibility to Malaysia is much easier compared to some cities in Kalimantan.³⁴⁰ The internal economic factor in Indonesia is also another major

³³⁷ Matt Blomberg and Khy Sovuthy, 'Malaysia Fails to Guarantee Cambodian Maids' Human Rights' *The Cambodia Daily* (Phnom Penh, 24 December 2013) <www.cambodiadaily.com/archives/malaysia-fails-to-guarantee-cambodian-maids-human-rights-49629/> accessed 11 September 2014.

³³⁸ *ibid.*

³³⁹ Juanita Elias, 'Foreign Policy and Domestic Worker: The Malaysian-Indonesian Domestic Worker Disputes,' (2013) 15:3 *International Feminists Journal of Politics* 391.

³⁴⁰ Djafar and Hassan (n 305).

reason. Remittances by migrants play an important role in Indonesia's economy. Figures presented by the World Bank in 2008 shows that, as of 2007, Malaysia contributed 81% of the total remittances of Indonesian workers' amounting to US\$2.58 billion, representing about 1.4% of Indonesian GDP.³⁴¹

In addressing this problem, various negotiations between the two countries took place and resulted in the signing of a new MOU in 2011 to amend the 2006 MOU. The 2011 MOU does not fundamentally address the issue of the welfare of workers, but still includes some positive changes such as allowing domestic workers to keep their passports instead of having to surrender them to their employers, and guaranteeing them a day per week off work.³⁴² Although the Indonesian side had been pressing to set a minimum wage, the issue does not arise in the said MOU. In many instances, the employers in Malaysia will make advance payments for the recruitment of Indonesian workers, including the immigration, transportation and pre-employment medical charges. This recruitment fee structure makes workers indebted for a significant period of the employment.³⁴³

Human trafficking and forced labour are also important issues in Sabah and Sarawak. In Sabah, the problem of human trafficking lies in the entertainment and plantation industries, involving mostly Filipino and Indonesians. Research clearly indicated that trafficking of girls for sex exploitation from the Philippines to Sabah involves organised crime groups.³⁴⁴ The victims were promised employment in supermarkets or factories and were also provided relevant immigration documents and arrive in Malaysia on a 30 days social visit visa.

³⁴¹ Bank of Indonesia, 'Data Collection and Monitoring on Indonesian Workers' Remittance' (2008) World Bank Regional Workshop on Malaysia-Indonesia Remittance Corridor Bali, Indonesia, June 9 – 11, 2008
<http://siteresources.worldbank.org/INTAML/Resources/Triono_Widodo_BI.pdf> accessed 11 September 2014).

³⁴² Human Rights Watch, 'Indonesia/Malaysia: New Pact Shortchanges Domestic Workers', Human Rights Watch (Geneva 31 May 2011)
<www.hrw.org/news/2011/05/31/indonesiamalaysia-new-pact-shortchanges-domestic-workers> accessed on 8 September 2014.

³⁴³ *ibid.*

³⁴⁴ Gusti Saat, 'Human Trafficking from the Philippines to Malaysia: The Impact of Urbanisation' (2009) 16 *South Asian Survey* 139.

However, they were deceived about the nature of the work, which they would be required to perform when they arrived in Sabah.³⁴⁵

The plantation sector, particularly the palm oil industry, has also contributed to the forced labour and trafficking problems. Sabah contributes to almost 30% of the total oil palm plantation in Malaysia with more than 700 plantations. The UN High Commissioner for Refugees (UNHCR) estimates that there are roughly 80,000 Filipino workers in Sabah, mostly the refugees of the separatism conflicts in Mindanao. Out of this number, more than 10,000 of their children are without birth documentation and are technically stateless.³⁴⁶ These people have no access to education and proper job training and are vulnerable to exploitation, particularly in the plantation sector. They live in isolated areas in the plantation areas, with generally low pay, poor living and working condition and are generally exploited.³⁴⁷

In Sarawak, the problem of forced labour and human trafficking lies with the workers in the plantation sector, particularly involving Indonesian labourers. As part of Malaysia-Indonesia reconciliation at the end of confrontation in 1966,³⁴⁸ the two countries signed the 1967 Malaysia-Indonesia Border Crossing Agreement.³⁴⁹ Under this agreement, inhabitants living in the immediate area of either side of the border are allowed to cross for short social visits using a border-crossing pass.³⁵⁰ However, applying for such a pass is time-consuming and expensive, and the pass does not allow the visitors to seek employment. Hence, many use illegal back roads or *jalan tikus*, using the services of informal labour brokers or middlemen to enable them to cross over the border and seek

³⁴⁵ Wong and Saat (n 316).

³⁴⁶ US DoS, Human Rights Report 2013: Malaysia
<www.state.gov/documents/organization/220419.pdf> accessed 8 September 2014.

³⁴⁷ Accenture for Humanity United, 'Exploitative Labor Practices in the Global Palm Oil Industry' <http://humanityunited.org/pdfs/Modern_Slavery_in_the_Palm_Oil_Industry.pdf> accessed on 17 August 2014.

³⁴⁸ Mazlan Nordin, 'The End of Confrontation' (2006) 21 *Malaysian Journal of Communication* 141.

³⁴⁹ Dewi F Anwar, *Indonesia in ASEAN: Foreign Policy and Regionalism* (Singapore: ISEAS 1994) 143.

³⁵⁰ Memet Agustiar, 'Indonesian Workers in Sarawak: The Direction of the Daily Commuting Workers Via the Entikong-Tepedu Border Post,' in Micheal B Leigh (ed), *Language, Management and Tourism. Borneo 2000. Proceeding of the Sixth Biennial Borneo Research Conference*, (Kuching: University of Malaysia Sarawak 2000) 235.

employment in oil palm plantations stretching along the Sarawak side of the border.³⁵¹ The jobs in this sector are generally lower paid and working conditions are dire, with long working hours and poor safety records.³⁵² The workers are usually housed in small settlements within the oil palm plantation, isolated from surrounding communities and the prying eyes of the authorities.³⁵³ These conditions of work and living make them extremely vulnerable to exploitation.

Malaysia adopts a modernist approach to immigration control, fragmenting migrant workers into different categories on the basis of a calculation of their potential economic contributions.³⁵⁴ In this regard, Malaysia creates a hierarchy of rights and freedoms, giving greater rights and permitting higher levels of integration to non-citizens with greater 'potential', while giving fewer rights and limiting the integration to those with less 'potential'. This is done in order to achieve two competing aims: to attract global capital and to allay the nationalistic concerns of its own citizens.³⁵⁵ The Malaysian authorities, particularly the Immigration Department have devised three different categories and issues three types of immigration pass. The first category is 'expatriates', issued to those who hold key and management positions held by foreigners which allow the company to 'safeguard their interest and investment'³⁵⁶ as where there is any shortage of trained workers. The second category is 'foreign worker' for those who occupy semi-skilled or unskilled positions. Employers of this category of migrant workers are only allowed to recruit individuals of specific nationalities as foreign workers, and they are only permitted to work in specific sectors, namely manufacturing, plantation, agriculture, construction and

³⁵¹ Eilenberg (n 319) 121.

³⁵² Nurul Ilmi Idrus, 'Makkunrai Passimokolo: Bugis Migrant Workers in Malaysia' in Michele Ford and Lyn Parker (eds), *Women and Work in Indonesia* (New York: Routledge 2008) 155.

³⁵³ *ibid* 171.

³⁵⁴ Nah, 'Globalisation, Sovereignty and Immigration Control: The Hierarchy of Rights for Migrant Workers in Malaysia' (n 301) 489.

³⁵⁵ Alice M Nah, 'State Power and the Regulation of Non-Citizen: Immigration Laws, Policies and Practices in Peninsular Malaysia' (PhD thesis, National University of Singapore 2012).

³⁵⁶ Prime Minister's Department Malaysia, 'Special Task Force to Facilitate Business, Guidelines on the Employment of Expatriates: Processes and Procedures' (2007) 3.

<www.pemudah.gov.my/documents/10124/37722/Guidebook+on+the+Employment+of+Expatriates+-+Processes+and+Procedures.pdf> accessed on 10 September 2014.

services.³⁵⁷ The final category is 'foreign domestic helpers' who must be females, aged between 21-45 years and of an approved nationality.³⁵⁸

In summary, the issue of foreign workers has been a problem to Malaysia. It stems from several factors, including pressures of migration, greater freedom and flexibility to work with any employer for any kind of job, the low pay that the locals are unwilling to accept, lack of enforcement, and the existence of a 'shadow' job market.³⁵⁹ A national policy regarding the illegal foreign workers has been fully implemented since early 1992, and since then Malaysia's stand on the issue of irregular migrants has remained fairly constant. They are seen as security threat and as 'public enemy number 2' after drug addiction,³⁶⁰ having no basic rights and must be apprehended, charged in court, sentenced and then deported.³⁶¹

The official perception that the influx of foreign workers impinges upon public safety and security should be examined further. The number of crimes committed by migrants has escalated from 1,333 in 1992 to 3,113 in 2002, a three-fold increase for the duration of ten years.³⁶² The number tripled during the first eight months in 2014 to 9,496.³⁶³ However, this percentage merely represents around 1% of the total index crime in Malaysia.³⁶⁴ Although this total index crime is relatively low, the foreigners are perceived to have a tendency to

³⁵⁷ Nah, 'Globalisation, Sovereignty and Immigration Control: The Hierarchy of Rights for Migrant Workers in Malaysia' (n 301).

³⁵⁸ Immigration Department of Malaysia, Foreign Domestic Helper <www.imi.gov.my/index.php/en/main-services/foreign-domestic-helper> accessed on 10 September 2014.

³⁵⁹ Kanapathy (n 312).

³⁶⁰ Mohd Zamberi Abdul Aziz, 'Pendatang Asing Tanpa Izin: Dasar dan Pelaksanaannya (Seminar on Foreign Workers and Illegal Migrants in Malaysia, Institute of Malaysian and International Studies, University Kebangsaan Malaysia 2011).

³⁶¹ Nah, 'Globalisation, Sovereignty and Immigration Control: The Hierarchy of Rights for Migrant Workers in Malaysia' (n 301).

³⁶² Amar Singh Sidhu, 'The Rise of Crime in Malaysia: An Academic and Statistical Analysis' (2005) 4 *Journal of the Kuala Lumpur Royal Malaysia Police College* 1.

³⁶³ BERNAMA, '9,496 Crime Cases Involving Foreigners Recorded from January to August' *The Sun Daily* (Kuala Lumpur, 14 November 2014).

³⁶⁴ Yiswarae Pelanasamy, 'Most Criminals are Malaysians, Police Say Amid Bangladesh Intake Concerns' *The Malay Mail* (Kuala Lumpur, 19 February 2016). Index Crime is defined in the Inspector General Standing Order (IGSO) para D203 as 'Crimes that are reported with sufficient regularity and with sufficient significance to be meaningful as an index to the crime situation.' See: Salim Ali Farrar, 'Crime and Justice in Malaysia' in Jianhong Liu, Susyan Jou and Bill Heberton (eds), *Handbook of Asian Criminology* (New York: Springer 2013) 233

commit violent crime³⁶⁵ such as armed gang robbery, drug trafficking, and commercial crimes, and the expansion of fake document industry run mainly by international syndicates.³⁶⁶ Accordingly, a negative perception arose among the locals about the criminality of foreign workers. Thus, on the effect of migration in Asia including Malaysia, that it is being handled as a national security issue,³⁶⁷ rather than a labour or economic issue.

Although the influx of immigrants to Malaysia does not impinge much upon the overall security of Malaysia, the uncontrolled migration negatively impacts the country including community tensions, social problems, alienation, law and order problems, border insecurity and many others.³⁶⁸ Social tensions include the argument that the lower paid immigrants have caused employers to minimise operating costs, and that an increase of unemployment rate and a decrease of the job opportunities for the locals will occur.³⁶⁹

In one aspect of addressing the irregular migrant problems, the Malaysia government launched what was described as 'comprehensive programme'³⁷⁰ in the name of 6P Programme: *Pendaftaran* (Registration), *Pemutihan* (Neutralise), *Pegampunan* (Amnesty), *Pemantauan* (Monitoring), *Penguatkuasaan* (Enforcement) and *Pengusiran* (Expulsion), from July to December 2011. It was extended several times and ended in September 2013.

³⁶⁵ Zaidi Morshidi, *Masalah Pendatang Asing Tanpa Izin (PATI) dan Hubungannya dengan Jenayah, Satu Kajian di Kuching, Sarawak*, Diploma in Policing Project Paper, (National University of Malaysia/Royal Malaysian Police, 1996).

³⁶⁶ Azizah Kassim, 'Current trends in Transnational in Populations Flows in Malaysia: Issues, Policy and Challenges' (International Population Conference on Migration, Urbanisation & Development, Faculty of Economics and Administration, University of Malaya, Kuala Lumpur, 8 July 2013).

<http://familyrepository.lppkn.gov.my/329/1/5-Copy_of_5.7.13_Current_Trends_ppt.pdf> accessed 9 September 2014.

³⁶⁷ Max Tunon and Nilim Baruah, 'Public Attitudes towards Migrant Workers in Asia' (2012) 1:1 *Migration and Development*, 149.

³⁶⁸ Tin MM Than, 'Politics and Security on Southeast Asia: Trends and Challenges', in Daljit Singh (ed) *Political and Security Dynamics of South and Southeast Asia* (Singapore: ISIAS Publishing 2007) 93.

³⁶⁹ Mohd Na'eim Ajis and others, 'Managing Foreign Workers in Southeast Asian Countries' (2010) 1:3 *Journal of Asia Pacific Studies* 481.

³⁷⁰ Azizah Kassim and Ragayah HM Zin, 'Policy of Irregular Migrants in Malaysia: Analysis of its Implementation and Effectiveness,' *Philippine Institute of Development Studies Discussion papers Series 2011-34* (December 2011) <<http://dirp4.pids.gov.ph/ris/dps/pidsdps1134.pdf>> accessed 9 January 2017.

It aimed to reduce the number of illegal migrants and register foreign workers.³⁷¹ Under the 6P Programme, employers must also ensure registration of their illegal employees or face legal repercussion, including the ATIPSOM 2007, should an element of cheating or exploitation be established against defiant employers.³⁷² About 1.3 million undocumented migrant workers registered, 800,000 fewer than the expected 2.1 million illegal migrants to take part in the Programme.³⁷³

3.8. Comparative and Regional Setting

3.8.1. Malaysia and the Regional Setting

Regional cooperation is another important element in combating trafficking in Malaysia. Since the mid-1990s, the ASEAN member states have emphasised the threats posed by issue of transnational crime in general, and human trafficking in particular.³⁷⁴ In December 1997, the ASEAN member states agreed on the Declaration on Transnational Crime, consisting of the first joint statement of cooperation in the fight against the phenomenon, and set up an institutional response. In 1999, the ASEAN Ministerial Meeting on Transnational Crime adopted the ASEAN Plan of Action to Combat Transnational Crime, among other calls for the exchange of information, legal and law enforcement cooperation, training, institutional building and other cooperation.³⁷⁵

Being a member of ASEAN, Malaysia has taken part in regional initiatives specifically at countering human trafficking. These include the 2004 ASEAN Declaration Against Trafficking in Persons Particularly Women and Children,

³⁷¹ Ministry of Communication and Multimedia Malaysia, 'Neutralisation of Migrants' <<http://pmr.penerangan.gov.my/index.php/component/content/article/445-kolumnis/10523-pemutihan-pendatang-asing.html>> accessed 10 September 2014.

³⁷² Teoh El Sen, 'Errant Employers Warned' *Free Malaysia Today* (Putrajaya 10 January 2012) <www.freemalaysiatoday.com/category/nation/2012/01/10/6p-registration-errant-employers-warned/> accessed 11 September 2014.

³⁷³ BERNAMA, 'Lebih 2 juta Pekerja Asing di Malaysia' *Sinar Harian* (Kuala Lumpur 23 October 2013) <www.sinarharian.com.my/mobile/nasional/lebih-2-juta-pekerja-asing-di-malaysia-1.213600> accessed 2 October 2014.

³⁷⁴ Ralf Emmers and others, 'Institutional Arrangement to Counter Human Trafficking in the Asia Pacific' (2006) 28:3 *Contemporary Southeast Asia* 490.

³⁷⁵ *ibid.*

the 2007 ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons as well as a number of regional instruments on transnational crimes such as the 2002 ASEAN Plan of Action to Combat Transnational Crime are the specific regional instrument adopted by the ASEAN member states.

Malaysia is also a member of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) signed in 2002. The Bali Process is aimed at effectively raising the regional awareness of the consequences of people smuggling, trafficking in persons and related transnational crime, and developing and implementing strategies and practical cooperation in response. There are currently 45 members of the Bali Process.

However, the state of human trafficking regulation in the region leaves a lot to be desired. This is reflecting by a lack of concerted effort on data collection and sharing.³⁷⁶ Anti-human trafficking efforts in the ASEAN began to intensify when the ASEAN member states signed the ASEAN Convention to Combat, Prevent and Suppress Trafficking in Persons Especially Women and Children in Southeast Asia (ACTIP 2015) in November 2015.³⁷⁷ The ACTIP 2015's objectives are to prevent human trafficking and to ensure just and effective punishment to the traffickers, to protect and assist the victims, and to promote cooperation among the states parties.³⁷⁸ It is supplemented with the regional plan of action³⁷⁹ that underlines the regional strategies towards the implementation of the ACTIP 2015 adopting the 3P paradigm strategy as well as enhancing the regional and international coordination to help address the human trafficking phenomenon. At the end of 2016, six ASEAN member states had ratified to the ACTIP 2015, with the Philippines having deposited its

³⁷⁶ International Organisation of Migration, *ASEAN and Trafficking in Persons, Using Data as a Tool to Combat Trafficking in Persons* (Geneva: IOM 2007).

³⁷⁷ Association of Southeast Asian Nations, 'ASEAN Commits to Combat Trafficking in Persons' ASEAN Secretariat News (Jakarta, 5 June 2014) < www.asean.org/news/asean-secretariat-news/item/asean-commits-to-combat-trafficking-in-persons> accessed 15 September 2014.

³⁷⁸ ACTIP 2015 art. 1.

³⁷⁹ ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children (ASEAN PoA).

instrument of ratification on 7 February 2017.³⁸⁰ Malaysia, Brunei, Indonesia and Laos have yet to ratify the treaty. However, the ratification by the Philippines paves the way for the treaty to come into force because the treaty provides that it needs a minimum of six ratifications, and will take effect after 30 days of the deposit of such instrument of ratification.³⁸¹ At the time of writing, the ACTIP is not yet come into force, therefore it is premature at this stage to comment on the effectiveness of the regional treaty.

3.8.2. United Kingdom and the European Setting

The UK became a signatory to the Trafficking Protocol 2000 on 14 December 2000 and ratified it on 9 February 2006.³⁸² Human trafficking offences and other measures were set out in the Modern Slavery Act (MSA) 2015. The UK has also launched the Modern Slavery Strategy in 2014 to combat human trafficking, with its strategic responses focus to reduce the prevalence of modern slavery and to be achieved through partnership across sector – government and beyond.³⁸³ The Modern Slavery Strategy focuses on four strategic areas such as to pursue, prevent, protect and prepare. The two forms of human trafficking measures in UK are sources for policy transfer. This issue is discussed further in Chapter Four.

The UK is perceived to be more effective than Malaysia in dealing with the phenomenon. This is because the UK is gradual at the First Tier of the TIP Report since its inception in 2001. Apart from the MSA 2015, other UK legislation also deal with human trafficking such as the Sexual Offences Act

³⁸⁰ ASEAN, 'Philippines Deposits Instrument of Ratification on Anti-trafficking Convention' <http://asean.org/%E2%80%8Bphilippines-deposits-instrument-of-ratification-on-anti-trafficking-convention/> accessed 19 February 2017.

³⁸¹ ASEAN PoA art 29.

³⁸² UNDOC, 'Signatories of the CTOC Trafficking Protocol' <www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> accessed 27 December 2014.

³⁸³ Human trafficking is distinct offence defined in the MSA 2015. However, the Modern Slavery Strategy covers all aspects of crime under the MSA 2015. Therefore, the strategy also applies to human trafficking. See UK Government, Modern Slavery Strategy (London: Her Majesty's Stationary Office 2014) 27.

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/383764/Modern_Slavery_Strategy_FINAL_DEC2015.pdf> accessed 14 April 2017.

2003, section 57-59; the Nationality, Immigration and Asylum Act 2002, section 145. Further, the Asylum and Immigration (Treatment of Claimants *etc*) 2004, section 4, deals with trafficking people for exploitation, while the Coroners and Justice Act 2009, section 71, is for slavery, servitude and force labour. The Policing and Crime Act 2009, section 14, further inserted section 53A of the Sexual Offences Act for offences related to sex with a coerced, deceived or threatened person. These Acts explicitly provide for trafficking measures and provide for criminalisation of the acts as well as provide for its protection of victims. Further, the Children Act 1989 deals with child victims and empowers local authorities to render protection to this vulnerable group.

Recently, in *Hounga v Allen*³⁸⁴ the Supreme Court referred to the Trafficking Protocol 2000 and affirmed that the UK is bound to the international instrument. On UK's compliance to the definition of Trafficking Protocol 2010, Lord Hughes said, '...of course a general principle of that law that ambiguous questions of construction are to be resolved in favour of compliance with the UK's international obligations where reasonably possible, and such obligations may similarly inform the application of open questions of common law'.³⁸⁵

Next, is the UK's obligation to the regional legal mechanisms. In the case of *O.O.O. and others v The Commissioner of Police for the Metropolis*,³⁸⁶ the Court held that the police are under a duty to carry out an effective investigation of an allegation of a breach of Article 4 once a credible account of an alleged infringement had been brought to its attention. This case reflects the UK's obligation to adhere with the ECHR, article 4 pertaining to the as stated in *Rantsev v Cyprus and Russia*³⁸⁷ pertaining to the procedural obligations on states under the ECHR in addressing human trafficking.

³⁸⁴ [2014] UKSC 47

³⁸⁵ *ibid* para 61.

³⁸⁶ [2011] EWHC 1246 (QB)

³⁸⁷ App. No. 25965/04 ECTHR [2010]. The discussion about *Rantsev* took place in Chapter One.

As for the MSA 2015, the Act aims at consolidating and simplifying existing modern slavery offences into one Act.³⁸⁸ The Act also includes elements of human trafficking. The whole spectrum of the law seeks to ensure that perpetrators will be severely punished for these crimes such as life sentences. The MSA 2015 also introduces new orders to enhance the court's ability to place restrictions on individuals where this is necessary to protect people from the harm caused by modern slavery offences. The Act next creates an Anti-Slavery Commissioner to improve and better coordinate the response to modern slavery. It introduces a defence for victims of slavery and trafficking compelled to commit an offence. It creates an enabling power for child trafficking advocates. The Act also introduces a new reparation order to encourage the courts to compensate victims where assets are confiscated from perpetrators; and closes gaps in the law to enable the police and the Border Force to stop boats where slaves are suspected of being held or trafficked. It is expected that with the passage of the MSA 2015, the UK can further intensify its fight against human trafficking and will certainly retain its current position in Tier 1 of the TIP Report.³⁸⁹

The UK ratified the Council of Europe Convention on Action against Trafficking in Human Being³⁹⁰ (COE Convention) in 2008. The COE Convention serves as a regional human rights treaty with the purpose to prevent human trafficking; to protect human rights of the trafficked victims; to design an effective framework for the protection of the victims and witnesses; and to ensure effective investigation and prosecution. The COE Convention also provides a definition of human trafficking, as well as criminalising it, while promotes the regional cooperation within the countries. The COE Convention also mandates national co-ordination measures including awareness raising, measures to identify and support victims and a 'recovery and reflection period', which was introduced by

³⁸⁸ UK Home Office, *Modern Slavery Bill Published*

<<https://www.gov.uk/government/news/modern-slavery-bill-published>> accessed 7 May 2014.

³⁸⁹ US DoS, *TIP Report 2014: United Kingdom* (Washington DC: US DoS 2014) 394.

<www.state.gov/documents/organization/226849.pdf> accessed 25 September 2014.

³⁹⁰ CETS No. 197.

way of the National Referral Mechanism (NRM) as part of its Action Plan on Tackling Human Trafficking.³⁹¹

The UK has also taken efforts to implement the EU Directive 2011/36/EU,³⁹² a regional agreement that sets the minimum standard on preventing and combating trafficking in human beings and protecting its victim.³⁹³ According to the European Commission's Report in 2016, the UK (England and Wales) has included an appropriate criminal offence for human trafficking MSA 2015 and other related legislation relating to human trafficking and exploitation of others.³⁹⁴

These regional mechanisms manifest firm regional efforts in addressing the trafficking problems; hence a study of them could be useful in comparison with the ASEAN regional efforts, though that goes beyond the purpose of this thesis.

As stated above, as part of its obligations under the COE Convention, the UK Government introduced the NRM being a framework for victim identification and support. Aside from the MSA 2015, the European Commission's Report in 2016 recognises the NRM that formalises the identification of victims of trafficking and to facilitate their referral to support services.³⁹⁵

³⁹¹ The UK Government, 'Human Trafficking: The Government's Strategy' (London: Home Office 2011)

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/97845/human-trafficking-strategy.pdf> accessed 15 April 2014.

³⁹² Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011. See EU Directive 2011/36/EU art. 7.

³⁹³ The Aire Centre, 'Monitoring Report on the Implementation by the United Kingdom of EU Directive 2011/36 on Preventing and Combating Trafficking in Human Beings' <www.airecentre.org/data/files/Monitoring_Report_on_Implementation_of_EU_Directive_July_2012.pdf> accessed 5 March 2017.

³⁹⁴ European Commission, 'Report from the Commission to the European Parliament and the Council Assessing the Impact of Existing National Law, Establishing as a Criminal Offence the use of Services which are the Objects of Exploitation of Trafficking in Human Beings, on the Prevention of Trafficking in Human Beings, in Accordance with Article 23 (2) of the Directive 2011/36/EU'. <<http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/12/ST-15198-2016-INIT.pdf>> accessed 4 March 2017.

³⁹⁵ *ibid* 9.

The UK Government also established the UK Human Trafficking Centre (UKHTC) as a dedicated multi-agency organisation led by the National Crime Agency (NCA) in dealing with human trafficking. The NCA plays a vital role in gathering intelligence and coordinating efforts against serious, organised and complex crimes,³⁹⁶ particularly the Border Policing Command (BPC) responsible to pursue those who commit serious or organised crime that affects the UK whether they are overseas, or within the country.³⁹⁷ At the same time, the UK Government, by way of engaging NGOs and civil society, has been effectively able to provide protection to the victims of trafficking, manifested through cooperation as well as financial contributions for Project Poppy, Salvation Army and many others, which enhance the application of 'Partnership' element in anti-trafficking efforts.³⁹⁸

The efforts to address human trafficking in the UK do not stop at promulgating the MSA 2015. The UK also has other anti-human trafficking mechanisms such as the human trafficking czar, the NRM as well as the setting up of the specialised institutions such as the UKHTC and the NCA. Therefore the UK is a fitting policy transfer model into Malaysian setting.

3.9. Conclusion

Human trafficking is a global and regional phenomenon and is plaguing serious problem in Malaysia. Various efforts have been or are being taken by Malaysia, including: accession to the international legal instruments including the Convention 2000, Trafficking Protocol; regional cooperation within ASEAN and Bali Process; promulgation of its dedicated anti-trafficking law in the form of ATIPSOM 2007. However, Malaysia was listed under Tier 3 of the TIP Report 2014 and only elevated to Tier 2 Watch List in 2015 and 2016. It shows that Malaysia's efforts thus far are unsatisfactory, at least from the perspective of

³⁹⁶ The National Crime Agency, 'About Us' <www.nationalcrimeagency.gov.uk/about-us> accessed 16 September 2014.

³⁹⁷ The National Crime Agency, 'Border Policing Command' <www.nationalcrimeagency.gov.uk/about-us/what-we-do/border-policing-command> accessed 16 September 2014.

³⁹⁸ The UK Government (n 391).

the TIP report. No doubt, there are obstacles that Malaysia has to face in its anti-human trafficking effort, amongst others involving strategy, law and enforcement.

Notwithstanding, Malaysia has learnt from these obstacles due to its experiences in handling the problem. Based on these experiences, the Malaysian state knows it must do more to combat the problem. However, there are hindrances that Malaysia needs to face and address. The political and security problems as well economic uncertainties in the region put Malaysia in a dilemma as it continues to receive migrant workers, legal or illegal. The agriculture and industrial sectors as well as the affluent market for domestic workers certainly wish to attract labour at lower costs as compared to employing locals. At the same time, for the economic sector, Malaysian needs for cheap labourer, and at times forced labourers have contributed to expand the Malaysian economy due to low costs, where most industry can keep the high expenses and cost at bay. Anti-trafficking efforts could thus jeopardise the economic interests of Malaysia due to possible loss of cheap labourers.

As well as needing to act further for domestic policy reasons, the TIP rating also places Malaysia in the 'hall of shame' in international fora and so jeopardises its foreign standing and role it wishes to play in the UN and ASEAN. Therefore, it would be of interest to Malaysia to ensure that the problem of human trafficking is properly addressed.

Based on the above points, Malaysia can benefit from policy transfer from the UK experience. Notable measures by the UK worth considering for Malaysia include: the establishment of a human trafficking commissioner, a protection regime and treatment for trafficked victims, and the regional cooperation to combat trafficking. These issues will be discussed in the forthcoming chapters.

Chapter Four

Human Trafficking in Malaysia: Policies and Strategies

4.1. Introduction

The purpose of this chapter is to provide critical analysis about the application of the anti-human trafficking policies and strategies within the perspective of Malaysia. Human trafficking is viewed as a global, regional and trans-boundary legal, social and political issue. There is an understanding that the problem should be addressed because every country in the world is not spared from the severity of human trafficking.¹ Therefore, such policies and strategies must be applied at the international level by implementing a concerted effort to combat human trafficking problems. They must then be effectively applied and implemented in each individual state in a way that suits the nature of the problem and the legal and other features in each state.

In this regard, this chapter discusses policies and strategies to combat human trafficking in Malaysia in the light of the international law.

This chapter also scrutinises the security agenda perspectives reflecting the government's struggle to transform itself from a colonial territory into a cohesive and united nation.² Therefore, this chapter presents a critical review and assessment of the reasons why overall Malaysian security policy influences its policy to address and combat human trafficking problems.

This chapter is divided into two main parts. First, it will focus on the definition and meaning of policy and strategy, and the nature of public policy particularly with regards to efforts to address problems in criminal justice and in particular human trafficking, and how such policy should be implemented strategically.

¹ International Organization for Migration, 86th Session of the IOM Council (2003), *Information Documents on Trafficking in Persons: IOM Strategies and Activities*, (Geneva: IOM, 2003) Agenda Doc. MC/INF/270) 1.

² Michael I Magcamit, 'A Case of Cohabitative Security: The Philippine and Malaysian Experience,' (2014) 10:1 *Journal of Human Security* 32.

Secondly, this chapter will discuss the policy and strategy regarding human trafficking in Malaysia, the challenges and how to move forward. This will involve elucidation of the application of the international treaties such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000 (Trafficking Protocol) and their application is suitable in Malaysia's setting.

4.2. Background to Anti-human Trafficking Policy and Strategy

4.2.1 Anti-human Trafficking Policy and Strategy as Fulfilment of Obligations to the UN Anti-Human Trafficking Treaties: The Case of Malaysia

The UN Convention against Transnational Organised Crime 2000 (UN Convention 2000) and the Trafficking Protocol 2000 seem to place a duty on the member states to harmonise their domestic measures pertaining to human trafficking. For example, the UN Convention 2000 article 34, places an obligation to states parties to take necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of their domestic laws, to ensure the implementation of their obligations under the Convention. Further, the Trafficking Protocol 2000 article 5, places duties on states with regards to the criminalisation of human trafficking, article 6 for the protection of the trafficked victims, article 7 on appropriate measures to permit trafficked victims to remain in the state's territory, article 9(1) on prevention measures, and article 9(5) on other measures, such as educational, social or cultural aspects, including through bilateral and multilateral cooperation, to discourage demand that fosters all forms of exploitation of persons.

Malaysia signed the UN Convention 2000 in 2002 and ratified it in 2004. In 2007, the Malaysian Parliament passed the Anti-trafficking in Persons and Anti-smuggling in Migrants (Malaysia) Act 2007 (ATIPSOM 2007) as a precursor to its accession to the Trafficking Protocol, which was exercised in 2009. The Minister of the Prime Minister's Department, during the second reading of the

ATIPSOM Bill, stated that the law is a clear demonstration of Malaysia's commitment to fulfil its obligations to the Trafficking Protocol 2000.³

International law is one of the reasons why Malaysia commits to fulfil the imposed international law obligations and motivates itself to implement the Trafficking Protocol 2000. But despite international law being the headline of Malaysia's anti-human trafficking efforts, the passage of the ATIPSOM 2007 is also a manifestation of Malaysia's interest and commitment to address human trafficking problems and to avoid becoming a 'hot spot' of human trafficking activities due to its status as one of the most economically dynamic countries in the Southeast Asian region.⁴ This is because the main purpose of the ATIPSOM 2007 is to create a single law to consolidate all efforts to prosecute offenders, prevent human trafficking activities, as well as to provide care and protection to human trafficking victims.⁵

Apart from the above reasons, the promulgation of the ATIPSOM 2007 and its interest to reflect anti-human trafficking international law could also be due to Malaysia's policy backdrop which emphasises a highly securitised approach based on its British colonial experience, economic development and socio-political. These issues will be discussed in section 4.2.3.

4.2.2 Human Trafficking as a Threat to Human Security

Security policies tend to focus on threats to states and their security capabilities.⁶ However, after the end of the Cold War, the attention of world political affairs has shifted from the security of state to the security of individuals and communities, combined with human rights and human development. This is because the threat to human security is no longer just about personal or local or national problems, but has become global.⁷

³ Parliament of Malaysia House of Representatives, *Hansard Anti-Trafficking in Persons 2007 Bill*, DR.9.5.2007, 28.

⁴ *ibid.*

⁵ *ibid.*

⁶ Mary Kaldon, *Human Security* (Cambridge: Polity Press 2007) 182.

⁷ UNDP, *Human Development Report 1994* (New York: UNDP 1994) 2.

The idea of human security was coined by the UN Development Programme (UNDP) in its Human Development Report 1994 as a new approach to human development problems.⁸ The Human Development Report divides major threats to human security into seven categories such as economy, food, health, environmental, personal, community and political.⁹ In 2003, the UN Commission on Human Security further defined human security to mean 'protecting fundamental freedoms... that are the essence of life; protecting people from critical (severe) and pervasive (widespread) threats and situations... using processes that build on people's strengths and aspirations... creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity'.¹⁰

By contrast, Malaysia's security perspectives and agenda are the reflections of its government's struggle to transform itself from a colonial territory into a cohesive and united nation.¹¹ Due to this backdrop, Malaysia's present political system also reflects itself being a product of three important factors: its colonial experience from the British colonial masters, its economic conditions, and socio-cultural factors.¹² All three factors have much influenced its domestic security doctrines. Malaysia's security principles adopt a comprehensive approach in defining its national security by combining its military, political, economic, social, cultural and psychological components.¹³

The Malaysian policy backdrop can be explained further by scrutinising the three factors as stated above. The first, Malaysia's British colonial experience, influences the Malaysian policy perspectives and can be seen in the security

⁸ Rashila Ramli and others, 'Towards a Modified Approach to Human Security in Southeast Asia: A Perspective from Bangi' (2011) 20:3 *Pertanika Journal of Social Science and Humanities* 577.

⁹ *ibid.*

¹⁰ United Nations Commission on Human Security, *Human Security Now* (New York: United Nations 2003) 4.

¹¹ Magcamit (n 2).

¹² Ho K Leong, 'Dynamics of Policy-Making in Malaysia: The Formulation of the New Economic Policy and the National Development Policy,' (1992) 14:2 *Asian Journal of Public Administration* 204.

¹³ Mahathir Mohamad, 'Key Note Address during the First ISIS National Conference on National Security,' 17 July 1986, <www.pmo.gov.my/ucapan/?m=p&pmahathir&id=1127> accessed 29 March 2015.

policy that can be further narrowed down in terms of anti-human trafficking policy and strategy. The tendency of the British colonial regime in Malaysia was to adopt a highly securitised approach to the society's problem in order to protect its interest and the elite group among the Malay locals who were being groomed by the British as a successor government.¹⁴ This is evidenced by the promulgation of the Emergency Ordinance in 1948 particularly as a response by the British colonial government to combat the communist insurgency by declaring a state of emergency.¹⁵ The 1948 Ordinance gives the colonial authorities powers to arrest and detain without trial anyone they believed to be involved in anti-government actions.¹⁶ This solution further influenced Malaysia post-independence on internal security approaches. The Emergency Ordinance 1948 then was replaced by the Internal Security Act (ISA) 1960 which provided the government with extraordinary powers that can impinge on civil rights, as some provisions of the later law included detention without trial on the pretext of preemptive and preventive actions against subversive groups opposing the government and state.¹⁷ Although the ISA 1960 was repealed in 2012, a new preventive and security law emerged in the form of the Security Offences (Special Measures) (SOSMA) Act 2013 along with the amendments to the Penal Code, Criminal Procedure Code and Evidence Act 1950.¹⁸ Two other laws such as the Prevention of Terrorism Act (POTA) 2015 to tackle terrorism issues and threats, and the National Security Act (NSC) 2016 that empowers the Prime Minister to declare a 'security area', allows the government to deploy security forces to such area and other security measures were additional laws promulgated to address security issues in Malaysia. These laws are the offspring of the ISA 2016.

¹⁴ Hari Singh, 'Malaysia's National Security: Rhetoric and Substance' (2004) 26:1 *Contemporary Southeast Asia* 1.

¹⁵ Barbara W Andaya and Leonard Y Andaya, *A History of Malaysia* (2nd edn, Hampshire: Palgrave 2001) 271.

¹⁶ Tyler JB Jeffrey, 'Preventive Detention in Malaysia: Constitutional and Judicial Obstacles to Reform and Suggestion for the Future' (2013) 41 *Georgia Journal of International and Comparative Law* 535.

¹⁷ Singh (n 14).

¹⁸ Abdul Razak, Jevaid Rehman and Joshua Skoczylis, 'Prevent' Policies and Laws: A Comparative Survey of the UK, Malaysia, and Pakistan' in Genevieve Lennon and Clive Walker (eds) *Routledge Handbook of Law and Terrorism* (London: Routledge 2015) 394.

In relation to economic factors, Malaysia is a rapidly developing state seeking to achieve certain economic levels such as a constant 7% economic growth as espoused by its Vision 2020.¹⁹ In this regard, the Malaysian government has promised to deliver to the people economic prosperity, even at the expense of individual rights, liberties and other values of the society.²⁰ Therefore, the expansion of economy forces Malaysia to seek workers from abroad. While a policy is put in place to control the importation of foreign workers, it is susceptible to abuses by errand employers and perpetrators of human trafficking. This issue was discussed in Chapter Three.

With regards to the social-cultural factors, core policy includes the issue of protecting its indigenous people or the *bumiputra*²¹, particularly after the racial riots on 13 May 1969.²² Prior to Malaysian independence, the British curbed the influence of the anti-colonial forces with Malay ethnic elites, who were trained by the British and groomed to take over political authority and state office to ensure continuity in economic policy-making.²³ After independence, the post-colonial Malaya government embarked upon an economic development emphasising economic diversification. The government commitment to the economic development at the time enabled the predominantly Chinese local businesses to further consolidate and strengthen their position. The ethnic division then created resentments among the majority Malays due to economic inequality and growing gaps between the rural and urban areas, whilst the non-Malays' frustrations were directed against the Malay-dominated government.²⁴ The sporadic resentments between the two ethnics have culminated in the racial riot in 13 May 1969.

¹⁹ Mahathir Mohamad, 'The National Congress Vision 2020: The Way Forward' <<http://www.mahathir.com/malaysia/speeches/1997/1997-04-29.php>> accessed 6 May 2016.

²⁰ Marzuki Mohamad, 'Between Legalisation of Politics and Politicisation of Law: Politics, Law and Development in Malaysia' (2004) 65 *Akademika: Journal of Southeast Asia Social Science and Humanities* 45.

²¹ *Bumiputera* is a Malay word literally means the 'son of the soil'. The Malays are the main *bumiputera* in Peninsular Malaysia, while in Sabah and Sarawak the *bumiputera* consists of the indigenous people.

²² Jomo K Sundaram and Wee C Hui, 'Lessons from Post-Colonial Malaysian Economic Development,' in Augustine K. Fosu (ed), *Achieving Development Success: Strategies and Lessons from the Developing World* (Oxford: OUP 2013) 51.

²³ *ibid.*

²⁴ *ibid* 52.

Following the May 1969 incident, Malaysia adopted an interventionist regulatory policy in the form of New Economic Policy (NEP), which outlines affirmative action strategies for the *bumiputras*.²⁵ Although the NEP sought to create the socio-economic conditions for 'national unity' towards achieving 'poverty eradication' and 'restructuring of the society',²⁶ it seems that while the government policy is very much inclined towards empowering the locals, particularly the *bumiputras*, it denies the equal significance of those people of different nationalities, culture and background. In this regard, there is a problem of attitude among the locals to have less concern about the minority. Moreover, foreigners are not treated as equals. This factor is also attributed to lack of cosmopolitanism in Malaysia, which is discussed in the next section.

The two factors above have shaped the political situation in Malaysia. The socio-political scenario in Malaysia has forced the government to put its preference to its own people, particularly the majority above others,²⁷ therefore causing the minority and foreign people vulnerable to human trafficking and putting human security in Malaysia at risk.

The basis for the connection between human security and human trafficking is because the latter has direct bearings on human security matters at various national, regional or global levels. This is also because human security is related to the threat against people's lives, as it includes 'freedom from death, poverty, pain, fear or whatever else makes people feel insecure'²⁸ that trafficked victims may experience. Further, given the immense profit gained by the shadow economy of the illegal trade of humans, it is therefore a magnet for various

²⁵ Amarjit Kaur, *International Migration and Governance in Malaysia: Policy and Performance*, UNEAC Asia Papers No. 22 2008 University of New England, NSW, Australia <pandora.nla.gov.au/pan/10530/20081020-0006/www.une.edu.au/asiacenter/No22.pdf> accessed 2 May 2015.

²⁶ Ragayah HM Zain, 'Poverty Eradication and Income Distribution' in Hal Hill and others (eds), *Malaysia's Development Challenges: Graduating from the Middle* (Oxon: Routledge 2012) 233.

²⁷ Diane K Mauzy, 'From Malay Nationalism to Malay Nation?' in Lowell W. Barrington (ed), *After Independence: Making and Protecting the Nation in Postcolonial and Postcommunist States* (Michigan: University of Michigan Press 2006) 60.

²⁸ Mohamed Y Mattar, 'Human Security of State Security? The Overriding Threat in Trafficking in Persons' (2006) 1 *Intercultural Human Rights Review* 249.

parties engaged in the national and transnational crimes.²⁹ At the same time, human trafficking is a result of human problems arising from its underlying root causes including economic and social disparity, unemployment, lack of education and lack of resources, among others. Therefore, human trafficking must be engaged as a multifaceted problem, the effects of which ripple beyond traffickers and victims, and the proliferation of which is very much connected with the broader social, political and economic forces.³⁰

Therefore, human security perspectives can be applied to anti-human trafficking policy. This is because at the outset of the anti-human trafficking debate, policymakers and advocates derive their understanding of human trafficking from precepts of international law and human rights.³¹

In the light of human trafficking being a threat to human security, the anti-human trafficking policy and strategy are prevalent in the effort to combat human trafficking. This is to ensure that this egregious criminal activity is eliminated for the safety and security of human beings. To ensure effective implementation of such strategy and policy, there has to be a generally acceptable and agreed notion as to the root of the problem, how the international community tackle it and its adaptability at the national and local levels.

4.2.3. Human Trafficking and Cosmopolitanism

The cosmopolitan discourse in the context of human trafficking may be ideally matched with the global justice concept as coined by Immanuel Kant on the universal hospitality of foreigners. According to Kant, a stranger shall not be treated as an enemy when the person arrives on the land of another state, although a state can refuse his entry but should not treat him with hostility. Further, the state must not ill-treat a foreign person as long as he comes in a

²⁹ Michael Chibba, 'Understanding Human Trafficking: Perspectives from Social Science, Security Matters Business and Human Rights' (2014) 9:3 *Contemporary Social Science: Journal of the Academy of Social Science* 311.

³⁰ Alex Kreidenweis and Natalie F. Hudson, 'More Than a Crime: Human Trafficking as Human (In)Security' (2015) 16 *International Studies Perspectives* 67.

³¹ *ibid.*

peaceful manner.³² This concept of hospitality should be applicable in the perspective of victims of human trafficking.

The cosmopolitan approach should also be aimed at preventing human trafficking in a much more long-term perspective about structural factors of global inequality and the most inclusive set of root causes.³³ This can include the issues pertaining to economic and gender inequality, ethnic, religious and national discrimination as well as conflict, peacekeeping and post-conflict reconstruction. Based on the arguments in Chapter Three, these factors are contributing to the expanding human trafficking phenomenon.

Therefore, the principle of global justice would form a further basis for the development of anti-trafficking policies. The policy approach may move beyond just human rights, by including the following: first, the policy will emphasise the rights of trafficking victims; second, it will provide cosmopolitan impartiality; third, it requires the commitment of states to long-term structural change in global economy; and fourth, it requires respect for the agency of victims and finally provisions of support to develop viable alternative livelihoods.³⁴

Cosmopolitanism may also augment anti-trafficking efforts by proposing a trans-border moral perspective to support social and economic sectors in the affected countries. This is because cosmopolitanism can provide for moral duties beyond state borders, civil society and individuals such as investing into social development and creating alternative livelihoods for citizens of other states.

However, the concept may not be parallel with the socio-cultural and socio-economic setting in Malaysia due to the lack of cosmopolitanism in the

³² Immanuel Kant, *Perpetual Peace: A Philosophic Essay* (Benjamin F Trueblood tr, Boston: The American Peace Society 1897) 19.

³³ Christien van den Anker, 'Cosmopolitanism and Trafficking of Human Beings for Forced Labour' in Gayle Letherby and others (eds), *Sex as Crime?* (Cullompton: Willan 2008) 151.

³⁴ Christien van den Anker, 'Contemporary Slavery, Global Justice and Globalisation', in Christien van den Anker (ed), *The Political Economy of New Slavery* (Basingstoke: Palgrave, 2004) 15.

Malaysian society, which can be inherently prejudicial towards migrants and foreigners.³⁵

While generally the 'affirmative action' set under the NEP in Malaysia gives advantage to the *bumiputras*, the protectionist approach is also expanded to the Malaysian citizens especially under labour law. The policy on hiring foreign workers states that industries that require migrant labour will be scrutinized before importation is allowed.³⁶ The employers are required to advertise new recruitments with priorities be given to the local employees. The implicit labour policy in Malaysia also provides for 'hire first and fire last' for all Malaysian nationals with respect to the recruitment of low-skilled foreign labour, and in no way the foreign labourers are able to integrate with the locals.³⁷ Import of contract migrant labour is subject to the labour market test. For example, employers must prove that there are no local workers for the particular job by having the post advertised before they are allowed to hire foreign labours.³⁸

4.3. Policy and Strategy

Having set on the background in section 4.2, the next part of this chapter will consider notions of policy and strategy, their differences and linkages in relation with the anti-human trafficking efforts taken at the international, regional and national levels. Such discussions will help to identify, elucidate and analyse the concept of public policy process and implementation in Malaysia, thus enabling the understanding of its anti-human trafficking policy and strategy.

³⁵ Amy Gurowitz, 'Migrant Rights and Activism in Malaysia: Opportunities and Constraints' (2000) 59:4 *Journal of Asian Studies* 863.

³⁶ Siti A Osman and Rohani A Rahim, 'Migrant Workers in Malaysia: Protection of Employers' (2014) 22 (S) *Pertanika Journal of Social Science and Humanities* 271.

³⁷ Max Tunon and Nilim Baruah, 'Public Attitude against Migrant Workers in Asia' (2002) 1:1 *Migration and Development* 149.

³⁸ Osman and Rahim (n 36).

4.3.1 Policy

The word 'policy' is not a tightly defined concept. It seems to be a highly flexible one, and can be used in different ways on different occasions.³⁹ Policy can be in the form of specific principles adopted by the state, organisations, or even teams. Policy can simply be defined as 'a principle or course of action adopted or proposed as desirable, advantageous, or expedient; especially one formally advocated by a government, political party, *et cetera*.'⁴⁰

The focus of this section is on public policy. Generally, in any society, governments enact laws and regulations, issues policies, and allocate resources. The term 'public policy' is to signify a set of legal systems, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives. The power to enact laws is usually vested upon the state, which is defined as a set of institutions with superordinate powers over a specific territory of jurisdiction.⁴¹

Public policy is made for various reasons. It can be an effort to signal concerns about emerging problems in some issues, or political problems to key constituents, to demonstrate influence by elected officials over government agencies, to cause changes of the agencies and individuals' behaviour, and to produce a socially desirable outcome.⁴²

In this regard, it is understandable that public policy is made by the state or any state institutions vested with power at various levels, be that national, regional or local. Notwithstanding, there are supra superordinate entities or institutions which are the international or regional institutions which are vested with certain

³⁹ Michael Hill, *The Public Policy Process* (5th edn, Essex: Pearson Longman 2009) 15.

⁴⁰ 'policy, n' (OED Online, OUP December 2016)

<<http://www.oed.com/view/Entry/146842?rskey=xkBKaE&result=1#eid>> accessed 5 March 2017.

⁴¹ Hill (n 39) 19.

⁴² Richard F. Elmore, 'Instruments and Strategy in Public Policy' (1987) 7:1 *Policy Studies Review* 174.

powers to regulate or make laws such as the UN, the World Trade Organisation, the European Union and so on.⁴³

The public policy process involves several stages. Generally, the policy maker will have to identify the problem as the starting point of the whole process. The problem must be clearly defined and understood at an appropriate scale. Then policy will be formulated that represents ideas and solutions addressing the problem and does do in a way that is acceptable to the society and politically palatable.⁴⁴ Next, the policy is adopted and implemented. This is an important stage of formality, as it represents a governing entity's commitment to enforcing the policy tenets.⁴⁵ Further discussion of the policy implementation will be dealt with in a different section of this chapter.

Public policy is meant to be implemented for it to achieve its specific goals. Much alike the policy formulation, the implementation of the public policy is also an iterative process and may involve many stakeholders across government agencies and governing bodies. The successes of the policy will very much depend on the actors responsible to enforce it as well as how well the policy was crafted during the problem identification and formulations stages.⁴⁶ This is because the content of such policy, and the impact on those affected by it, may be substantially modified, elaborated or even negated during the implementation stage,⁴⁷ and 'policy is made as it is being administered and administered as it is being made'.⁴⁸

The circle of public policy completes when it is goes through policy evaluation stage. At this stage, the success or failure of such policy is assessed so as to enable the government to move towards development of subsequent policies. Evaluation is undertaken using empirical research, addressing tangible goals as well as intended and unintended social, economic and environmental

⁴³ Hill (n 39) 20.

⁴⁴ Brandi Robinson, 'Stages of Public Policy' (The Pennsylvania State University 2014) <www.e-education.psu.edu/eme803/node/516> accessed 8 March 2015.

⁴⁵ *ibid.*

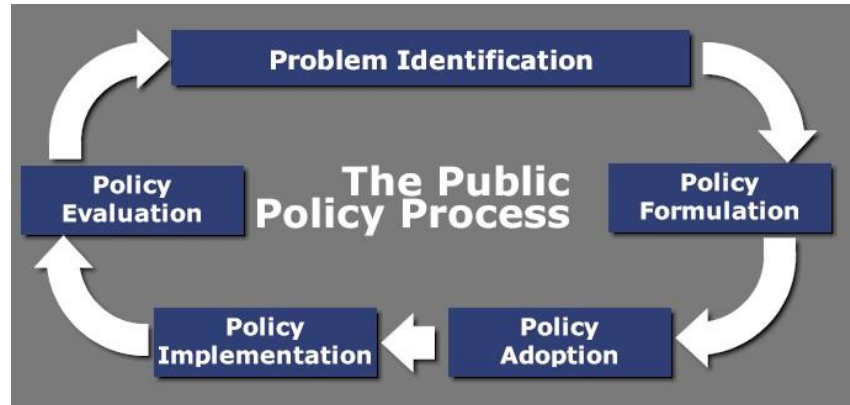
⁴⁶ *ibid.*

⁴⁷ Michael Hill and Peter Hupe, *Implementing Public Policy* (London: SAGE 2005) 7.

⁴⁸ James E. Anderson, *Public-Policy Making* (New York: Praeger 1975) 79.

outcomes as a result of the policy implementation.⁴⁹ Diagram 4.1 below illustrates the process.

Diagram 1 : Public Policy Process⁵⁰



4.3.2 Strategy

The concept of strategy is central in the studies of managerial, organisation or policy sciences. The word strategy originates from the Greek 'Strategos' or a 'General' which in turn became a root term for the meaning of 'army' and 'lead'.⁵¹ In the Greek verb, *stratego* means 'plans the destruction of one's enemies through effective use of resources',⁵² or with an enriched definition such as 'the practical adaptation of the means placed at a general's disposal to the attainment of the objects in view'.⁵³ It thought to be 'the art of bringing the enemy to battle on terms disadvantageous to him'.⁵⁴

Therefore, 'strategy' is pertinent to human activity particularly in the organised setting.⁵⁵ Strategy deals with the practical management of human affairs, whether in business, in government, in the warfare or in the development and

⁴⁹ Robinson (n 44).

⁵⁰ Jonathan Mott, 'The Policy Process'

<www.thisnation.com/textbook/processes-policyprocess.html> accessed 8 March 2015.

⁵¹ Jeffrey Bracker, 'The Historical Development of the Strategic Management Concept' (1980) 5:2 *Academy of Management Review* 219.

⁵² *ibid.*

⁵³ *The Encyclopaedia Britannica* (11th edn, 1910) Vol 25, 986.

⁵⁴ *ibid.*

⁵⁵ Roger Evered, 'So What is Strategy?' (1983) 16:3 *Long Range Planning* 57.

the transformation of the society,⁵⁶ and involves separating thinking from doing and creating new functions staffed by specialists, by strategic planners.⁵⁷

Therefore, how is strategy related in the effort to combating human trafficking? According to the UK Ministry of Justice, strategy in criminal justice is the essence of a modern public service which provides a swift, determined response to crime, treats victims and witnesses with the care and consideration they deserve, and provides much better value for money to the taxpayer.⁵⁸ All these elements are vital to creating a good criminal justice system responding well to all parties involved.

A major distinction between policy and strategy is that while the former can be understood as a guide to the thinking and action of the decision makers, strategy concerns the direction in which human, physical and capital resources will be deployed, utilised and applied in order to maximise the intended objectives in the face of difficulties.

Therefore, it can be summarised that policy involves a recognition that there should be an organised response to the problem or risk; therefore a decision should have to be in the form of policy. Strategy, on another hand, could be the product of such decision, some kind of patterning which policymakers want to enact by trying to impose an order in the future.

4.3.3 Malaysia's Public Policy and Strategy

The initial public policy formulation in Malaysia, much alike most of the Third World countries, is essentially a directed exercise.⁵⁹ The ability of Malaysian leaders to put their beliefs into action has always been powerful, because of the

⁵⁶ Evered (n 55).

⁵⁷ Henry Mintzberg, 'The Fall and Rise of Strategic Planning (1994) Jan-Feb *Harvard Business Review* 107.

⁵⁸ United Kingdom Ministry of Justice, *Transforming the CJS A Strategy and Action Plan to Reform the Criminal Justice System* (London: The Stationery Office Limited 2013) 3.

⁵⁹ Donald L Holowitz, 'Is there a Third-World Policy Process?' (1989) 22 *Policy Sciences* 197.

domination of elite groups in the political system and the effectiveness of its bureaucracy to implement such policies.⁶⁰

The tendency to centralise the policy making process in Malaysia somehow continues to be at the hands of the political elites. Even though the formulation process is open to public opinion and interest group, it is nevertheless a relatively autonomous administrative act, mostly directed by the political elite,⁶¹ in this instant either by the federal or state governments. More often than not, public policy in Malaysia mirrors the 'top-down' process, formulated without much consultation with the public. This particularly occurs at the time of crisis, for example during the currency crises in 1997-98 when Prime Minister Mahathir set up a National Economic Action Council (NEAC) to find the solution to address the economic problem at that point. This led to the pegging of Malaysian currency, Ringgit Malaysia (RM), at RM3.80 against a US Dollar, putting up capital control and bailing out some strategic business entities.⁶² Against all odds, Malaysia succeeded and was able to recover its economy.⁶³

Malaysian public policy is generally built upon the requirement of the political and social structures and the future demand of the nation as a whole. With its characteristic as a multi-ethnic, multi-religious and multi-cultural society, any public policy formulation has to consider various factors such as political, social and economic factors acceptable to the citizens. This is reflected by the formulation of the National Economic Plan (NEP) after the racial riots in 1969. The NEP outlines the affirmative action plans particularly on social and economic gaps among different ethnic groups in Malaysia.

Malaysia inherited many characteristics of British political and administrative rule including education, political, administrative and legal systems, that were

⁶⁰ Donald L Holowitz, 'Cause and Consequences in Public Policy Theory: Ethnic Policy and System Transformation in Malaysia' (1989) 22 *Policy Sciences* 249.

⁶¹ Ho (n 12).

⁶² Murray Hunter, 'Who Makes Public Policy in Malaysia?'

<<http://asiapacific.anu.edu.au/newmandala/2013/02/19/who-makes-public-policy-in-malaysia/>> accessed 3 June 2015.

⁶³ Md S Shuib and others, 'The Concept of Mahathiriskonomisme: An Economic Recovery Model During Crisis' (2019) 2:1 *Journal of Politics and Law* 75.

the legacy of more than 100 years of British colonial rule. Such institutions appear to be better functioning and stronger than some other developing countries.⁶⁴ However, policy making in Malaysia is very much influenced by its multi-ethnicity distribution mainly in economic terms, but also political and cultural terms which has been the basic tenet of the Malaysian government and its discourse of legitimacy since the ethnic riots in 1969, which render the government to be typically quite resistant to advocate change in these areas,⁶⁵ especially on ethnic redistribution.⁶⁶

Next, Malaysian public policy must always be in line with the national principles (the Rukunegara) which lists belief in God and good social behaviour amongst them.⁶⁷ This is reflected in the case of *The Ritz Hotel Casino Ltd & Anor v Dato' Seri Osu Haji Sukam*⁶⁸ where the learned Judge described the term 'public policy'⁶⁹ as 'The principle of public policy is this: *ex dolo malo non oritur action*. Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare'.⁷⁰ The case of *The Ritz Hotel* shows that public policy in Malaysia must be made in consideration with religion and good social behaviour amongst Malaysians. In fact the learned Judge compared gambling to prostitution, and the defendant, a Muslim, was perceived to have been involved in an activity frowned upon by his religion and thus against public policy.⁷¹

⁶⁴ Zainal A Yusof & Deepak Bhattasali, *Economic Growth and Development in Malaysia: Policy Making and Leadership* (Washington DC: The World Bank 2008) 31.

⁶⁵ Graham K Brown, Siti Hawa Ali and Wan Manan Wan Muda, 'Policy Levers in Malaysia,' (Centre for Research on Inequality, Human Security and Ethnicity (CRISE) Policy Context Paper 4, May 2004] 2.

⁶⁶ Yusof and Bhattasali (n 64) 95.

⁶⁷ Azmi Sharom, 'Private International Law in the Malaysian Courts', (2006) 10 *Singapore Yearbook in International Law* 357.

⁶⁸ [2006] 6 MLJ 760.

⁶⁹ Jeevan L Kapur (ed), *Pollock & Mulla on Indian Contract and Specific Relief Act* (10th edn, Bombay: N.M. Tripathi 1986).

⁷⁰ *The Ritz Hotel Casino* (n 68) 763.

⁷¹ Sharom (n 67).

4.3.4. Malaysia's Public Policy-making Process

The public policy-making systems in Malaysia are designed through one or a combination of three processes. Firstly, the public policy is made by way of political channels, initiated through Cabinet orders or through the recommendation of one of several political parties. Secondly, it is made through administrative processes at the ministerial level. Since a policy has implications for the administrative machinery, the draft policy is discussed at several high-level of government meetings. Alternatively, thirdly, the policy is made through the combination of both processes by way of integrated approach/interaction. To achieve this, Special Committees may be set up to study the policy in-depth before presenting it to the Cabinet.⁷² The Malaysian Cabinet then will deliberate the proposed policy and, if agreed, the policy will be approved and be implemented.

In general, policy making process in Malaysia must undergo several stages such as identifying arising problems, planning, recommending/formulating suitable alternatives, legitimising policies, implementing the suitable action policy, coordinating various events to suit the established policy and finally evaluating the effectiveness of such policy.⁷³ This is in accordance with the public process as shown in Diagram 4.1 above.

In the meantime, the involvement of non-governmental organisations (NGOs) and civil society is gaining prominence. Previously, their voice and movement were not given high priority, because the government often viewed that they were encouraged by foreign entities and could hinder economic development in the country.⁷⁴ However, the role of NGOs and civil society began to develop in the recent years, such as the establishment of the Royal Commission to Enhance the Operations and Management of the Royal Malaysian Police in

⁷² Prime Minister's Department, Cabinet Division, Putrajaya, 1997 (unpublished).

⁷³ *ibid.*

⁷⁴ Robert S Milne and Diene K Mauzy, *Malaysian Politics under Mahathir* (London: Routledge 1999) 104.

February 2004, apparently as a result of NGOs and civil societies' persistent campaigns and pressure on the government.⁷⁵

Malaysian public policy will usually have specific goals and usually entails an implementation strategy. While public policy in Malaysia usually is translated into in the form of statutes, the strategy of implementation rests in the hands of the bureaucrats. An example of public policy strategic implementation in Malaysia exists through the NEP since 1970. Malaysia's prime development policy before that was aimed at promoting growth with a strong emphasis on the export market. Despite the economic growth during this period being at an annual average of 6%, there was insufficient emphasis on distributional aspects, resulting in socio-economic imbalances among the ethnic groups with negative social consequences in the form of a racial riot in May 1969.⁷⁶ As stated above, the NEP came into existence as an effort to create the socioeconomic conditions for a 'national unity' towards achieving 'poverty eradication' and 'restructuring of the society' in Malaysia. The overriding goal of the NEP was the 'national unity' and the Malaysian government has adopted two major strategies, among others; the NEP's aim is to reduce and eradicate absolute poverty irrespective of race through raising income levels and increasing employment opportunities for all Malaysians; and to restructure society to correct economic imbalances so as to reduce and eventually eliminate the identification of race with economic function.⁷⁷

4.4. Implementation of Public Policy and Strategies

The purpose of public policy is for it to be implemented so that it can achieve its specific goals that have been identified by the policy itself. The implementation is a policy-action relationship⁷⁸ of which needs to be regarded as a 'process of interaction and negotiation, taking place over time, by those seeking to put

⁷⁵ Kua K Soong, 'Introduction: Reform of the Malaysian Police' in Kua K Soong (ed) *Policing the Malaysian Police* (Petaling Jaya: SUARAM 2005) 2.

⁷⁶ Rahimah A Aziz, 'New Economic Policy and Malaysian Multi-ethnic Middle Class' (2012) 13 *Asia Ethnicity* 29.

⁷⁷ *ibid.*

⁷⁸ Hill and Hupe (n 47) 7.

policy into effect and those upon whom action depends'.⁷⁹ For a long time, public policy implementation has been considered a rather mechanistic and apolitical activity. It was once categorised as 'a series of mundane decisions and interactions unworthy of the attention of scholars'.⁸⁰ But implementation can and does lead to reformulation of policies, or to other outcomes than expected, or even to outright failure. This gap of implementation was attributed to different causes, for example to a lack of conditions necessary for successful implementation such as control and monitoring,⁸¹ as well as shaping the policy in itself.⁸²

Policy implementation is always related to the government intention and what it seeks to achieve. Policy implementation is defined as '... what develops between the establishment of an apparent intention on the part of government to do something, or to stop doing something, and the ultimate impact in the world of action'.⁸³ It is also defined as '... a process involving decisions and actions taken toward putting into effect authoritative policy decisions, in the perspective of a government, to fulfil its political promise'.⁸⁴ In this regard, in implementing public policy and strategy, Diagram 2 explains the applicable measures and mechanisms:

⁷⁹ Susan Barret and Colin Fudge, 'Examining the Policy-Action Relationship' in Susan Barret and Colin Fudge (eds), *Policy and Action: Essays on the Implementation of Public Policy* (London: Methuen 1981) 4.

⁸⁰ Donald S Van Meter and Carl E Van Horn, 'The Policy Implementation Process: A Conceptual Framework' (1975) 6:4 *Administrative & Society* 445.

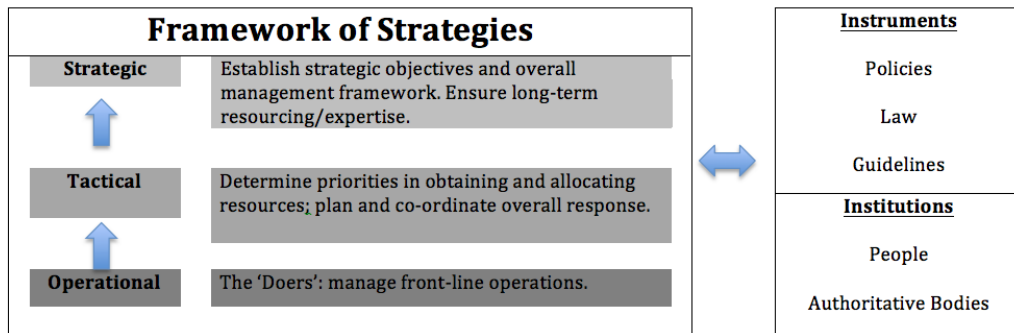
⁸¹ Jeffrey L Pressman and Aaron Wildavsky, *Implementation, How Great Expectations in Washington are Dashed in Oakland: Or, why It's Amazing that Federal Programs Work at All, this Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers who Seek to Build Morals on a Foundation of Ruined Hopes* (3rd edn, California: University of California Press 1984) 164.

⁸² *ibid* 170.

⁸³ Laurence J O'Toole Jr., 'Research on Policy Implementation: Assessment and Prospects' (2000) 10:2 *Journal of Public Administration Research and Theory* 263.

⁸⁴ James P Lester and Malcolm L Goggin, 'Back to the Future: The Rediscovery of Implementation Studies' (1998) 8:3 *Policy Currents* 1.

Diagram 2 : The Framework of Strategic Application⁸⁵



At the highest level of the strategy, there should be a strategic framework of what it intends to achieve and the means it intends to use. Then there is a tactical aspect of the strategy where it determines priority of what to achieve and the allocation of resources, including the funding and people. At this stage, plans and tactics are outlined with the anticipation of the outcome of the act. Finally, should resources have been identified; they must be well informed and trained to execute the job in order to achieve the strategy.

Notwithstanding the above, the implementation of the policy intertwines with the instruments and institutions that have the means and are empowered for its execution. The instruments could involve policy, law and guidelines. In addition, they can also include the budget for the implementation and cooperation both within the national jurisdiction and internationally. As for the institutions, there must be people and authorities to implement the strategy, involving government executives and the relevant government agencies. In the case of anti-human trafficking implementation strategies, they include the police, the immigration and welfare departments and others. At the same time, involvement of NGOs is also crucial.

⁸⁵ Clive Walker and James Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford: OUP 2006).

4.4.1 Malaysia's Public Policy and Strategy Implementation

The implementation of public policy in Malaysia lies on the shoulders of the public service, mainly the federal government agencies, and they are typically required to formulate, implement and monitor the public policies to meet the needs of stakeholders.⁸⁶ They play a critical role in putting the intent of policy into practise, with the essence of the implementation relying on the wide range of bureaucratic actors who are the experts in the field of work.

Throughout the years, the Malaysian public service has played a significant role in the country's economy and social development.⁸⁷ Despite often being criticised as bloated,⁸⁸ with the number of public servants totalling around 1.6 million employees,⁸⁹ the fact is just a matter of definition and structure in Malaysia as compared to other countries. Malaysian civil service comprises almost every aspects and levels of government delivery system, in the federal, state and local governments⁹⁰ and in 28 schemes of service.⁹¹ The Malaysian public service is divided into the federal government, the state governments, federal statutory bodies and state statutory bodies, as provided in the Federal Constitution article 132.⁹² Therefore, having too many people is not really such a big problem, for example, the inclusion of teachers, doctors, police and the armed forces as per the definition of public servants in Malaysia.

⁸⁶ Nik Zainiah NA Rahman, 'National Competitiveness: The Role of Public Sector in Malaysia' (2006) 5:1 *Jurnal Pengurusan Awam* 19.

⁸⁷ Chief Secretary of the Malaysian Government, History of Public Service in Malaysia. <<http://ksn.jpm.gov.my/dokumenattached/rencana/CIVIL-SERVICE-FULL.pdf>> accessed 18 June 2016.

⁸⁸ Noor Hazilah A Manaf, 'Civil Service System in Malaysia' in Evan M. Berman (ed), *Public Administration in Southeast Asia: Thailand, Philippines, Malaysia, Hong Kong and Macao*, (London: CRC Press 2011) 227.

⁸⁹ Ministry of Finance Malaysia, *Touchpoints on Budget 2016* <www.treasury.gov.my/pdf/bajet/ucapan/TouchPoints_Bajet_2016_BM.pdf> assessed 15 September 2016.

⁹⁰ Norma Mansor and Raja Noriza R Ariffin, 'Public Administration in Malaysia' in Meredith L Weiss, *Routledge Handbook of Contemporary Malaysia* (Oxon: Routledge 2015) 103.

⁹¹ Idris Jala, 'Malaysian Civil Service is not Bloated, Government Looking at Ways to Improve' *The Star* (Kuala Lumpur, 27 January 2014) <www.thestar.com.my/business/business-news/2014/01/27/govt-not-bloated-it-is-looking-at-ways-to-improve/> accessed 14 September 2016.

⁹² The Federal Constitution art 132 provides for the public services to include the armed forces; the judicial and legal service; the general public service of the federation; the police force; the joint public services mentioned in art 133 comprising the joint services between the federation and states; the public service of each state; and the education service.

Notwithstanding to the above, the issue with policy implementation by the civil service in Malaysia, may be seen from two different perspectives. First, the Malaysian public service is perceived to be politically tainted/biased due to the fact that it is dominated by a certain ethnicity. Therefore it has some influences on the socio-cultural and service delivery system preferring only the locals, and the majority. This issue has been discussed in section 4.2. Secondly, the issue of corruption may hamper effectiveness and efficiency of public policy implementation. This issue has been discussed in chapter three. These issues have repercussions on human trafficking policy implementation efforts in Malaysia.

On public policies concerning domestic security, the task is vested with the Ministry of Home Affairs who will then makes policies and coordinate the implementation. But the Cabinet remains as the policy arbiter with the relevant ministries⁹³ or agencies submitting policy papers by way of 'Cabinet Papers' presented by the respective ministers for the cabinet's consideration, subject to concurrence of other ministries should the matter of concern be within the jurisdiction of other ministries. For example, should the draft policy involve legal issues, concurrence by the Attorney General should be given prior to the matter going to the Cabinet meeting.

4.5. Anti-Human Trafficking Policy and Strategy

4.5.1 Anti-Human Trafficking Policy

Anti-human trafficking policy can be focused on three main characteristics: First, human trafficking can be considered as a criminal problem, more often than not a transnational organised crime. This is because human trafficking has been a global phenomenon that traverses interstate borders, recruits perpetrators internationally, involves millions of trafficked victims from other countries and is a multi-million dollar business.

⁹³ Paul Sabatier and Daniel Mazmanian, 'The Implementation of Public Policy: A Framework of Analysis' (1980) 8:4 *Policy Studies Journal* 538.

Second, human trafficking poses a great threat to human rights. Trafficked victims are exploited, abused and forced into the sex industry, recruited into forced labour and subject to servitude, forced to be child soldiers and many other forms of exploitation. These abuses deprive them of any human rights protection whatsoever as guaranteed by the Universal Declaration of Human Rights 1948. In this regard, their rights must be protected, and kept separate and distinct from their value as witnesses for the prosecution.

Third, human trafficking is a border security issue. In most cases, human trafficking is a crime perpetrated by the clandestine transnational criminal group involving trans-border illegal activities. These activities are acute problems that can jeopardise state sovereignty because trafficking networks can operate in a surreptitious manner and gain covert access to states' territories. These groups are able to undermine states' control over borders and territory, a fundamental pillar of state sovereignty. Often, they colluded with corrupted government servants at the border checkpoints to facilitate their movements.

Based on the aforesaid backdrop, the authorities have to formulate a policy or a set of policies to counter human trafficking. But these policies are fruitless if they cannot be adopted and implemented unless the authorities have concrete strategies to ensure such policies are taken into action. Based on the Trafficking Protocol 2000, the national anti-human trafficking policy must include the 3P Strategic Paradigm, involving 'Prevention, Prosecution and Protection' as discussed in 4.5.2.1. below.

Accordingly, the anti-trafficking policy framework in this regard should involve these elements. One step is for the state to create a law and make resources available to enforce such law, followed by the education of members of the public about the nefarious nature of trafficking activities, and the public must be recruited to help reduce this crime. This will eventually protect human rights of the victims, and pragmatically will make victims able and willing to come

forward. Such efforts to combat human trafficking will founder without these three aspects of implementation.⁹⁴

4.5.2. Anti-Human Trafficking Policy and Strategy

As stated in Chapter Three, the anti-human trafficking policy and strategy are moulded in the three aspects of Prevention, Prosecution and Protection (3P). It can be understood that this 3P paradigm strategy assigns straightforward roles, such as to the criminal justice agencies including police and enforcement agencies responsible to investigate, the prosecutors and judges to charge, try, convict and sentence, and the welfare and victim protection agencies, including NGOs, to provide protection to the victims.⁹⁵

4.5.2.1 Sources of Anti-Human Trafficking Policy and Strategy

The formulation of the 3P paradigm strategy is derived from the Trafficking Protocol 2000 and the US Trafficking Victims Protection Act (TVPA) 2000. The US had been monitoring human trafficking problems as early as in the 1990s prior to the agreement of the Trafficking Protocol 2000.⁹⁶ The US then pioneered the 3P strategy as its public policy initiatives directed at combating initially the incidences of female sex trafficking.⁹⁷

Prior the promulgation of the TVPA 2000, the Clinton Administration issued a Directive stated in the Executive Memorandum of 1998 on 'Steps to Combat Violence against Women and Trafficking and Girls'.⁹⁸ The Directive pointed out that human trafficking, focused on the trafficking and exploitation of women and

⁹⁴ Eun-hye Yoo and Elizabeth Heger Boyle, 'National Human Trafficking Initiatives: Dimensions of Policy Diffusion' (2015) 40 *Law and Social Inquiry* 1.

⁹⁵ Allison Jernow, 'Human Trafficking, Prosecutors & Judges', in Cornelius Friesendorf (ed) *Strategies Against Human Trafficking: The Role of the Security Sector* (Vienna: Nat. Defence Academy & Ministry of Defence and Sports 2009) 329.

⁹⁶ Vidyamali Samarasinghe, 'Controlling Globalisation in Anti-trafficking Strategies in Asia' (2003) 10:1 *Brown Journal of World Affairs* 91.

⁹⁷ *ibid.*

⁹⁸ US Government Publishing Office, 'Memorandum on Steps to Combat Violence against Women and Trafficking and Girls,' <www.gpo.gov/fdsys/pkg/WCPD-1998-03-16/pdf/WCPD-1998-03-16-Pg412.pdf> accessed 24 March 2017.

girls, as 'fundamental human rights violation'.⁹⁹ President Clinton also outlined a three-tier strategy to combat human trafficking with a focus on the areas of prevention, victim assistance and protection, and enforcement.¹⁰⁰

The US anti-human trafficking strategic approach subsequently became a fundamental component in the initial proposal of the UN for the establishment of an international human trafficking treaty¹⁰¹ This is understandable, because despite negotiations in the Vienna Process,¹⁰² an initial proposal of such a treaty was characterised by sharp disagreement amongst a range of various state and non-state actors. The agreed instrument reflects mainly the primary concerns as per the US draft.¹⁰³ In fact, some argued that, due to embedded US interest in the anti-trafficking effort, the template of the TVPA is entrenched into the Trafficking Protocol.¹⁰⁴ The US proposal was primarily aimed at creating a law enforcement instrument tied to the specific fields of transnational crime and constructed mainly in responding to crimes, enforcing laws, controlling borders and stimulating cooperation among governments.¹⁰⁵

The Trafficking Protocol 2000 requires member states to embrace three basic strategies in the effort to combat human trafficking¹⁰⁶ as follows. First, it should focus on the prevention of human trafficking. Second, the strategy enables the prosecution and appropriate legal enforcement to act against the trafficking

⁹⁹ William J Clinton, 'Steps to Combat Violence and Trafficking Against Women and Girls' (1998) 3:4 *Trends in Organised Crime* 20.

¹⁰⁰ US Department of State, 'How Has the Clinton Administration Taken Steps to Stop the Trafficking of Women and Children?' (https://1997-2001.state.gov/www/global/women/fs_000118_clinton.html) accessed 9 February 2017.

¹⁰¹ Michele Ford and others, 'Labour Migration and Human Trafficking' in Michele Ford and others (eds), *Labour Migration and Human Trafficking in Southeast Asia: Critical Perspectives* (Oxon: Routledge 2012) 3.

¹⁰² The UN Convention and its supplementary Protocols on human trafficking, migrant smuggling and arm smuggling were negotiated under the auspices of the Vienna-based United Nations Commission on Crime Prevention and Criminal Justice (a functional Commission of the Economic and Social Council). The United Nations Centre for International Crime Prevention (part of the UN Office for Drug Control and Crime Prevention), also based in Vienna, served as Secretariat to the Ad-Hoc Committee.

¹⁰³ *ibid.*

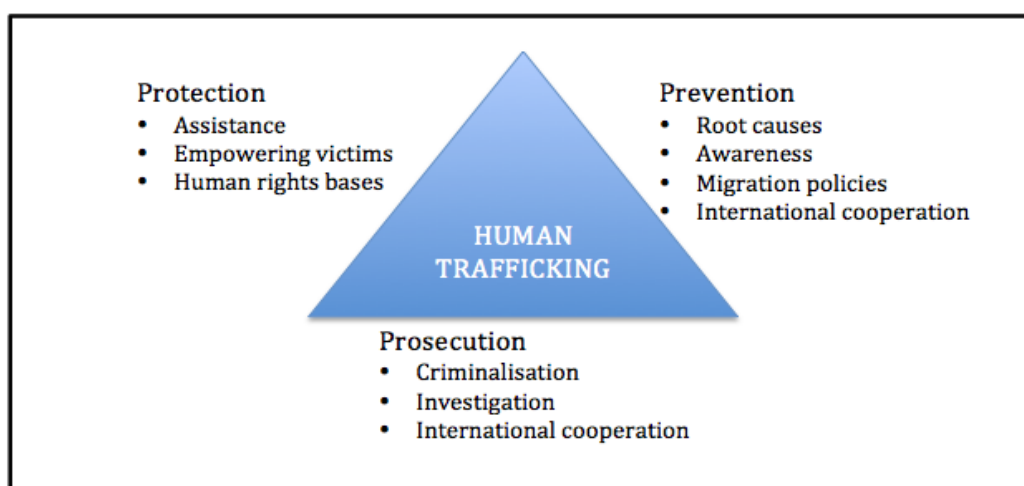
¹⁰⁴ Seo-Young Cho and Krishna Chaitanya Vadlmannati, 'Compliance with the Anti-trafficking Protocol' (2012) 28 *European Journal of Political Economy* 249.

¹⁰⁵ Janie Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (2005) 27 *Michigan Journal of International Law* 437.

¹⁰⁶ *ibid.*

perpetrators. Third, the strategy should provide for protection and assistance to the victims of trafficking.¹⁰⁷ This 3P policy and strategy paradigm should be interconnected in the comprehensive approach to human trafficking and should be a balance between these prongs.¹⁰⁸ Therefore, national adoption of these strategies in the domestic anti-trafficking mechanism manifests compliance with the Trafficking Protocol 2000. This is because the effective adoption of the anti-human trafficking strategies demands and relies on the efforts taken domestically in each member state.¹⁰⁹ The 3P policy and strategy paradigm is illustrated as a triangle in Diagram 3 below and discussed later in this section.

Diagram 3 : Anti-human Trafficking 3P Policy and Strategy Paradigm



4.5.3. Responsibilities of States to Address Human Trafficking Problems

At base, the Trafficking Protocol 2000 works as a treaty aimed at international crime control cooperation and is designed to promote state parties cooperation in combating human trafficking.¹¹⁰ However, while including aspects of criminal

¹⁰⁷ UNODC, *Trafficking in Persons: Global Patterns* (New York: UN 2006)

<www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf> accessed 25 January 2015.

¹⁰⁸ Venla Roth, *Defining Human Trafficking and Identifying Victims: A Study on the Impacts and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Leiden: Martinus Nijhoff 2012) 10.

¹⁰⁹ Cho and Vadlmannati (n 104).

¹¹⁰ Janie A Chuang, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13:1 *Indiana Journal of Global Legal Studies* 137.

justice, such as providing a clear definition of human trafficking, as well as a clear agreement to criminalise human trafficking worldwide, the Trafficking Protocol also contains some elements of protection for trafficking victims and the prevention of trafficking. Therefore, it is pertinent to discuss these three basic aspects of anti-human trafficking strategies as they have become the thrust of the international legal framework. Further, there are additional strategies to the 3P paradigm strategy duly proposed for the effective anti-human trafficking efforts, which will be discussed later in this chapter.

Although there is a global consensus about combating human trafficking, with the international response via the agreement towards the Trafficking Protocol as well as the creation of many global and regional mechanisms to fight human trafficking, including the anti-trafficking strategies, the primary responsibility still rests with the member states for initiating their own anti-trafficking strategies. For instance, the UN Convention 2000, article 5, provides for the state parties to establish criminal offences. The Trafficking Protocol, article 2, promotes the cooperation of state parties to meet the Protocol's objectives to prevent human trafficking and to protect victims. This is mainly because states would be facing the prevalence of human trafficking problems within their own jurisdictions based on political and social conditions, and within their own limited means. In this way, the UN based global anti-human trafficking approach can be a guideline for all states to embark upon when creating their own strategies, policies and laws.

A case example of the above can be illustrated by the UK experience. The policy in the UK is that human trafficking is part of what it terms as modern slavery and the government aims to reduce significantly the prevalence of modern slavery and enhance its international response.¹¹¹ Earlier in 2011, the UK government issued a strategic document entitled 'Human Trafficking: The Government's Strategy' aiming to tackle trafficking from beginning to end: from recruitment to exploitation, ensuring agencies have the right tools and intelligence to reduce

¹¹¹ UK Government, *Modern Slavery Strategy* (London: Controller of Her Majesty's Stationary Office 2014).

the threat, and maintaining effective victim support. The document shows that it has been the UK policy to address and combat human trafficking.

In furtherance of the anti-human trafficking policy, the UK introduced the Serious and Organised Crime Strategy¹¹² and the Modern Slavery Strategy.¹¹³ These strategic papers outline the UK government's comprehensive approach to tackling serious and organised crimes as well as modern slavery, both partly concerning human trafficking, in four strategic ways, among others 'pursue', 'prevent', 'protect' and 'prepare.' It is claimed that this strategy has been successfully implemented and works effectively.¹¹⁴ Under the UK strategy to pursue and prevent, these two principles are intended to reduce the threat from human trafficking by way of disruption and deterrence because 'pursue' involves prosecuting and disrupting individuals and groups responsible for the criminal acts,¹¹⁵ while under the 'protect' and 'prepare' elements, the strategy intends to reduce overall vulnerability to human trafficking, through protecting vulnerable people, raising awareness and resilience and improving victim identification and support.¹¹⁶ The explanation of the UK strategy is set out in the following diagram 4 below:

¹¹² UK Government, *The Serious and Organised Crime Strategy: Annual Report for 2014*, (London: Controller of Her Majesty's Stationary Office, 2015).

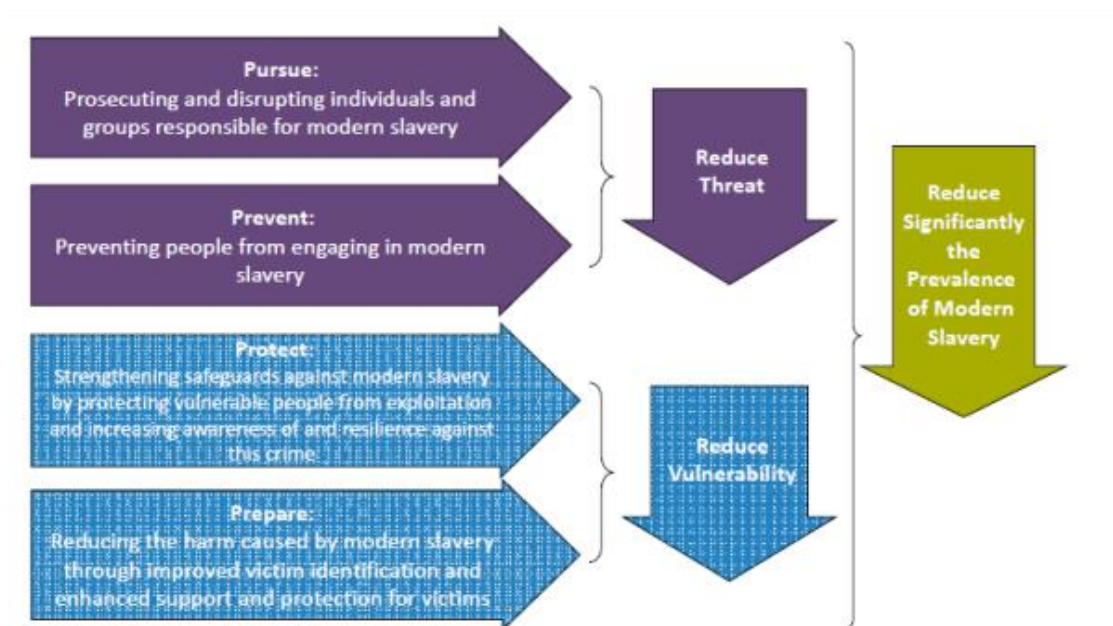
¹¹³ UK Government, *Modern Slavery Strategy* (n 111).

¹¹⁴ *ibid.* para 3.2.

¹¹⁵ *ibid.* para 3.7.

¹¹⁶ *ibid.*

Diagram 4 : U.K. Modern Slavery 4 Strategies¹¹⁷



In contrast to the notion of an action plan, an anti-human trafficking strategy does not mean the detailed plan of actions, specific legal instruments or set of rules of engagement or enforcement against the act of human trafficking and the perpetrators. It is also not a set of programmes projects or tactics to counter anti-trafficking.

4.5.1.1. Strategy of Prevention

The statement of purpose of the Trafficking Protocol 2000 clearly mentions that it is to prevent and combat trafficking in persons, with particular attention given to women and children.¹¹⁸ The Trafficking Protocol 2000 Part III details that state parties' obligations to prevent human trafficking consist of undertaking research, information, mass media and public campaigns on anti-trafficking as well as economic and social activities;¹¹⁹ cooperation with non-governmental organisations and civil society;¹²⁰ training of officials and security personnel; border control, airport and train stations;¹²¹ and pursuing international

¹¹⁷ UK Government, *Modern Slavery Strategy* (n 111). para 3.6.

¹¹⁸ Trafficking Protocol 2000, art 2(a).

¹¹⁹ *ibid* art 9(2).

¹²⁰ *ibid* art 9(3).

¹²¹ *ibid* art 11.

cooperation with other governments and exchanging of information.¹²² At the UN, the strategy for the prevention of human trafficking is centrally focused on raising awareness in both origin and destination countries,¹²³ but the responsibility to implement rests with the individual state parties. Although there is no doubt that enforcement, prosecution and victim protection are strong responses of the criminal justice system, prevention works as the best solution to chronic and potentially growing problems.¹²⁴ This is because it addresses the root causes of human trafficking,¹²⁵ and state parties are obligated to 'take or strengthen measures ... to alleviate ... the factors that make persons ... vulnerable to trafficking, underdevelopment and lack of equal opportunity'.¹²⁶ In this regard, prevention must be undertaken in a concerted, holistic way due to the complexity of human trafficking by the state parties and intergovernmental organisations.¹²⁷

Prevention of human trafficking is perceived to be both a short and long-term measure in combating human trafficking, and requires a global and regional coalition in member states and NGOs.¹²⁸ It is argued that sending countries must be the focal point of the long-term approach in the preventive strategy.¹²⁹ For example, their economic and social development,¹³⁰ with special emphasis on the persons vulnerable to human trafficking, such as women and girls, perhaps constitutes the best long-term mechanism to combat human trafficking.

For the short-term approach, strict border control is the quickest and easiest way of reducing flows of human trafficking.¹³¹ But the border and immigration

¹²² Trafficking Protocol 2000, art 10(g).

¹²³ UNODC, *A Comprehensive Strategy to Combat Trafficking in Persons and Smuggling of Migrants* (Vienna: UNODC 2012) 8.

¹²⁴ Chuang 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (n 105).

¹²⁵ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guidelines 7* UN Doc. E/2002/68/Add.1.

¹²⁶ Trafficking Protocol 2000, art 9(4).

¹²⁷ *ibid.*

¹²⁸ Loring Jones and others, 'Globalisation and Human Trafficking' (2007) 34:2 *Journal of Sociology & Social Welfare* 107.

¹²⁹ *ibid.*

¹³⁰ UN Convention 2000, art 31; Trafficking Protocol 2000, art 9.

¹³¹ Cho and Vadlmannati (n 104).

controls will be difficult to implement especially if the country has porous border areas. However, enforcing strict control over the border would have direct consequences requiring some legal distinction between human trafficking and migrant smuggling. As discussed in Chapter One, the definition of migrant smuggling is distinct from human trafficking as the former emphasises the illegal movement of persons across border for profit,¹³² of which is committed by both smuggler and the smuggled person. Technically, the potential trafficked victim, who has yet to complete the human trafficking process would be apprehended at the border and be considered as a smuggled migrant, and thus would have to face different legal consequences as perpetrator as opposed to being a trafficked victim.

International cooperation with other governmental and international organisations is also essential for a workable preventive strategy. Activities in implementing this strategy seems to be potentially quicker and result oriented as compared to domestic court proceedings such as prosecution and victim protection as both will incur great deal of financial and time constraints. Further, preventive strategy would not involve much change of the domestic legal system or require adoption of new legal mechanisms, which would possibly cause resistance and conflicts with other law.¹³³

At the same time, other activities under this strategy – research, information dissemination, use of mass media, public campaigns and training of officials on anti-trafficking – can easily be accommodated by state parties due to the fact that they are routine activities of any government within their existing resources.

4.5.1.2. Strategy of Protection

Among the prime objectives of the Trafficking Protocol 2000 is to protect and assist trafficked victims. The preamble of the Trafficking Protocol 2000 declares

¹³² UN Protocol against the Smuggling of Migrants by Land Sea and Air 2000 supplementing the UN Convention against Transnational Organized Crime (adopted 15 November 2000 entered into force 28 January 2004) 2241 UNTS 507, art 3.

¹³³ Cho and Vadlmannati (n 104).

that state parties should take action to 'protect the victims of such trafficking, including by protecting their internationally recognized human rights',¹³⁴ while Part II of Trafficking Protocol explicitly provides for the protection and assistance to the victims and outlines state responsibilities to ensure victim protection and rehabilitation. The victim protection aspect is complemented by the '3R approach,' meaning rescue, rehabilitation and reintegration, to emphasise that anti-human trafficking policy, strategy and activities need to internalise in order to be victim-centric.¹³⁵

The first r, 'rescue', would require the authorities to first identify the trafficked victims. This is because victim identification is the most important way to protect the trafficked victims from exploitation, particularly why they are identified at the border crossing, inspection of a work site routine, traffic control or raids of brothels.¹³⁶ This is in line with the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (OHCHR Guidelines) that suggests precise identification of victims,¹³⁷ appropriate training in victim identification¹³⁸ and cooperation among the authorities, officials and NGOs in victim identification and assistance.¹³⁹

Secondly, 'rehabilitation' takes place once the victims are identified, and they will be supported and rehabilitated to ensure their full physical and psychological recovery. This is in line with the Trafficking Protocol 2000, article 6(3), that provides for state parties to consider measures to provide for the physical, psychological and social recovery for the victims including appropriate housing, counselling, medical, psychological and material assistance. This is because they are often vulnerable to drug dependence and HIV/AIDS and must receive health care, psychological assistance, emergency protection and help in reintegration.¹⁴⁰ To implement this rehabilitation approach, it is imperative for the

¹³⁴ Trafficking Protocol 2000, Preamble.

¹³⁵ Roth (n 108) 11.

¹³⁶ Christal Morehouse, *Combating Human Trafficking: Policy Gaps and Hidden Political agenda in the USA and Germany* (Wiesbaden: Springer 2009) 41.

¹³⁷ OHCHR Guidelines 2(1).

¹³⁸ OHCHR Guidelines 2(2).

¹³⁹ OHCHR Guidelines 2(3).

¹⁴⁰ *ibid.*

authorities to provide a protection centre with rehabilitation service. Such a centre will be a place for the protected victims to regain their strength to recover from trauma and to mingle with the community, which will help their rehabilitation process.¹⁴¹

The third r, 'reintegration', is for the purpose of returning and reintegrating the victims to the society following rescue and rehabilitation process and to pursue the criminal justice outcomes.¹⁴² This is due to the fact that if the victims are not reintegrated, their return to society or their home country will risk re-victimisation and re-exploitation. The reintegration frameworks are contained in the Trafficking Protocol 2000, article 8, such as requiring the state parties to facilitate the repatriation of the victims to their home country with due regard to their safety without delay. Article 8 also requires that three considerations must be taken by the state parties, that repatriation shall be with due regard for the safety of victims, their status as victims in any legal proceedings related to human trafficking cases, and repatriation must be made voluntarily.¹⁴³ The state parties are also required to ensure the necessary documents are provided to the victims for their return to origin countries.¹⁴⁴ In addition to the above, the UN also introduced a model law¹⁴⁵ on human trafficking with a victim protection strategy that emphasises the principle of the *non-refoulement* and of the prohibition of inhuman or degrading treatment for the victims' safe return. The *non-refoulement* principle will be discussed in Chapter 5 of this thesis.

At the Vienna Process, the focus was on the tensions between states' desire to combat human trafficking as a crime and border control issue as against their obligation to uphold international human rights law.¹⁴⁶ This dichotomy is based

¹⁴¹ Khairil A Mokhtar and Zuraini A Hamid, 'Incorporating the United Nations Protocol on Trafficking in Persons in the Malaysian Legal Framework' (2016) 24:2 *International Islamic University of Malaysia Law Journal* 377.

¹⁴² Sanja Milijevic and Marie Segrave, 'Responses to Sex Trafficking: Gender, Border and Home' in Leslie Holmes (ed) *Trafficking and Human Rights: European and Asia-Pacific Perspectives* (Cheltenham: Edward-Elgar 2010) 42.

¹⁴³ Trafficking Protocol art 8(2).

¹⁴⁴ Trafficking Protocol art 8(4).

¹⁴⁵ UNODC, *Model Law against Trafficking in Persons* (Vienna: UN 2009)

¹⁴⁶ UN, 'Report of the *Ad Hoc* Committee on the Elaboration of a Convention against Transnational Organized Crime on its fourth session, held in Vienna from 28 June to 9 July 1999' U.N. Doc. A/AC.254/17.

on the report by the UN Special Rapporteur on Violence Against Women, who revealed that failure to protect the human rights of the victims of human trafficking led to their further victimisation, and in some cases, being re-trafficked.¹⁴⁷ Accordingly, human rights advocates attempted to convince UN member states that human right protections were integral to their ultimate crime and border objectives.¹⁴⁸ Although the negotiation gave relatively little attention to human rights protections due to the intense debate on the trafficking definition, the group managed to convince negotiating parties to include a savings clause requiring the Protocol to be interpreted consistently with the obligation of states under international law, including international humanitarian, human rights and refugee law.¹⁴⁹ Article 14 of the Protocol reflects this idea.

But the question remains whether such protection strategy is well received in practice by the state parties, albeit that it is critically important as far as victims are concerned? On one side, the strategy will ensure the protection and assistance to the victims, but, on another, there is a possibility it will trigger resistance domestically. In order for such strategy to be successfully implemented, states must amend their immigration regime and law, thus changing victims' status from illegal immigrants to victims that require assistance. Such assistance will impose financial burden on states as they will have to bear the cost of any assistance programmes such as medical, housing and job training. At the same time, the generosity of the host country in providing victim protection may encourage human trafficking because it might encourage more victims in developing countries to risk illegal migration into those countries.¹⁵⁰ Another issue is that 'victims' may not be the actual victims of trafficking. Due to the conflation between human trafficking and migrant smuggling, smuggled migrants who were apprehended by the authorities may

¹⁴⁷ United Nations Human Rights Commission, 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Randhika Coomaraswamy, On Trafficking in Women, Women's Migration and Violence Against Women' 4. UN Doc. E/CN.4/2000/8.

¹⁴⁸ Global Alliance Against Traffic in Women and others, *Human Rights Standards for the Treatment of the Trafficked Persons* (1999) <www.hrlawgroup.org/resources/content/IHRLG Traffickin_tsStandards.pdf> accessed 6 January 2015.

¹⁴⁹ Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy* (n 110).

¹⁵⁰ Cho and Vadlmannati (n 104).

instead pose as victims of human trafficking, for fear of being prosecuted or deported.

4.5.1.3. Strategy of Prosecution

The Trafficking Protocol 2000, article 3, explicitly mentions that its application is for the prevention, investigation and prosecution of the offences of human trafficking. Article 5 provides for states' obligations to criminalize those attempting to commit human trafficking crimes, participating as an accomplice, organising or directing others to commit, and obstructing justice when carried out in respect of the offence created by the Trafficking Protocol. Further, the UN Convention 2000, article 5, provides that state parties 'shall adopt legislative and other measures to establish criminal offence of the organised criminal group', and article 34(3) provides that 'each State Party may adopt more strict or severe measures' to prevent and combat transnational organised crimes, including human trafficking.¹⁵¹

Criminalisation of human trafficking, in turn, can be said to be the central and mandatory part of the Trafficking Protocol 2000. This is due to the fact that the criminalisation of human trafficking is widely considered as an essential component of a comprehensive national response to combat and eliminate human trafficking, ending impunity for the trafficking perpetrators and providing justice to the victims.¹⁵²

In the circumstances, the prosecution strategy provides for the obligation of state parties to undertake the necessary criminal justice system measures to combat the human trafficking problem. This would mean the effective investigation, prosecution and adjudication of cases of human trafficking to fulfil the aim of delivering justice to all, by convicting and punishing the guilty and help them to stop offending, while protecting the innocent'.¹⁵³ But the question is what is the extent of state responsibility in ensuring that the criminal justice

¹⁵¹ The UN Convention 2000 and the Trafficking Protocol 2000 must be read *mutatis mutandis*.

¹⁵² Anne T Gallagher, *The International Law of Human Trafficking* 218.

¹⁵³ Peter Jones, *Criminal Justice: An Introduction* (2nd edn, London: Routledge 2012) 102.

action mechanism is taking place? Under international law, the basic principle is that every internationally wrongful act entails responsibility of the state, giving rise to an obligation.¹⁵⁴

The above can be illustrated by the case of *Rantsev v Cyprus and Russia*,¹⁵⁵ where the European Court of Human Rights (ECtHR) ruled that human trafficking violates article 4 of the European Convention of Human Rights (ECHR), which prohibits slavery, servitude and forced labour. The case was brought to the ECtHR by a father of a 20 year old Russian woman who was found dead whilst in Cyprus on an 'artiste' visa. In its judgment, the ECtHR set out the 'positive obligation' on the part of the state of origin, transit and destination under article 4 with respect to human trafficking. The ECtHR also found Cyprus in violation of the same article due its failure to adequately investigating her death, as well as in violation of article 2 (right to life) for failure to conduct an effective investigation of her death and article 5 (arbitrary detention). With regards to Russia, the ECtHR found a violation of article 4 for the failure to effectively investigate how and where the deceased had been trafficked, and who was involved in her trafficking.

The ECtHR analysis in *Rantsev* on ECHR article 4 can be said to be of particular interest because the ECtHR elaborated on the responsibility of the state in the issue of human trafficking. In considering whether human trafficking falls under the violation of article 4, and what positive obligations are owed by states, the ECtHR noted that although human trafficking was not specifically mentioned in article 4, the ECHR is 'a living instrument which must be interpreted in the light of the present-day conditions'.¹⁵⁶ The ECtHR also observed that human trafficking had significantly increased and responses by the international community to combat the challenge had been considerable.¹⁵⁷ In this regard, the ECtHR considered it appropriate to examine 'the extent to which trafficking itself may run counter to the spirit and purpose of Article 4'.¹⁵⁸ The Court also

¹⁵⁴ Gallagher (n 152) 219.

¹⁵⁵ [2010] ECHR 22 (Application No. 25965/04).

¹⁵⁶ *ibid* para 277.

¹⁵⁷ *ibid* paras 278 and 279.

¹⁵⁸ *ibid* para 279.

declared that ‘... there can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with the democratic society and the values expounded in the Convention’.¹⁵⁹

Some critics of the Trafficking Protocol 2000 stated that it has significant deficiencies because it focuses and frames human trafficking as a problem of crime control, emphasising the role of organised crime in human trafficking but recognising only limited assistance and protection to the victims of human trafficking.¹⁶⁰ This is true because the Trafficking Protocol 2000, article 4, emphasises ‘those offences are transnational in nature and involve organised criminal groups’. In this regard, the definitional character of the Trafficking Protocol recognises that human trafficking can also happen within the domestic border and be committed by individual perpetrators. The prosecution strategy requires a lengthy legal process that will incur time and money. State, in turn, will have to enact specific anti-trafficking laws or amend the existing laws to specifically include offences created by the definition of the Trafficking Protocol, as well careful interpretation in the court proceedings in the related cases.¹⁶¹

4.6. Malaysia’s Anti-Trafficking Policy and Strategy

4.6.1. Malaysia’s Policy against Security Threats

Malaysia has to respond to current global challenges that pose a myriad of security threats against its sovereignty and interests that arise from both internal and external dimensions.¹⁶² The impacts from the process of globalization, economic imbalances in the region and massive migration movements have formed new and emerging non-traditional security threats, including human

¹⁵⁹ *Rantsev* (n 155) para 282.

¹⁶⁰ *Roth* (n 108) 152.

¹⁶¹ Kelen Fredette, ‘Revisiting the UN Protocol on Human Trafficking: Striking Balance for More Effective Legislation’ (2009) 17 *Cardozo Journal of International and Comparative Law* 101.

¹⁶² Kamarulnizam Abdullah, ‘Emerging Threats to the Malaysian Security’ (2010) 5:2 *Journal of Policing, Intelligence and Counter Terrorism* 55.

security. In this regard, Malaysian authorities need to take serious attention to address such threats.

4.6.1. Sources of Anti-human Trafficking Policy and Strategy in Malaysia

The main source of policy on anti-human trafficking in Malaysia is contained in the ATIPSOM 2007. The legislation elaborates the guidelines and implementation measures focusing on the 3P paradigm strategy, establishes the Anti-Trafficking in Persons Council (*Majlis Anti Pernerdagangan Orang – MAPO*) and contains other matters related to human trafficking. Prior to the introduction of ATIPSOM 2007, there was no specific legislation dealing with human trafficking, nor there was any definition of such a crime in Malaysia. Despite the Federal Constitution providing for the prohibition against slavery¹⁶³ and forced labour,¹⁶⁴ the pre-ATIPSOM legislation seem to be focused on the prohibition against prostitution, abduction, illegal immigrants and forced labour which contain some characteristics of human trafficking. However, such laws lacked comprehensive anti-human trafficking objectives by outlined as the Trafficking Protocol. These laws are discussed in Chapter Five.

The passage of the ATIPSOM 2007 is a manifestation of an explicit intention of the Malaysian government to fulfil and discharge its responsibilities set under the UN Convention 2000, as well as to enable itself to accede to the said Protocol and to prevent human trafficking problems.¹⁶⁵ It is enacted based on the Malaysian government's realisation, readiness and commitment for the need of a single and comprehensive legal provision to address human trafficking problems.¹⁶⁶ The ATIPSOM 2007 combines various aspects of prosecution, prevention, victim care and protection.¹⁶⁷ It also demonstrates Malaysian government's recognition that trafficking is a growing serious problem and needs combating. The law was amended in 2010 to include

¹⁶³ Federal Constitution, art 6(1).

¹⁶⁴ *ibid* art 6(2).

¹⁶⁵ Parliament of Malaysia (n 3) 33.

¹⁶⁶ *ibid* 28-29.

¹⁶⁷ *ibid* 29.

provisions matter pertaining to the smuggling of migrants and to make a clearer delineation in terms of definition and offences of between human trafficking and smuggling of migrants.

The MAPO was established under the Ministry of Home Affairs in a recognition that there is a need for a single multi-sectoral coordinating body¹⁶⁸ to lead the efforts to address human trafficking in Malaysia. The MAPO is entrusted with the enormous task of monitoring the implementation of the law and any issues of human-trafficking that Malaysia is concerned with, both domestically and internationally. MAPO is tasked to formulate policies and programmes to prevent human trafficking, including providing necessary assistance to the trafficked victims, and to initiate education programmes to increase public awareness of the public of the causes and consequences of human trafficking.¹⁶⁹

The MAPO's objective is to make Malaysia internationally accredited as being substantially free of illegal activities in connection with human trafficking and smuggling of migrants.¹⁷⁰ The MAPO setup comprises of 16 cross-sector representatives including the ministries and government agencies and the representation of civil society and NGOs. Five committees were set up among others to deal with specific areas of legislation, enforcement, protection and rehabilitation, labour trafficking and media and publicity.

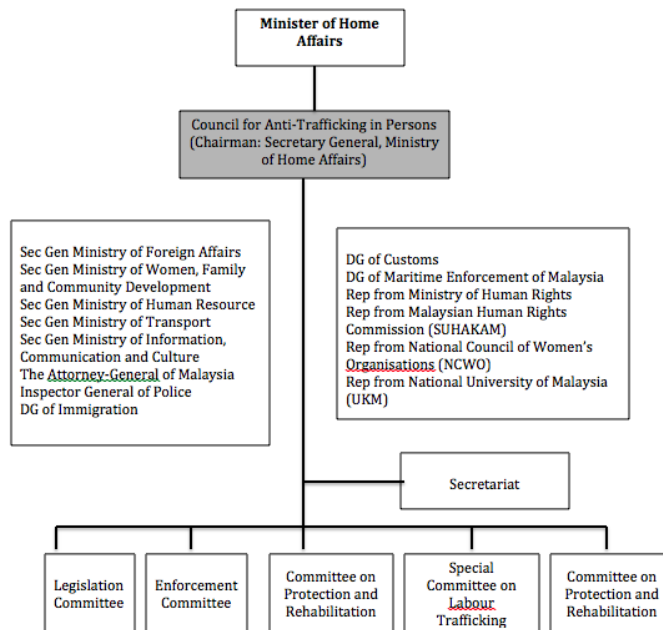
The organisational structure and the specific functions of its members is as in Diagram 4.5.

¹⁶⁸ ATIPSOM 2007, s 7.

¹⁶⁹ Wan Nur Ibtisam Wan Ismail, Raja Noriza Raja Arifin and Kee Cheok Cheong, 'Human Trafficking in Malaysia: Bureaucratic Challenges in Policy Implementation' (2017) 49:3 *Administration & Society* 212.

¹⁷⁰ Suhana Saad and Ali Salman, 'Government Policy and the Challenge of Eradicating Human Trafficking in Malaysia' (2015) 10:6 *Malaysian Journal of Society and Space* 66.

Diagram 5 : Structure of MAPO



Prior to the establishment of MAPO, there was no coordinating body to coordinate the anti-human trafficking efforts in Malaysia. The main task in tackling human trafficking problems in Malaysia was vested in the Royal Malaysian Police and the Immigration Department. However, their specialties are basically on enforcement mechanisms, and they lack of prevention and victim protection strategic implementation as mandated by the Trafficking Protocol.¹⁷¹ Therefore, the inclusion of the cross-sector government, NGO and civil society manifests an integration of the 3P anti-human trafficking strategy in Malaysia.¹⁷²

In achieving its objectives as provided in the ATIPSOM, MAPO has launched the Five-Year National Anti-Trafficking in Persons Action Plan (NAP) 2010-2015 and later the NAP 2016-2020. These NAPs are the strategic plans manifesting Malaysia's determination to address human trafficking problems and activities, thus to eliminate Malaysia's negative image as a mainly transit point for international human trafficking activities as well as it being the destination and, to a certain extent, the source of human trafficking activities.

¹⁷¹ Interview with Policy 2.

¹⁷² *ibid.*

The NAPs underline five guiding principles¹⁷³ that the MAPO needs to adopt in its anti-human trafficking efforts: government ownership; civil society participation; human rights based treatment of victims; inter-disciplinary coordination at government level and with participation by international organisation and NGOs; and systematic evaluation and sustainability.

4.6.1.1. Government Ownership

The Malaysian government takes ownership of battling with human trafficking, emphasising its serious commitment to address the human trafficking problem which it has placed high on the national agenda.¹⁷⁴ The importance of the anti-trafficking government ownership is that it can be implemented using government at machineries and will mostly be budgeted for by the government. Although there is no record of the specific budgetary allocation towards anti-trafficking efforts, it was reported that the Malaysian government allocated the equivalent of approximately \$1,221,000 (RM3.85 million)¹⁷⁵ to the Ministry of Home Affairs for anti-trafficking work and \$909,000 (RM2.86 million)¹⁷⁶ for the Women's Ministry in its 2014 budget.¹⁷⁷

4.6.1.2. Civil Society Participation

The guiding principles acknowledge the importance of civil society and NGO participation. Section 6 of the ATIPSOM 2007 provides that aside from the government representation, MAPO also consists of representatives of NGOs and civil society 'having appropriate knowledge, expertise' in problems and issues relating to human trafficking.

¹⁷³ Statement by the Deputy Minister of Home Affairs Hon. Jelaing Anak Mersat at the High Level Segment of the 12th UN Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, 17-19 April 2010.

<www.un.org/webcast/crime2010/plenary/statements/18malaysia_en.pdf> accessed 24 March 2017.

¹⁷⁴ Government of Malaysia, National Action Plan Against Trafficking in Persons 2010-2015, (Putrajaya: MAPO, 2010) 6.

¹⁷⁵ US DoS, Trafficking in Persons Report 2014: Malaysia, <www.state.gov/j/tip/rls/tiprpt/countries/2014/226770.htm> accessed 5 April 2015; Calculated based on RM3.15 per US1 at the time of the US TIP Report 2014 was released.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

Civil society and NGOs are recognised as an essential 'third' sector. They have a positive influence on the state and the market. They are increasingly important agents for promoting good governance including transparency, effectiveness, openness, responsiveness and accountability.¹⁷⁸ Their representation is often viewed as the 'conscience of the government' and they step in when the government is said to have failed to take initiatives.¹⁷⁹ But, in the concept of the MAPO's anti-human trafficking principles, the participation of civil society, often by NGOs, has been given due recognition by the government.

One example of civil society is the Human Rights Commission of Malaysia (SUHAKAM), which has been actively engaged with representatives of foreign embassies and Malaysian government agencies. Such discourses focus strategies to move the trafficking agenda forward and to identify the real situation of trafficking as well as areas of cooperation among various stakeholders in addressing trafficking.¹⁸⁰

4.6.1.3. Human Rights Based Treatment of Victims

Human rights treatment of the trafficked victims plays an important element in Malaysia's anti-human trafficking policy implementation. This principle requires for the promotion and adherence with the international standard of human rights at all levels, regardless of the gender, age and religion of the victim.¹⁸¹

Accordingly, the Malaysian government has established places of refuge to provide protection for the trafficked victims while the investigation process is ongoing and their evidence is being recorded. Currently, the Malaysian

¹⁷⁸ Aisha Ghaus-Pasha, 'Role of Civil Society Organisations in Governance,' 6th Global Forum on Reinventing Government Towards Participatory and Transparent Governance' (May 2005) Seoul Republic of Korea.

<<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan019594.pdf>> accessed 3 April 2015

¹⁷⁹ Marina Tzvetkova, 'NGO Responses to Trafficking in Women' (2002) 10:11 *Gender and Development* 60.

¹⁸⁰ Human Rights Commission of Malaysia, Report to the 15th Annual Meeting of the Asia Pacific Forum of International Human Rights Institution, Bali, 3-5 August 2010 (Kuala Lumpur: SUHAKAM 2010) 7.

¹⁸¹ Government of Malaysia (n 174) 7.

government operates five facilities to house victims of trafficking including three facilities for women in Kuala Lumpur, Johor, and Sabah, a shelter for child trafficking victims in Negeri Sembilan, and a shelter for male trafficking victims in Malacca.¹⁸² At the same time, the Malaysian government has allocated funds for the establishment of two additional shelter homes for the human trafficking victims.¹⁸³ During the visit of the Special Rapporteur on Trafficking in Persons in 2015, she acknowledged and recognised that these centres have been providing adequate living conditions for the trafficked victims along with psychological, medical, language and other support services provided in collaboration with NGOs.¹⁸⁴

4.6.1.4. Interdisciplinary Coordination at Governmental Level and with International Organisations

Next, the guiding principle is pertaining to the coordination among the relevant cross-sector parties. Human trafficking is a very complex issue that needs a concerted and synergic response by various actors. The appropriate approach is an integrated and holistic response by a full range of stakeholders.¹⁸⁵ Such participation includes a host of international and national agencies including law enforcement officials, agencies concerned with the delivery of justice system, social welfare and development, as well as civil society organisations, the media, academics and others.

This principle also encourages cooperation and coordination with international organisations. This is reflected by the government's cooperation with the international organisations including the UN bodies like the UN Office of Drugs and Crime (UNODC), the International Labour Organisation (ILO), the

¹⁸² US DoS (n 175).

¹⁸³ Akil Yunus, 'Wisma Putra: Malaysia's Poor Ranking in Trafficking Report is Unfair' The Star (Petaling Jaya, 22 June 2014) <www.thestar.com.my/news/nation/2014/06/22/wisma-putra-disappointed-over-trafficking-status/> accessed 4 April 2015.

¹⁸⁴ OHCHR, 'Preliminary Findings, UN Special Rapporteur on Trafficking in Persons, Especially Woman and Children, Maria Grazia Giammarinaro Visit to Malaysia (23-28 February 2015), 2 March 2015 <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15631&LangID=E#sthash.zL3mOBVT.dpuf> accessed 2 April 2015.

¹⁸⁵ G. Shabbir Cheema and others, *Cross-Border Governance in Asia: Regional Issues and Mechanisms* (Tokyo: United Nations University 2011) 241.

International Organisation for Migrants (IOM) and the United Nations Human Rights Council.¹⁸⁶ Malaysia has also boosted its relations with the UN Office of the Commissioner on Human Rights (OHCHR) in its effort to combat human trafficking such as the invitation to the Special Rapporteur on Trafficking in Persons, Maria Grazia Giammarinaro, to visit Malaysia on 23-28 February 2015. During the visit, the special rapporteur was briefed on the situation in Malaysia and efforts being undertaken by the Malaysian government to address human trafficking problems in the country including the proposal to amend the ATIPSOM 2007. She also concluded, in her report,¹⁸⁷ that Malaysia's anti-human trafficking legal, policy and institutional frameworks are comprehensive and sufficient to criminalise and address human trafficking.¹⁸⁸ However, she underscored that the attitude of the Malaysian authorities to emphasise human trafficking from the aspects of sexual exploitation only.¹⁸⁹ Hence there is a lack of a clear understanding about human trafficking on the part of the authorities and there is a danger of misidentification of victims.¹⁹⁰ She also provided some recommendations, particularly pertaining to the victim protection and the betterment of the policy and law implementation. The discussion about the special rapporteur's visit to Malaysia is sprinkled throughout chapter six.

4.6.1.5. Systematic Evaluation and Sustainability

Finally, the guiding principles focus on ensuring the sustainability of the measures set by the NAPs by a systematic evaluation approach to assess the effectiveness of the anti-trafficking efforts. It is crucial for knowledge and capacity-building programmes to be further enhanced among policy implementation personnel and agencies such as training programmes to equip them with the required skills. For example, the Malaysian Inspector General of Police stated that the 'arrangement for the training programmes is for the

¹⁸⁶ Interviews with Policy 1 and 3.

¹⁸⁷ UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro: Mission to Malaysia'. UN Doc A/HRC/29/38 Add.1 (2015).

¹⁸⁸ UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro: Mission to Malaysia' (n 212) parts C (1) (b); C (2) and C (3).

¹⁸⁹ *ibid* para 51.

¹⁹⁰ *ibid* paras 54-55.

purpose of enhancing knowledge relating to human trafficking's investigation and to show our seriousness in combating human trafficking problem ... such a course will optimise the opportunity for the enforcement agencies to share their knowledge, information, expertise and intelligence method'.¹⁹¹ Many other courses were also arranged, for example by the Attorney General's Chambers through its Judicial and Legal Training Institute (ILKAP) on human trafficking since 2008.¹⁹²

4.7. Compliance of Malaysia's Anti-human Trafficking Strategies with Trafficking Protocol 2000

The outlined anti-human trafficking policy and strategy in Malaysia, the promulgation of the ATIPSOM 2007, the establishment of the MAPO and the NPAs are all indications that Malaysia is serious in its effort to address human trafficking problems. It seems that the human trafficking policy and strategies in Malaysia adhere to the provisions set under the Trafficking Protocol 2000.

The promulgation of ATISPOM 2007 provides for the establishment of coordinating bodies such as MAPO. The law also provides for the criminalisation of human trafficking including pursuing trafficking, enforcement, investigation and prosecution against perpetrators; the protection of human trafficking victims including providing shelter for the victims pending investigation, non-criminalisation of the victims, and assistance towards their repatriation clearly can be attested as compliance with the internationally recognised anti-human trafficking policy and strategy. Further, Malaysia has entered into cooperation with various international bodies and other bilateral cooperation with its neighbours and strategic partners. It also has embarked on many programmes to prevent human trafficking.

¹⁹¹ Ismail Omar, Key Note Address, 'Anti-Trafficking in Persons and Anti-Smuggling of Migrants' Kuala Lumpur, 4 May 2011
<www.rmp.gov.my/news-detail/2014/06/11/kursus-anti-pemerdagangan-manusia-dan-penyeludupan-migran> accessed 6 April 2015.

¹⁹² Judicial and Legal Training Institute, *Annual Report 2009* (Kuala Lumpur: ILKAP 2009) 12.

Notwithstanding the various efforts duly undertaken, Malaysia has not improved its tier ranking based on the evaluation of the US TIP Report. Malaysia has been downgraded to tier 3 of the TIP Report 2014, joining the ranks of the worst group countries with worst human rights records. The downgrading has raised questions as to what went wrong with the anti-human trafficking policy and strategy being implemented in Malaysia and whether they are compatible with the international treaties that Malaysia acceded to, or alternatively whether such grading indicates that Malaysia does not fulfil the prescribed minimum standard set by the United States. It is the intent of this thesis to explore such answers in the subsequent chapters, particularly Chapter 6 of this thesis.

4.8. Conclusion

Human trafficking is a transnational crime which is proliferating all around the globe, abetted by activities of clandestine business groups and individuals. There is a common understanding among the global community that this crime should be obliterated. The agreements of various anti-human trafficking international treaties have signalled that the world community has been finding a common goal to create globally acceptable standards of combating human trafficking by way of agreeing to anti-human trafficking policies and strategies. The Trafficking Protocol 2000 has given guidelines on how states should implement their domestic laws, policies and strategies to combat human trafficking.

As a state party to the Trafficking Protocol 2000, Malaysia has shown its interest to combat and eliminate human trafficking, not only because of its obligation to the international law, but because it has the sense of responsibility to address the problem so that it can combat the prevalence of human trafficking within its border. The first step undertaken by the Malaysian authorities has been to promulgate the anti-human trafficking policy and strategy.

Based on the discussions above, it appears that the distinction between the public policy and strategy is well defined and applied in Malaysia. Further, the strategy is also formulated to implement such policy. In Malaysia, the policy

process must go through the proper cycle of problem identification, formulation, adoption, implementation, and evaluation. However, the policy process in Malaysia seems to be confined within the government sector, and there is a lack of participation by the stakeholders. The same approach applies to the strategy where it is formulated based on the condition that it must have strategic objectives, set out tactics and must be operational by way of the support from institutions and resources.

The anti-human trafficking policy in Malaysia is embodied in the ATIPSOM 2007, after the bill went through a policy making process. The anti-human trafficking strategy is set out in the five-year NAPs that contain the 3P mechanism to address human trafficking problems. Nevertheless, the anti-trafficking policy lacks input from independent bodies beside the government and/or government-aligned NGOs and civil society and this undermines the operations of the anti-human trafficking policy and strategy in Malaysia.

Chapter Five

Human Trafficking in Malaysia: The Anti-human Trafficking Laws

5.1 Introduction

The discussions in Chapter Four underscored the significance of policy and strategy in addressing human trafficking issues. Yet the implementation of such policy and strategy cannot take place effectively without a proper legal framework. Therefore, the law plays an important role as the policy and strategy implementation device. Prior to the agreement of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000 (Trafficking Protocol 2000), a clear understanding of the meaning of human trafficking was still lacking, with various definitions being offered,¹ as well as a lack of clarity about the crime of human trafficking, with trafficking mistaken for migrant smuggling or illegal immigration.² For Malaysia, anti-human trafficking provisions can be found in various legislation, and the specific anti-human trafficking law was promulgated in the form of Anti-trafficking in Persons and Anti-smuggling in Migrants Act 2007 (ATIPSOM 2007) that outlines various principles and measures to combat human trafficking. The question is whether these existing laws are sufficient to combat human trafficking in Malaysia and whether these laws are compatible with international treaties.

The essence of this chapter is the legislative responses to human trafficking problems in Malaysia. The law is an important instrument in the effort to address human trafficking because it translates the policy and provides the human trafficking definition, outlines provisions relating to the related offences, creates legitimate institutions to handle and coordinate anti-human trafficking efforts, empowers the government and its apparatus to operate against the human trafficking phenomenon, and outlines the 3P anti-human trafficking paradigm to

¹ Geoffrey Yussouf, 'Global Human Trafficking and the UN Convention against Transnational Organised Crime' (2008) 1 *UCL Human Rights Review* 173.

² Madevi Sun-Suon, *Human Trafficking and the Role of the Local Governments: Good Practices, Challenges and Way Forward* (New York: UNITAR 2008) 20.

address human trafficking problems involving the agenda of prevention, prosecution and protection. The concept of 3P paradigm has been discussed in previous chapters particularly in Chapter Four.

This chapter is divided into three parts. Firstly, it focuses on Malaysia's obligations to establish anti-human trafficking law from two perspectives. On the one hand, article 6 of the Federal Constitution guarantees fundamental liberties with prohibition against slavery and forced labour. On the other hand, Malaysia is obliged to comply with various international laws and treaties such as the UN Convention against Transnational Organized Crime 2000 (UN Convention 2000) and the Trafficking Protocol 2000. For this purpose, this chapter analyses these constitutional prohibitions and the treaty obligations on the part of Malaysia.

Secondly, this chapter focuses on the ATIPSOM 2007. This is because the ATIPSOM 2007 is the specialised legislation responding to the Trafficking Protocol 2000 and a manifestation of the Malaysian government's seriousness to address human trafficking. This addresses the issue as to whether the ATIPSOM 2007 reacts to the need to apply the 3P paradigm within the national context, and whether the law is effectively and fairly able to prevent human trafficking, criminalise the perpetrators and protect the victims of human trafficking.

Finally, this chapter will make an assessment of the anti-trafficking laws, particularly the ATIPSOM 2007 and other human trafficking-related laws in Malaysia to answer the following questions. Firstly, whether the law is compatible with the Trafficking Protocol 2000 and the elements of the 3P paradigm are well placed in it. Secondly, whether these laws are effective and fair to address human trafficking in Malaysia pursuant to the conditions and situation in Malaysia, and thirdly, whether there are any loopholes which need to be covered.

5.2 The Role of Law Against Human Trafficking in Malaysia

The role of law is crucial but not exclusive with regards to the efforts to address anti-human trafficking problems, including in Malaysia. In this regard, three issues could possibly be raised to describe the pertinent roles of law: symbolic, instrumental and producing change.

First, the law is *symbolic* to the fact that the Malaysian government is serious and thoughtful in its anti-human trafficking efforts. The law outlines and elaborates the purpose of the anti-trafficking policy and strategy of the government as well as marking its readiness to comply with the international agreements it has entered into.

Second, the law is *instrumental* in terms of implementing the international treaties and obligations therewith. It also serves as the proof of a political commitment when Malaysia acceded to the Trafficking Protocol 2000 and imposes some kind of obligation to implement and enforce the Protocol. The obligation is well placed in the general principle of international law of *pacta sunt servanda* that a treaty in force is binding upon the parties and must be performed by them in good faith.³ Notwithstanding, Malaysia practices a 'dualist' system, where the international treaties signed or entered by the executive must be transformed by way of legislation so as to make them part of the law of the land.⁴ This principle is reaffirmed in the case of *Malaysian Bar v Government of Malaysia*,⁵ where Salleh Abas L P stated that the judicial authority in Malaysia will not be concerned with the wisdom of the executive policy until and unless such policy has been implemented by legislation and translated into law.⁶ The principle in the *Malaysia Bar* case echoed the case of *Merdeka University Berhad v Government of Malaysia*,⁷ where Abdoolcader J stated that 'policy is a somewhat nebulous and amorphous concept difficult for the courts to discern

³ Ian Brownlie, *Principles of Public International Law* (5th edn, Oxford: OUP 2001) 620.

⁴ *ibid* 42.

⁵ [1987] 2 MLJ 165.

⁶ *ibid* 169.

⁷ [1981] 2 MLJ 356.

as such until and unless it becomes apparent from a legislative measure which reflects and effectuates it'.⁸

The law is also instrumental in securing domestic change. For example, the introduction of the ATIPSOM 2007 enabled the development of the anti-trafficking or counter trafficking field from law enforcement and prosecution into preventive and victim protection perspectives.

Third, the law produces *change* in society. This is because the law signals change, gives certainty and is enforceable. Even in recent years, many researchers who examined social change within sovereign states found that law was viewed as an instrument or vehicle for the implementation of social and economic policy.⁹ This is the 'magic' of law where change and certainty will pave the way for criminal law, which will be followed by civil liability such as damages, liability for duties of the state subject to judicial review, and such change and certainty bring about the establishment and empowerment of related institutions. In this regard, the promulgation of ATIPSOM 2007 provides the definition of human trafficking in Malaysia that was lacking in other statutes, as well as creating a framework for the establishment of institutions such as the Anti-trafficking in Persons Council Malaysia (*Majlis Anti Pernerdagangan Orang Malaysia*) (the MAPO). The ATIPSOM 2007 also provides for the conduct of the courts as well as the manner in which the victims are to be protected. The detailed discussions about these matters will take place later in this chapter.

Based on the above reasons, the establishment of the municipal law against human trafficking is crucial to Malaysia. Although there were already existing laws prior to the promulgation of the ATIPSOM 2007, they were yet to fulfil the requirements set by international treaties, lacking conceptual definition of human trafficking and bare of any important aspects of anti-human trafficking regimes such as the prevention and victim protection aspects. As stated, Malaysia's obligations to promulgate its national anti-human trafficking legislation in Malaysia is derived from two important factors. First, it is due to

⁸ Merdeka University Berhad (n 7), 358.

⁹ Sharyn LR Anleu, *Law and Social Change* (2nd edn, London: SAGE 2013) 4.

Malaysia's obligation to the treaty-based international law. Secondly, the Federal Constitution, article 6, provides for the prohibition against slavery and forced labour. These obligations will now be discussed.

5.3. Obligations to Establish Anti-human Trafficking Law

Most countries initially included anti-human trafficking provisions as part of their penal code or general criminal law rather than a comprehensive and specialised act. Consequently, they only addressed human trafficking as a criminal offence.¹⁰ This is historically true in the case of Malaysia because most of anti-human trafficking provisions are contained in the Penal Code, particularly those related to the practices of slavery and forced labour. The Penal Code serves as the general statute of criminal law and describes crime and determines punishment against perpetrators. This is because the Penal Code's objective is to set the three contours of criminal liability such as range, scope and conditions.¹¹ Range refers the types of activity that are criminalised, the scope refers to the questions of the extent that the law criminalises people who started a crime but never complete it (conspiracies of attempts) or those who provides some kind of encouragement but never carry out physical elements of crime (complicity of abatement) and the conditions of criminal responsibility refer to the fault element and defence.¹² However, relevant provisions pertaining to the protection of the trafficked victims and the efforts to prevent human trafficking were never part of the Penal Code, thus resulting in a limited enforcement of the requirements and objectives of the Trafficking Protocol. Therefore, there arose a need for specialised legislation that consolidates relevant elements of anti-human trafficking efforts and serves as the comprehensive law enabling the implementation of all policy and strategy.¹³

¹⁰ Anleu (n 9) 4.

¹¹ Andrew Ashworth, *Principles of Criminal Law* (Oxford: OUP 2006) 6.

¹² Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (Singapore: LexisNexis 2007) 4.

¹³ UNODC, *International Framework for Action to Implement the Trafficking in Persons Protocol* (New York: UN 2009) 45.

While the ATIPSOM is arguably also an indirect response to the political promises of the US Department of State's Trafficking in Persons Report (US TIP Report),¹⁴ the Malaysian anti-human trafficking policy is legally founded on two other factors. First, this is because Malaysia is obliged under various international laws, in which discussions will focus on the customary international law and the international treaties that Malaysia signed, ratified or acceded to that require it to implement by way of domestic legislation. Secondly, the Malaysia Federal Constitution guarantees and respects the fundamental rights of everyone, citizens or not, as one of the essential conditions for a free and democratic way of life, including prohibition from the practices of slavery and forced labour in Malaysia. Since human trafficking can be treated as a blatant infringement of the fundamental rights to individuals, not only the perpetrators must be adjudicated and punished, but the victims shall also be subject to protection and be decriminalised for the wrongs they committed resulting from human trafficking. Each of these two origins will now be examined in detail.

5.3.1. Obligations Under International Law

Malaysia's obligation to address human trafficking by legislating anti-human trafficking law arises from two possible views. First, due to the consequences of human trafficking leading to slavery practices, there is a possibility of human trafficking becoming customary international law, should it is seen from slavery perspective. Secondly, it is due to obligations as a result of the accession to international agreements and treaties.

The first view is derived from the notion that human trafficking is also a form of slavery practice. As discussed in Chapter Three, slavery is defined in the Slavery Convention 1926 as '... the status or condition of a person over whom any or all of the powers attaining to the right of ownership are exercised'.¹⁵ Based on this definition, it is imperative to elucidate the phrase 'powers attaining to the right of ownership', which could arise to an inference that slavery in itself

¹⁴ Parliament of Malaysia House of Representatives, *Hansard*, Anti-trafficking in Persons Bill 2007 (DR. 9.5.2007) 29.

¹⁵ Slavery Convention 1926, art 1(1).

could be attributed as a subset of another activity,¹⁶ which could include human trafficking.

In the case of *Prosecutor v Kunarac, Kovac and Vicovic*,¹⁷ it is stated that the prohibition against slavery in itself has been recognised as having the status of customary international law and even *jus cogens* as it is universally accepted.¹⁸ The Tribunal in *Kunarac* also stated that further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.¹⁹ However, the case of *Kunarac* deals with crimes committed during armed conflict, therefore to certain extent it deals more with international humanitarian law than human rights law. Nonetheless, there is a clear nexus, because human rights laws continue even during the armed conflict.²⁰

Consequently, laws against human trafficking can be construed as an obligation from human rights legal instruments against slavery and forced labour. In the case of Malaysia, it has already acceded to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1957.²¹ In respect of forced labour, Malaysia ratified the Forced Labour Convention 1957 on 11 November 1957²² and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 on 11 November 2000.²³ In this regard, ratification of these international treaties marks an explicit acceptance by

¹⁶ Kevin Bales, 'Slavery in its Contemporary Manifestations' in Jean Allain (ed), *Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: OUP 2012) 217.

¹⁷ (*Trial Judgment*), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, para 520 <<http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>> accessed 10 March 2016.

¹⁸ *ibid* para 539.

¹⁹ *ibid* para 542.

²⁰ Ryszard Piotrowics, 'States' Obligations Under Human Rights Law Towards Victims of Trafficking in Human Beings: Positive Development in Positive Obligation' (2012) 24:2 *International Journal of Refugee Law* 181.

²¹ International Labour Organisation (ILO) 'Ratifications for Malaysia' <www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102960> accessed 10 March 2016.

²² *ibid*

²³ ILO (n 21).

Malaysia that it does share with the global community common standards and values on human rights regardless of cultural and geographical origins,²⁴ as well as showing Malaysia's readiness and willingness to subject itself to the obligations under the international law.

But juxtaposing human trafficking with slavery may not be the right application of the human trafficking definition provided by the Trafficking Protocol 2000. This is because it would be inappropriate to ignore the fundamental fact that trafficking by definition must also include the transportation of a person, as well as the use of deception or coercion,²⁵ which would represent the process of the criminal act, and not just the exploitation as the end result. Alternatively, exploitation, which may include practices akin to slavery, could be the by-product or the end product of human trafficking. Furthermore, the prohibition of human trafficking does not attain the status of customary international law as opposed to slavery.

Given Malaysia's accession to the Trafficking Protocol 2000, the principle of *pacta sunt servanda* must be satisfied. The principle outlines a fundamental rule in international law that states must exercise their right and duties under treaty obligations and these must be fulfilled in good faith.²⁶ International law recognises that the two elements of the Vienna Convention 1969 – the binding force of treaties and performance in good faith – are equally important.²⁷ Further, the principle enshrined under the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter,²⁸ is that every state has the duty to fulfil in good faith its obligations under international agreements valid under the

²⁴ Arifin Zakaria, 'The Malaysian Perspective on Human Rights in the 21st Century and the Role of the Court,' 50th *Turkish Constitutional Court and International Symposium, Turkey, 25-28 April 2012*, para 37

<www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/PAPER%20PRESENATION%20-%20CJ%20OF%20MALAYSIA.pdf> accessed 11 March 2016.

²⁵ Rhacel S Parreñas and others, 'What Is Human Trafficking? A Review Essay' (2012) 37:4 *Signs: Journal of Women in Culture and Society* 1015.

²⁶ Vienna Convention of the Law of Treaties 1969 art 26.

²⁷ Malcolm D Evans (ed), *International Law* (4th edn, Oxford: OUP 2014) 177. The principle was reconfirmed in the case of *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, [1997] I.C.J. Rep. 7, para 14.

²⁸ UN Doc A/RES/25/2625 (1970).

generally recognised principles and rules of international law. Notwithstanding to the above, should the obligations arising under international agreements are in conflict with the obligations of UN member states under the UN Charter, the obligations under the Charter shall prevail.

Therefore, Malaysia has the duty to fulfil its obligations under the international law particularly those outlined by the Trafficking Protocol 2000 to establish a specific law concerning human trafficking domestically.

5.3.2. Obligations Under the Federal Constitution

Despite the ATIPSOM 2007 being modelled upon the Trafficking Protocol 2000, it is imperative to highlight the way it is adapted in the Malaysian legal system. At the outset, it is essential to note that the Federal Constitution is the supreme law in Malaysia, and any laws inconsistent with the Constitution shall, to the extent of the inconsistency, be void.²⁹ Therefore, any laws in Malaysia must be contemporaneous with the Federal Constitution. The relevant constitutional provision is enshrined in article 6 as follows:

‘Slavery and forced labour prohibited:

(1) No person shall be held in slavery.

(2) All forms of forced labour are prohibited.’

Based on article 6, the prohibition against slavery is an unqualified human right³⁰ and absolute liberty³¹ under the Federal Constitution. The prohibition against forced labour is also specified by the Federal Constitution subject to the qualification that Parliament may by law provide for compulsory service for national purposes;³² or work or service incidental from imprisonment imposed by the court;³³ or when there is a law requiring a function of public authority to

²⁹ Federal Constitution, art 4(1).

³⁰ Siththaranjan Paramalingam, ‘Slavery: A Continuing Evil’, (1994) 4 *Malayan Law Journal* cxii.

³¹ Kevin Y.L. Tan, *Constitutional Law in Singapore* (Alpen van den Rijn: Wolters Kluwer 2011) 427. The majority of the provisions in the Constitution of Singapore are *pari materia* with the Federal Constitution of Malaysia.

³² Federal Constitution, art 6(2).

³³ *ibid* art 6(3).

be performed by another public authority, the employees of the second-mentioned public authority shall not be considered as forced labour for rendering services to the second-named authority.³⁴

The constitutional 'human rights' provisions refer to the guarantees of 'fundamental liberties'³⁵ in Part II of the Federal Constitution that provides nine provisions³⁶ and 14 types of liberties,³⁷ including freedom from slavery and forced labour. The authors of the Federal Constitution, the Reid Commission, highlighted these guarantees and recommended these provisions to the Government of the United Kingdom and the Conference of (Malay) Rulers. They opined that the Constitution should define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life.³⁸ In addition, article 5(1) of the Constitution guarantees that no person shall be deprived against his life and personal liberty.

The fundamental liberties as enshrined in the Malaysian Federal Constitution can be said to refer to the influence of the post-1945 growth of international human rights, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950. The history of a system of law is largely a history of borrowing and assimilation of materials from other legal systems from outside.³⁹ In fact, some independence constitutions in Asia bear the unflattering 'mark of uninventiveness'.⁴⁰ This is perhaps the case with Malaysia. The prohibitions against slavery and forced labour in the Federal Constitution are greatly influenced by the British acceptance of the basic

³⁴ Federal Constitution, art 6(4).

³⁵ Rohaida Nordin, 'Malaysia Perspective on Human Rights' (2010) 14 *UKM Journal of Law and Society* 17.

³⁶ Federal Constitution, arts 5-13.

³⁷ The fundamental liberties guaranteed by the Malaysian Federal Constitution include personal liberty, prohibition against slavery and forced labour, protection against retrospective criminal law and repeated trials, equality before the law, prohibition against banishment and freedom of movement, freedom of speech, assembly and association, freedom of religion, rights of education, and rights to property.

³⁸ British Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957* (London: HM Stationary Office 1957) 162.

³⁹ Roscoe Pound, *The Formative Era of American Law* (New York: Peter Smith 1938) 94.

⁴⁰ Richard N Spann, *Notes on Some Asian Constitutions* in Richard N Spann (ed), *Constitutionalism in Asia* (Bombay: Asian Publishing House 1963) 10.

principles of the civil and political rights contained in ECHR, article 4, that provides as follows:

- 4(1) 'No one shall be held in slavery or servitude.
- 4(2) No one shall be required to perform forced or compulsory labour.'

In fact, the Federal Constitution article 6 is almost identical to the ECHR article 4 including its proviso of the forced labour provision in case of national service or due to imprisonment imposed by the courts.

The relevance of the Federal Constitution to the ECHR arises as follows: The ECHR provides both a symbolic statement of the principles for which the Western European States established a remedy that might protect them from communist subversion,⁴¹ as well as the need to avoid future fascist dictatorship.⁴² The ECHR was negotiated over a relatively short period between August 1949 and September 1950, and signed by the member states on 4 November 1950. Significantly, the ECHR was drafted with considerable input from British lawyers.⁴³ The ECHR is significant because it formed the model for the bill of rights used in most colonial territories limited to the terms that the British Government had ratified and extended to its colonies.⁴⁴ This is because article 63 of the ECHR⁴⁵ requires for its signatories to extend the Convention to territories for whose international relations it is responsible.⁴⁶ During the ministerial meeting on 18 October 1951, the Colonial Secretary said:

... that he was content that the Government should accept the Council of Europe Convention on the conditions proposed [as in Article 63 – author's note]. If we did so, it was in his view essential that Colonial

⁴¹ David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, Oxford: OUP 2009) 1.

⁴² John G Merrills and Arthur Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (4th edn, Manchester: Manchester University Press 2001) 3.

⁴³ Charles OH Parkinson, *Bill of Rights and Decolonisation* (Oxford: OUP 2007) 27.

⁴⁴ *ibid* 41.

⁴⁵ ECHR Protocol No. 11 amended art 63 to art 56.

⁴⁶ Alfred WB Simpson, *Human Rights and the End of Empire* (Oxford: OUP 2001) 825.

Governments should then be consulted and encouraged to adhere to the Convention. It would not be desirable to treat the Convention as applicable only to Europe and to invite the Colonies to adhere to the UN Convention'.⁴⁷

Therefore, the general policy in the UK Colonial Office was to commend the ECHR and press colonial governments to accept it, an advantage being that this might help to protect the Colonial Office from the dangers of a UN Declaration of Human Rights.⁴⁸ The Malayan government accepted the ECHR, although there was earlier suggestion for it to be excluded due to interest in the development of an Asian Convention.⁴⁹

Malaysia gained its independence in 31 August 1957 and has a minimalist bill of rights created under the British influence and tailored to the local conditions and dependency. In fact, Malaysia was the first dependency under the administration of the British Colonial Office to receive a bill of rights.⁵⁰ The discussions pertaining to the Malayan Constitution began with the establishment of the Reid Constitutional Commission in 1955 and the subject of fundamental rights was discussed at four meetings,⁵¹ with a long list of proposals. However, the leader of the Malayan delegation, Tunku Abdul Rahman, requested a shorter list of such rights, as he conceded that 'if we are to mention other rights there are million rights'.⁵² Hence the proposal was accepted subject to certain limitations.

Although there is no comprehensive or detailed explanation as to why the provisions against slavery and forced labour were included in the Malaysian Federal Constitution, the suggested explanation can be based on two conditions.

⁴⁷ Simpson (n 46). Details of the Meeting can be read in the Public Record Office document CAB 134/64 GEN 337.

⁴⁸ *ibid.*

⁴⁹ *ibid* 828.

⁵⁰ Parkinson (n 43) 72.

⁵¹ Reid Constitutional Commission's 34th, 44th, 45th and 46th meetings. *Public Record Office Document No. CO 889/1.*

⁵² Simpson (n 46) 861.

Firstly, there were the intentions of the Reid Commission to promulgate rights while framing the Federal Constitution. They felt that constitutional safeguards were necessary because of 'vague apprehension of the future'⁵³ and to ensure the 'power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise'.⁵⁴ At the same time, it is argued that Malaysia was different to other British colonies because of its cultural, religious and social diversity. Many immigrants, especially the Indians, were brought to Malaya by the British colonial masters as indentured labourers particularly in the plantation industry. This system came to an end in 1910,⁵⁵ but the immigration continued until 1938 when the government of India placed a ban on the recruitment of coolies for labour abroad.⁵⁶ The negotiation team representing Malaya by then included members from major ethnic groups, among others the Malay, Chinese and Indian. The inclusion of the prohibition against slavery and forced labour can be articulated as the surety that the incidences of the infringement of human rights, at least from these two aspects, would not recur in Malaya after the British left its former colony.

Secondly, it might be assumed that the provisions of fundamental liberties became the 'standard template' in the constitutions of newly independent colonies. However, this is not the case because not all the fundamental rights in such constitutions were derived from the ECHR.⁵⁷ References can be made to the independence constitutions of Ghana and Nigeria, former British colonies that attained their independence almost at the same time as Malaysia. The Ghana Order in Council (Constitution) 1957⁵⁸ was modelled upon, in fact 'a paste and scissors job', of the Indian Constitution 1950, the Universal Declaration of Human Rights 1948 and the Irish Free State Constitution 1937,

⁵³ British Colonial Office (n 38) para 161.

⁵⁴ *ibid.*

⁵⁵ Richard O. Winstedt, *Malaya and its History* (London: Hutchinson University Library 1966) 126.

⁵⁶ George C Allen and Audrey G Donnithorne, *Western Enterprise in Indonesia and Malaya: A Study in Economic Development* (London: Routledge 2007) 43.

⁵⁷ Simpson (n 46) 871.

⁵⁸ Ghana Independence Act, 1957 (UK) 5 & 6 ELIZ 2 c 6.

with nothing owed to the ECHR.⁵⁹ While the Ghanaian Constitution 1957 provides seven articles dealing with fundamental rights, it does not spell out a prohibition against slavery and forced labour. However, this was not the case in Nigeria. The Colonial Office changed its policy towards a bill of rights in Nigeria, from opposing all constitutional rights to supporting the use of an extensive bill of rights.⁶⁰ The methodology of the Working Group on the Nigerian Constitution was to 'cut and paste' a bill of rights from various sources including the ECHR, Sudan, Pakistan, Malaya and elsewhere,⁶¹ and so prohibition against slavery and forced labour was included in article 19 of the Constitution.

Based on the comparisons above, it can be adduced that the ECHR's anti-slavery and anti-forced labour provisions have been transplanted in the Federal Constitution. However, the inclusion of such provisions would only depend on the circumstances of the independent colonies and did not become a template for the drafters of the constitution.

Nevertheless, the Federal Constitution does not have any specific prohibition against human trafficking. But this absence is understandable because the Constitution in itself does not contain specific laws but consists a system of principles, rules and practices of a legal or quasi-legal, binding, nature that frame political action and public decision making⁶² in which the state acknowledges itself to be governed.⁶³ Hence, the fundamental statement in the Constitution provides higher rules to which actions or behaviours should conform.⁶⁴ It is likely to be broadly worded and would not be frequently changed or updated – such as to take into account the new usage of the language around

⁵⁹ Simpson (n 46) 852.

⁶⁰ Parkinson (n 43) 170.

⁶¹ *ibid* 152.

⁶² Andrew Harding, *Constitution of Malaysia: A Contextual Analysis* (Oxford: Hart 2012) 2.

⁶³ Oxford Dictionary <www.oxforddictionaries.com/definition/english/constitution> accessed 12 March 2016.

⁶⁴ Peter Madwick and Diana Woodhouse, *The Law and Politics of the Constitution of the United Kingdom* (Hertfordshire: Harvester Wheatsheaf 1995) 4.

human trafficking. In fact, the term used prior to Trafficking Protocol 2000 was 'traffic'⁶⁵ and not 'trafficking'.⁶⁶

The aforesaid constitutional provisions pertaining to the prohibition of slavery and forced labour are related to human trafficking that may result into a modern form of slavery or slavery related practices, as discussed earlier in Chapter Three. Further, since human trafficking involves activities construed as deprivation against person's life and personal liberty, it can be understood that the Federal Constitution guarantees protection against such activities.

Notwithstanding the above coverage, the Federal Constitution does not define slavery and forced labour. However, such definitions can be adduced from the Slavery Convention 1926 article 1.⁶⁷ Meanwhile, 'forced or compulsory labour' is attached under the definition of slavery in the Forced Labour Convention 1930 article 2.⁶⁸ Since Malaysia is a signatory to the related international treaties, the definition of such treaties should be applicable to Malaysia. Alternatively, such definitions can be adduced from the English law as a result of the application of the English Common Law on the basis of the lacunae in the Malaysian written law.⁶⁹ The discussions about this issue will take place in section 5.5 of this chapter.

Nevertheless, it is interesting to note that, thus far, the Federal Constitution, article 6, and the definition of slavery have not been a subject of litigation or

⁶⁵ See International Agreement for the suppression of the White Slave Traffic 1904, International Convention for the Suppression of the White Slave Traffic 1910, International Convention for the Suppression of the Traffic in Women and Children 1921, International Convention for the Suppression of the Traffic in Woman Full of Age 1933 Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others 1949. These International treaties have been discussed in chapter three.

⁶⁶ The term 'trafficking' is not entirely new at all. Human trafficking is not a new language but it is a developed term to include other types of exploitation rather than just sex exploitation, as appears in the international treaties before 2000. In addition, it seems that development of its meaning has departed from the notion of 'slavery' because the meaning of 'slavery', particularly in the West, gives a picture of 'chained' slaves. In the context of human trafficking, it is more subtle, complex, elaborate and indirect form of 'slavery'.

⁶⁷ Malaysia ratified to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery on 18 November 1957. See ILO (n 21).

⁶⁸ ILO (n 21).

⁶⁹ Shamrahayu A Aziz, 'The Malaysian Legal System: The Roots, the Influence and the Future' [2009] 3 *Malayan Law Journal* xcii.

contested in Malaysian Court. But the Court has made a liberal and broad interpretation to the definition of forced labour.⁷⁰ In *Barat Estates Sdn. Bhd. & Anor v Parawakan a/l Subramaniam & Ors*⁷¹ the court held that any written law or state action or arrangement shall not deprive the employees' right of choice according to article 6. According Gopal Sri Ram JCA:

'... no person may dictate to another that he shall be the employee of the former. When an employer sells off his business to another, he must give his employees the right to make a choice as to the course he or she wishes to adopt the giving of notice by the former employer upon the sale of a business thus enables the employee to exercise his right to the choice that he is entitled to make. A failure to give notice deprives the employee of his right to make a choice.'⁷²

The learned judge further deliberated that freedom of choice in the context of employment is a constitutional right. Based on the liberal and broad interpretation to article 6 in this case, 'compelling an employee to work for a particular employer, without affording him a choice in the matter, is merely one form of forced labour'.⁷³

In summary, this section elaborates the role of the law in addressing human trafficking based on international legal obligations and constitutional provisions. But international law cannot take effect, nor constitutional provisions be translated until the legislature promulgate a proper and enforceable law. In this regard, such a need for the domestic law is discussed in the following section.

5.4 The Need to Establish Specific Anti-human Trafficking Laws in Malaysia

Notwithstanding the provisions in the Federal Constitution and the obligations under the treaty-based international law, the municipal law does not always

⁷⁰ Gopal Sri Ram, 'The Workman and Constitution' [2007] 1 *Malayan Law Journal* clxxii.

⁷¹ [2000] 4 MLJ 107.

⁷² *ibid.* 116.

⁷³ *ibid.* 117.

confer a legal status on international treaties that the executive has signed. Such international treaties shall be binding internationally but subject to their incorporation in the domestic legislation so as to be enforceable in the domestic courts. This based on a UK landmark case of *R v Chief Immigration Officer, Heathrow Airport ex p Salamat Bibi*,⁷⁴ where His Lordship Lord Denning MR stated that ‘... I would dispute altogether that the convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament’.⁷⁵

The obiter in *Salamat Bibi* indicates that any treaty signed by the executive cannot change the law of the land, otherwise it would cause a serious violation of the separation of powers because the executive could derogate from the powers of the national legislature. In Malaysia, the principle in *Salamat Bibi* was followed by *Koh Wah Kuan v Pengarah Penjara Kajang, Selangor Darul Ehsan*.⁷⁶ It was held that the Malaysian legislature needs to transform or incorporate the contents of a treaty into municipal law by legislating the terms of the treaty or expressly adopting the treaty through relevant statutes.⁷⁷ The court stated that ‘the full regime of the Convention on the Rights of a Child still remain within the purview of the executive in the area of treaties and external affairs’.⁷⁸ Therefore the court cannot imply provisions in international treaties that have not been incorporated into the municipal law in Malaysia. The same principle was also applied in the case of *Public Prosecutor v Narogne Sookpavit & Ors*.⁷⁹ In this case, the respondents, several Thai fishermen, were arrested while cruising three miles from the Malaysian coast and charged under the Malaysian Fisheries Act 1963. The respondents’ defence that they have the rights in accordance to article 14(1) of the Geneva Convention on the Territorial Sea that allows ships of all states for innocent passage through territorial sea, however, was declined by the court because Malaysian legislature did not incorporate the particular provisions of this Convention with regard to innocent passage into the

⁷⁴ [1976] 3 All ER 843.

⁷⁵ *ibid* 847.

⁷⁶ [2004] 5 MLJ 193.

⁷⁷ Farid Sufian Shuaib, ‘The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse?’ (2008) *IJUM Law Journal* 181.

⁷⁸ *Koh Wah Kuan* (n 76) 224.

⁷⁹ [1987] 2 MLJ 100.

domestic law. The court stated that 'before a convention can come into force in Malaysia, Parliament must enact a law to that effect. ... No Malaysia statute has been cited to me to show that Article 14 had become part of Malaysian law'.⁸⁰

Although slavery and forced labour prohibition are enshrined in the Malaysian constitution as well as in relevant domestic legislation such as the Penal Code, these sources lack precise coverage. The Malaysian law ought to have transformed the prohibition of slavery and forced labour from the international treaties, and at the same time incorporated their definition into the municipal law. This is because according to the principle of incorporation, customary rules of the international law are part of the municipal law as long as they are not inconsistent with the legislation of the state.⁸¹ Even in England, the English courts take judicial notice of international law, provided that the court ascertains that there are no barriers within the internal system of law applying the rules of international law or provisions of a treaty.⁸² For the case of Malaysia's application of customary international law, the incorporation of such law is made through the application of English common law so long as it is not in contradiction with the legislation.⁸³

At the same time, the Malaysian courts were of the view that certain provisions in the Federal Constitution were in fact to accommodate Malaysia's commitment and obligations under the international treaty. In the case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors*,⁸⁴ the court held the word 'gender' used in the Federal Constitution article 8(2)⁸⁵ was in fact in order to comply with Malaysia's obligation under Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979.⁸⁶ The CEDAW 1979 defines 'discrimination against women' as any distinction, exclusion or restriction made

⁸⁰ *Narogne Sookpavit* (n 79) 106.

⁸¹ Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press 1998) 42.

⁸² *ibid* 41.

⁸³ Abdul G Hamid, 'Judicial Application of International Law in Malaysia: A Critical Analysis' (2005) 34:2 *Journal of the Malaysian Bar* 1.

⁸⁴ [2012] 1 MLJ 832.

⁸⁵ Federal Constitution, art 8(2) is pertaining to the prohibition against discrimination based on the religion, race, descent, place or birth or gender.

⁸⁶ *Noorfadilla* (n 84) 840.

on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁸⁷ The court opined that article 8(2) of the Federal Constitution, read together with CEDAW 1979, reflects the view that women are not discriminated against.⁸⁸ In order to reach its opinion, the court referred to the Parliamentary Hansard on the Bill to amend the Constitution to include the word 'gender' in article 8(2). According to the Minister, the word was incorporated to accede to the CEDAW 1979 in order to reflect the view that women are not discriminated against. Accordingly, the court is obliged to have regard to Malaysia's obligation under CEDAW 1979 in defining equality and gender discrimination under article 8(2) of the Constitution.⁸⁹

In the case of human trafficking in Malaysia, the Malaysian executive's decision to adopt the international treaty on human trafficking as legislation has been executed in law. It is worth noting that the anti-human trafficking-related legislation in Malaysia was promulgated prior to Malaysia's accession to the Trafficking Protocol 2000. The incorporation of the anti-human trafficking principles such as its definition and the 3P anti-trafficking paradigm has been made into the Malaysian legislation in the form of ATIPSOM 2007.⁹⁰ Therefore, it seems that the relevant elements of international law have now been fully put in place by the Malaysian legislation.

5.5. The Anti-human Trafficking Laws in Malaysia

The legal system in Malaysia developed in stages and has gone through many changes. The earliest known system practiced by the indigenous people was

⁸⁷ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) art. 1.

⁸⁸ *Noorfadilla* (n 84) 840.

⁸⁹ *ibid* 841.

⁹⁰ Parliament of Malaysia (n 14) 28.

the Hindu-origin animism and ancestor worship⁹¹ between the seventh to 14th centuries that greatly influenced the Malay customs.⁹² In Sabah and Sarawak, the native people professed the ancient belief of 'Gods of nature'.⁹³ During the era of the Malaccan Empire, Islam was brought to the Malay Archipelago in the 14th century by the Arab and Indian traders who traded at the port of Malacca,⁹⁴ assimilated among the Malays, and transformed the Malay *adat* (customs) and islamised their traditions.⁹⁵

Although the Malay *adat* and the *Sharia* laws can be considered as important sources of slavery laws, the contemporary Malaysian legal system is more a legacy of the British colonial era reflecting the plural model that had emerged in Britain's Malay colonies.⁹⁶ Islamic laws, on the other hand, remain as personal law among Malaysian inhabitants with limited criminal codification affecting only Muslims in Islamic-related matters.⁹⁷ The demarcation of legislative powers between the federal and state governments is stated in the Federal Constitution, article 74, and enumerated in the ninth schedule among others the federal (list I), state (list II) and concurrent (list III) lists. The ninth schedule provides that the federal government shall have the power to legislate criminal law,⁹⁸ while the power of the state is to ensure 'the creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List'.⁹⁹ In this regard, human trafficking shall be administered under the federal list, hence this allocation dilutes the influence of Islamic legal principles in this subject.

⁹¹ Sharifah Suhana Syed Ahmad, *Malaysian Legal System* (2nd edn, Singapore: Lexis Nexis 2007) 1.

⁹² Siti Zubaidah Ismail, 'At the Foot of the Sultan: The Dynamic Application of Shariah in Malaysia' (2015) 3 *Electronic Journal of Islamic and Middle Eastern Law* 69.

⁹³ Ahmad (n 91) 1.

⁹⁴ Ramizah Wan Muhammad, 'Sejarah Pentadbiran Kehakiman di Malaysia: Satu Sorotan' (2009) 21:1 *Kanun: Jurnal Undang-Undang Malaysia* 1.

⁹⁵ Ismail (n 92).

⁹⁶ Farid Sufian Shuaib, 'The Islamic Legal System in Malaysia' (2012) 21:1 *Pacific Rim Law and Policy Journal* 85.

⁹⁷ Abdul Aziz Bari, 'Religion, Law and Governance in Malaysia' (2010) 2:1 *Islam and Civilisational Renewal* 60.

⁹⁸ Federal Constitution, list I(1).

⁹⁹ Federal Constitution, list II(1).

The subsequent development of laws against, or related to, human trafficking in Malaysia can be divided into three parts. First, the discussion will be focused on the time of Malaysia's pre-independence, particularly with the influence of the English common law, English statutes as well as transplantation of the Penal Code of India into the Straits Settlements Penal Code. Secondly, the discussion is centred on the Malaysian post-independence of Malaysia where various legislative provisions have emerged, but prior to the passage of the ATIPSOM 2007. Finally, the elaboration relates to the promulgation of the ATIPSOM in 2007 and its provisions.

5.5.1 Pre-Independence Laws

The pre-independence anti-human trafficking laws in Malaysia are predominantly influenced by the English law, including the Victorian-era Acts, English common law as well as the Penal Code which is rooted in the English criminal law.¹⁰⁰ Although post-independence Malaysia has seen its legislature churning out statutes at unprecedented rates,¹⁰¹ there is no doubt that the applicability and influence of the English common law and equity is imperative in the context of Malaysian law.

5.5.1.1. Prior to British Arrival

The earlier slavery-related laws in the Malay Archipelago were greatly influenced by Islamic law or Sharia legal principles, which consist of five groups including *Undang-Undang Kerajaan*, the *Minangkabau* Digests, the *Kedah* Digests, the *Malacca* Digest and the *Ninety Nine Laws of Perak*.¹⁰² Although these laws exhibit no clear division between constitutional, criminal and civil law, family law, legal power of the ruler, rules relating to proper conducts, particularly to sexual conducts, and penalties to all offences,¹⁰³ the provisions relating to

¹⁰⁰ James F Stephens, *A History of the Criminal Law of England* (Vol III London: Macmillan & Co 1883) 300.

¹⁰¹ Farid Sufian Shuaib, 'Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods' (2009) 13 *UKM Journal of Law and Society* 158.

¹⁰² Michael B Hooker, *Readings in Malay Adat Laws* (Singapore: NUS Press 1970) 51.

¹⁰³ Shuaib, 'The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse' (n 77).

slavery are common.¹⁰⁴ Some provisions on slavery are also traced in these Malay Digests including the law for fugitive slaves, the law of contract affecting the hire of slaves and animals, the offence of selling into slavery a person who has entered service to escape death from starvation or shipwreck and penalties for stealing the slaves of owners of various ranks.¹⁰⁵

Notwithstanding the above, the concept of slavery practices in the Malay world back then was dissimilar to the 'chain-slaves' of the Transatlantic or the Barbary-slavery practices. Under the Malay Digest, there were three categories of slaves: royal slaves, debt slaves and ordinary slaves - and they were all accorded with legal protection. In the Malacca Digest, for example, legal protection was provided for the royal slaves, and they were apparently better off than the ordinary commoners.¹⁰⁶

The application of the Malay *adat* laws and Islamic principles continued even during the early British colonial era in Malaysia. For slavery, there had been a never ending struggle between the customary law and the *sharia* with Islamic clerics often seeking to enforce the latter.¹⁰⁷ Nevertheless these clerics met with pleas that the slavery practices were lawful under the Malay customs – that debt bondage was always defended.¹⁰⁸ Notwithstanding, British officials began to characterise debt bondage as 'unauthorised and illegal innovation in terms of Islamic law'.¹⁰⁹ In seeking to end these problems, they stressed that the Quran urged the remission of debts.¹¹⁰ Slavery was not mentioned in the treaty signed with the Malay rulers from 1874, but the British officials often verbally instructed

¹⁰⁴ Shamsul Amri Baharuddin, 'Islam Embedded: Moderate Political Islam and Governance in the Malay World', in KS Nathan and Mohammad Hashim Kamali (eds), *Islam in Southeast Asia, Political, Social and Strategic Challenges in the 21st Century* (Singapore: Institute of Southeast Asian Studies 2005) 112.

¹⁰⁵ Jelani Harun, 'Kajian Naskah Undang-Undang Adat Melayu di London' (2008) 26 *International Journal of Malay World and Civilisation* 127.

¹⁰⁶ Abu Talib Ahmad, *Museums, History and Culture in Malaysia* (Singapore: NUS Press 2015) 112.

¹⁰⁷ William E Maxwell, 'The Law Relating to Slavery among the Malays' (1890) 22 *Journal of the Straits Branch of the Royal Asiatic Society* 247.

¹⁰⁸ *ibid.*

¹⁰⁹ Richard O Winstedt and Seong Chee Tham, *The Malays: A Cultural History* (Singapore: G. Brash 1981) 54-55.

¹¹⁰ Philip Loh Fook Seng, *The Malay States, 1877-1895: Political Change and Social Policy* (Singapore: OUP 1969) 189.

that 'no slavery could be permitted to exist in any state under British protection'.¹¹¹

5.5.1.2. After British Arrival

The contemporary anti-human trafficking laws in Malaysia are greatly influenced by the English law while the Federal Constitution is the highest law in Malaysia, article 160 interprets 'law' in Malaysia to include written law, the English common law, as well as any custom or usage having the force of law in the federation. In this regard, such constitutional provisions make an explicit recognition of the English law as being an integral part of Malaysian law.

The beginning of the contemporary legal system in Malaysia can be traced back to early stage of the British colonisation in the Straits Settlement.¹¹² But the acceptance of the English legal system arose in stages.

The introduction of English law began in Penang when the colonisers enforced the First Charter of Justice 1807,¹¹³ based on the claim that the island was *terra nullius*. Upon acquiring Penang, Singapore and Malacca, the British incorporated the Straits Settlements in 1826 and granted a new Charter in 1826, extending the jurisdiction of the Court of Judicature of Prince of Wales Island (Penang) to Singapore and Malacca.¹¹⁴ The 1826 Charter, aside from retaining the provisions of the 1807 Charter, introduced the laws of England as of 1826 as well as arranged the administration of justice in the Straits Settlements and provided for the application of English criminal law.¹¹⁵ Subsequently, the third Charter was granted in 1855. It did not introduce English law after 1826, but

¹¹¹ Barbara W Andaya and Leonard Y Andaya, *A History of Malaysia* (2nd edn, Palgrave 2001) 160.

¹¹² There are arguments as to whether the occupation of English colonial masters in Malaysia began by way of settlement or cession, but the issue is immaterial for the purpose of this thesis. The Straits Settlements comprise of Penang, Malacca and Singapore, three states before British acquired control over the Federated Malay States and sealed agreements to 'advise' the rulers of the Unfederated Malay States .

¹¹³ Ahmad (n 91) 13.

¹¹⁴ Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System* (Petaling Jaya: Longman 1990) 19.

¹¹⁵ Yeo, Morgan and Chan (n 12) 7.

according to Sir Benson Maxwell in *R v Willans*,¹¹⁶ the third Charter was to re-organise the existing courts. This was executed by splitting the courts into two divisions, one for Penang and another for Malacca and Singapore.¹¹⁷

The British then consolidated their laws in Peninsular Malaysia when the rulers of both the Federated Malay States (FMS) voluntarily agreed to accept the common law system in 1937. In 1951, the Unfederated Malay States (UMS) accepted the common law of England by passing the Civil Law (Extension) Act 1951, thus signalling that the English law was being applied to the whole of Malaya. In 1956, both the 1937 and 1951 enactments were repealed and replaced by the new Civil Law Ordinance 1956, the predecessor to the currently enforceable Civil Law Act 1956, which applied to the whole of Federation of Malaya including Penang and Malacca.

The application of the common law in the states of Sabah and Sarawak, came by way of voluntary endorsement. It started in Sarawak when it passed the Law of Sarawak Ordinance 1928 followed by North Borneo (Sabah) which passed the Civil Law Ordinance 1938.¹¹⁸ These laws marked the formal acknowledgment of the English law in such states having regard to native customs and local conditions. The application of common law was further clarified and expanded when the states passed the Application of Law Ordinance 1949 in Sarawak and the Application of Law Ordinance 1951 in North Borneo respectively.

The application process of the English common law in Malaysia was completed with the formation of the Federation of Malaysia on 16 September 1963. At that time, there were three different statutes recognising the application of common law in Malaysia, among others the Civil law Ordinance 1956 in the Peninsular, and the Application of Law Ordinances in Sarawak 1949 and Sabah 1951 respectively. Soon after the formation of Malaysia, the Civil Law Ordinance 1956

¹¹⁶ [1858] 3 Ky 16.

¹¹⁷ Abdul Hamid Mohamad and Adnan Trakic, 'The Reception of English law in Malaysia and Development of the Malaysian Common Law' (2015) 44 (2) *Common Law World Review* 123.

¹¹⁸ *Ibid.*

was extended to both Sarawak and Sabah through the Civil Law Ordinance (Extension) Order 1971, and amalgamated into one single statute and called the Civil Law Act 1956 (Act 67), which came into force on 1 April 1972. The acceptance of English common law and equity is provided by section 3(1) of the Civil Law Act 1956 that provides for any Court in Peninsular Malaysia or any part thereof, to apply the common law of England and the rules of equity as administered in England on the 7 April 1956.¹¹⁹ In Sabah and Sarawak, the law also provides for the application of common law and equity, but with the addition to the application of the English statutes of general application as administered or in force in England on 1 December 1951 in Sabah,¹²⁰ and the same laws as of 12 December 1949 in Sarawak.¹²¹ Section 3 also provides that the application of common law and equity is contingent to other provision made or may hereafter be made by any written law in force in Malaysia.

As for the Malaysian Penal Code, that law was basically a transplantation of the Indian Penal Code 1860 into the Penal Code of Straits Settlement¹²² in 1871. But the Indian Penal Code in itself is based on the 'the law of England, stripped of technicality and local peculiarities, shortened, simplified, made intelligible and precise'.¹²³ The Malaysian concept of criminal and punishment law gradually developed amid the influence of liberal 19th century ideas, and was largely modelled on the British penal system.¹²⁴ Initially, the criminal law in Malaysia was concerned only with punishments, but as it developed, it tended to acquire reformative characteristics, such as the spread of rehabilitation centres from protective custody and approved schools, seeking to equip the prisoner for civilian life, on his release from the security of prison to the uncertainty of a free life.¹²⁵

¹¹⁹ Civil Law Act 1956, s 2(1)(a).

¹²⁰ *ibid* s 1(b).

¹²¹ *Ibid* s 1(c).

¹²² Andrew BL Phang, 'Of Codes and Ideology: Some Notes on the Origin of the Major Criminal Enactments of Singapore' (1989) 31 *Malaya Law Review* 46.

¹²³ Whitley Stokes, *Anglo-Indian Codes* (Vol I, Oxford: Clarendon 1887) 71.

¹²⁴ Reginald H Hickling, *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (Subang Jaya: Pelanduk 2001) 180.

¹²⁵ *ibid* 181.

Subsequently, the British colonial regime introduced a codified criminal law to the FMS in the form of the Penal Code 1936. Later in 1948, the Federation of Malaya was formed as a result of the amalgamation of the Straits Settlements, FMS and the UMS. The Penal Code 1936 then was extended to the Federation of Malaya by the Penal Code Amendment Ordinance 1948. Malaya then changed its name to Malaysia when the states of Sabah and Sarawak and Singapore¹²⁶ joined the Federation in 1963. The Penal Code 1936 was extended throughout Malaysia through the Penal Code Amendment Act 1976, and was revised in 1997 to change its title from the Enactment to the Act.¹²⁷ Further discussion about the Penal Code will be made later in the next section of this chapter.

Accordingly, the anti-human trafficking laws in Malaysia can be traced back to the application of its English legal system. As was discussed in Chapter Three, the passage of the Abolition of the Slave Trade Act 1807 was a result of the anti-slavery movement in the UK. Next, the passage of the Slave Trade Consolidation Act 1824 and the Slavery Abolition Act 1833 further consolidated the success of the anti-slavery campaigns in the UK and its territories.

The acceptance of English common law was also another milestone towards the anti-slavery laws being applicable in Malaysia. It has been recognised that slavery, slave-related practices and forced labour, whether committed during peace or in time of war and with respect to any civilian population became international crimes under the conventional and customary international law.¹²⁸ In the perspective of English law, customary international law is not only a part, but also a source of the law.¹²⁹ In this regard, a reference is made to the celebrated case of *In re Piracy Jure Gentium, Special Reference*¹³⁰ where the Privy Council concurred that actual robbery is not an essential element in the crime of *piracy jure gentium*. According to the Privy Council, even a frustrated

¹²⁶ Singapore proclaimed its independence from Malaysia on 9 August 1965.

¹²⁷ Norbani M Nazeri, 'Criminal Law Codification and Reform in Malaysia: An Overview' (2010) *Singapore Journal of Legal Studies* 375.

¹²⁸ M. Cherif Bassiouni, 'Enslavement as International Crime' (1990-1991) *N.Y.U. Journal of International Law and Policy* 445.

¹²⁹ James L Brierly, 'International Law in England' (1935) 51 *Law Quarterly Review* 24.

¹³⁰ [1934] A.C. 586.

attempt to commit a piratical robbery is equally *piracy jure gentium* because it is a *hostis humani generis* and justiciable by any state anywhere,¹³¹ including the UK. The case manifests the recognition of customary international law in the UK.

The acceptance and influence of the English law included some anti-slavery dimensions in the Malaysian legal system. However, such laws do not provide the mechanisms to properly and comprehensively address human trafficking problems because of the following reasons. Firstly, the definition of 'slavery' in those laws can be construed as representing the 'old' transatlantic slavery. Although human trafficking in some way conforms to the situation of a person being enslaved, such a definition of 'slavery' is too general and lacks similarity with the definition of human trafficking as per the Trafficking Protocol 2000 that warrants the element of an act, means and purpose.

Secondly, such laws only prohibit and criminalise slavery by way of prohibiting and providing sanctions against slavery but lack the prevention and protection mechanisms as mandated by the Trafficking Protocol.

Thirdly, there is no provision pertaining to the establishment of an institution that consolidates anti-human trafficking efforts, staff and financial allocations.

5.5.2. Post-Independence Laws

Prior to the passage of the ATIPSOM 2007, several laws were used to criminalise acts of human trafficking or slavery as well as protecting women and children from being trafficked. These laws include the Penal Code, the Child Act 2001, the Immigration Act 1959, and the Anti Money Laundering and Anti-Terrorism Financing Act 2001.

¹³¹ *In re Piracy Jure Gentium* (n 130) 589.

5.5.2.1. The Penal Code

Under the Penal Code, the most important provision with regards to the criminalisation against slavery are in sections 370 and 371. Section 370 deals with the prohibition against buying or disposing of any persons as a slave. The tenor of section 371 is such that the crime of dealing in slaves in any way includes trafficking of human beings, which may have some characteristics of human trafficking.¹³² The prohibition against exploiting any person for the purpose of prostitution is stated in section 372. The Penal Code also prohibits the act of kidnapping, such as kidnapping a woman in order to compel her to a life of prostitution (section 366) or kidnapping a person in order to subject him to slavery (section 367). Based on the aforementioned provisions, it can be seen that the Code itself recognised the requirement for the criminalisation of human trafficking in Malaysia in accordance with the Trafficking Protocol 2000. However, the Penal Code concerns the criminalisation aspects of acts related to human trafficking, yet it lacks other aspects of an anti-human trafficking regime.

It seems that the Penal Code primarily addresses the issue of trafficking for the purpose of prostitution. Although the Penal Code provides for two offences relating to slavery, apart from habitual dealings, the penalties are relatively light and would not comply with the need for specialised anti-human trafficking legislation to address human trafficking problems.

5.5.2.2. The Child Act 2001

The Child Act 2001 incorporates certain principles of the UN Convention on the Rights of the Child 1989 in Malaysia. The Child Act 2001 stipulates punishments for the exploitation of children such as its Part VIII relates to trafficking in and abduction of children. Under Part VIII, section 48(1) criminalises any person who

¹³² Khairil A Mokhtar, 'Eliminating Slavery and Combating Human Trafficking in Malaysia: The Relevant Constitutional Provisions and Domestic and International Laws', in Khairil A Mokhtar (ed), *Constitutional Law and Human Rights in Malaysia: Selected Issues* (Kuala Lumpur: IIUM Press 2011) 465.

takes part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody or control of a child for any valuable consideration, while section 48(2) criminalises those without lawful authority or excuse harbours or has in his possession, custody or control a child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration by any other person within or outside Malaysia. Section 48 does specifically mention the word 'trafficking', but the contents of such provision corresponds with the definition child trafficking under the Trafficking Protocol, so it does not need any element of 'exploitation' to constitute an offence of human trafficking. Notwithstanding, section 32 prohibits anyone from exploiting a child such as for the purpose begging (subsection 1) or any illegal activities (subsection 2).

5.5.2.3. The Immigration Act 1959

The Immigration Act 1959 regulates entry, work and stay in the country. But the Act does not make any distinction between prohibited immigrants or any other category of vulnerable persons worthy of protection and assistance under the international law, such as the Trafficking Protocol. However, the Immigration Act serves to only criminalise the act pertaining to illegal migration or harbouring illegal migrants.¹³³ It does not provide protection to the victims of human trafficking because they will be considered as the offenders rather than victims.

5.5.2.4 Other Laws

The Anti-Money Laundering and Anti-Terrorism Financing Act (AMLAFTA) 2001 regulates money laundering activities in Malaysia.¹³⁴ Under section 4 of AMLAFTA, the law criminalises an acts or attempts to be involved in or to assist in the commission of money laundering. The definition of money laundering is

¹³³ *Siti Rashidah Razali & Ors v PP* [2011] 6 MLJ 417.

¹³⁴ Guru Dhillon, 'A Review of Anti-Money Laundering Regulations in England and Malaysia' [2015] 2 *Malayan Law Journal* i.

divided into three limbs of separate offences.¹³⁵ First, there is a person who is directly or indirectly involved in a transaction or proceeds of the unlawful activity. Second, there is an offence if the person obtains, accepts, keeps, hides, transfers, transforms, exchanges, transmits, arranges, uses, eliminates from or brings into Malaysia the proceeds of unlawful activity. Third, there is an offence if a person encumbers the establishment of the true identities of the unlawful activities. The AMLAFTA lists 180 predicate offences in its Second Schedule including human trafficking and proceeds from human trafficking activities.

While the Penal Code continues to be the general statute of criminal law in Malaysia, there are also several statutes dealing with specialised forms of criminality, for example, the Prevention of Terrorism Act 2015, that the Malaysian government has proclaimed to provide greater authority to the police in safeguarding Malaysia from any terrorism activities and militant movement,¹³⁶ as well as the Malaysian Anti-Corruption Commission Act 2009 that deals with matters pertaining to and the prevention of corruption activities in Malaysia.

5.5.3. Assessment of the Laws Prior to ATIPSOM

Although the Penal Code contains several matters akin to human trafficking, it is only concerned with the criminalisation of the perpetrators. It seems that the focus of such laws are with the offence of slavery rather than human trafficking. This is because the older laws lack other requirements of the Trafficking Protocol 2000 such as prevention and protection of victims. Such laws seem to have only auxiliary function to the anti-human trafficking laws, and therefore would not be sufficient to fulfil the requirements and obligations set under the Trafficking Protocol. In this regard, a specialised anti-human trafficking law was still needed in the efforts to address the problem.

¹³⁵ Guru Dhillon and others, 'Online Betting - Legislation & Regulation - The Way Forward' 2012: ix *Current Law Journal* 1.

¹³⁶ Parliament of Malaysia House of Representatives, *Hansard*, Prevention of Terrorism Act Bill 2015 (Second and Third Reading) DR. 6.4.2015, p 31-32.

5.5.4. Development of Malaysian Anti-human Trafficking Law After 2007

Human trafficking involves a distinctive kind of crime. Based on the Trafficking Protocol 2000, the anti-human trafficking agenda involves a wide spectrum of actions; to put in place policies and strategies, to create sufficient laws and ensure appropriate punishment against the perpetrators, to enhance international collaboration, and to ensure that the welfare and rights of the victims are protected, amongst others. Prior to the passage of the ATIPSOM 2007, there was no provision in the law that specified the crime of human trafficking in the country. The laws available back then were those limited to prosecution against acts akin to human trafficking,¹³⁷ but none provided the definition of such crime or dealt with it on a comprehensive basis.

In Chapter One, it was stated that the generally acceptable definition of human trafficking was only agreed in 2000 when the Trafficking Protocol 2000 entered into force. The Trafficking Protocol 2000 also consists of provisions pertaining to the prevention, prosecution and protection of the trafficking victims that form the basis of the 3P paradigm of the efforts to combat and obliterate human trafficking. Hence the introduction of the ATIPSOM 2007 was aimed at countering human trafficking and providing protection to the victims of human trafficking in Malaysia¹³⁸ on a direct and comprehensive basis.

The advent of the ATIPSOM 2007 manifests the Malaysian government's determination and effort to tackle human trafficking issues in Malaysia, as it specifically encompasses aspects of prosecution, prevention and care and protection to the human trafficking victims.¹³⁹

¹³⁷ Parliament of Malaysia (n 14) 29.

¹³⁸ *ibid* 30.

¹³⁹ *ibid* 29.

5.6. Anti-Trafficking in Persons and Anti-Smuggling of Migrants (ATIPSOM) 2007

5.6.1. Overview of the ATIPSOM 2007

The ATIPSOM 2007 was initially enacted as the Anti-Trafficking in Persons (ATIP) in 2007 and is the most important legislation providing the definition of human trafficking, and prescribes the necessary national policy measures in combating human trafficking. This includes the adoption of the 3P anti-human trafficking paradigm.

Following its amendments in 2010, the ATIPSOM 2007 also included components extended to the prohibition against migrant smuggling by incorporating a few new provisions based on the Protocol against the Smuggling of Migrants by Land, Sea and Air. The law then had its name changed to the ATIPSOM 2007. Although there is a relation between human trafficking and migrant smuggling, in which smuggling may result into trafficking, this thesis, however, does not cover the issue of migrant smuggling.

In 2015, the ATIPSOM 2007 was amended to include a few additional and enhanced elements particularly about the protection of victims.¹⁴⁰ The amendments include the additional definition of shelter facilities for victims,¹⁴¹ the establishment of the High Level Committee which is chaired by the Minister of Home Affairs,¹⁴² an increased period of interim protection order from 14 days to 21 days,¹⁴³ and provisions relating to the eligibility of the trafficked victims to seek employment,¹⁴⁴ as well as pertaining to compensation to the victims¹⁴⁵ and the wage in arrears to the trafficked victims.¹⁴⁶

¹⁴⁰ Parliament of Malaysia House of Representatives, *Prevention of Terrorism Act Bill 2015* 63.

¹⁴¹ Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) 2015 s 2.

¹⁴² ATIPSOM 2007, s 5A.

¹⁴³ *ibid* s 44.

¹⁴⁴ *ibid* s 51A and s16A-B.

¹⁴⁵ *ibid* s 66A.

¹⁴⁶ *ibid* s 66B.

There was a delay in the promulgation of the ATIPSOM 2007 from the time of the agreement of the Trafficking Protocol 2000. It raises a question whether the anti-human trafficking law was a priority to the Malaysian government or otherwise. There are three possible explanations: First, it seems that human trafficking is quite a new phenomenon in Malaysia although such practices have been occurring for some time but not well understood.¹⁴⁷ According to one interviewee, her organisation only discovered and realised that some inmates in a prison they visited 'were just not normal prisoners. There was something wrong with their detention. They were not criminal. They were victims of human trafficking'.¹⁴⁸ Secondly the lack of resources can be another reason for the delay. This is because there is a need for people, financial allocation and infrastructure in order to establish new laws and to implement them. The human trafficking 3P elements would need several specialised government organs to enforce such as the prevention, investigation, enforcement, prosecution and protection of victims. Third, there is a probability that the authorities thought that the laws prior to the promulgation of the ATIPSOM 2007 were sufficient to combat human trafficking.

The long title of the ATIPSOM 2007 states that the core purpose of the Act is to 'prevent and combat human trafficking and migrant smuggling and to provide for matters connected therewith.' There is no explanation about what 'the connected matters' mean, but overall the provisions of the ATIPSOM 2007 could indicate that the purpose is to address the overall issue of human trafficking. This issue was highlighted during the introduction of the ATIPSOM 2007 in the Parliament that the purpose is not only to complement the then existing anti-trafficking laws, but to serve as a specialised law to establish human trafficking offences, to provide protection and assistance to the victims as well as to form an anti-human trafficking council.¹⁴⁹ Due to the complex, multifaceted issue of human trafficking, there is a requirement for a holistic, human rights-based response that is broad enough to address the problem at multiple levels as well

¹⁴⁷ Interview with NGO 4.

¹⁴⁸ Interview with NGO 2.

¹⁴⁹ Parliament of Malaysia (n 14) 30.

as it making sense in the context of its application domestically.¹⁵⁰ Therefore, responding to human trafficking problems is a daunting task to governments and policymakers as well as the organisations that are tasked to assist victims. In this regard, comprehensive counter-trafficking activities often focus on three broad objectives, as in the perspective of the ATIPSOM, the anti-human trafficking 3P paradigm: prevention, protection and protection.

5.6.2. Themes of the ATIPSOM 2007

The main themes of the ATIPSOM 2007 are threefold. First, the Act provides for the establishment of the legal and administrative mechanisms for the prevention of trafficking. This is implicit in the mandate given to the MAPO where its establishment is due to the need for an anti-human trafficking agenda in Malaysia because the Act is 'aimed to prevent and combat trafficking in persons'.¹⁵¹ Second, the Act provides for an offence of human trafficking¹⁵² by ensuring the perpetrators are apprehended, prosecuted and, once found guilty, are appropriately punished. This is contained in several provisions pertaining to the criminalisation of human trafficking and the punishment the perpetrators. Thirdly, the ATIPSOM 2007 provides for the protection and support of the human trafficking victims.¹⁵³ This is the distinct agenda of the anti-human trafficking efforts compared from earlier anti-human trafficking laws in Malaysia.

The structure of the ATIPSOM 2007 is divided into six parts. Part I includes the preliminary issues, which include the short title, the commencement of the Act and the definitions. The ATIPSOM 2007's scope of application is stated in section 3 where it covers offences regardless of whether they took place inside or outside Malaysia by either the nationals or non-nationals on two conditions: first, if Malaysia is the receiving or transit country or of the exploitation occurred in Malaysia; or second, if the foreign country is an origin or transit country but

¹⁵⁰ International Organisation for Migration, *Handbook on Performance Indicators for Counter-Trafficking Projects* (Washington D.C.: IOM 2008) 5.

¹⁵¹ The long title of the ATISPOM stated that it is an 'Act to prevent and combat trafficking in persons and smuggling in migrants and to provide for matters connected therewith'.

¹⁵² Daniel Lo, 'Investigation: What are the Key Elements in a Trafficking in Persons Case?' (2010) *Law Review* 419.

¹⁵³ *ibid*

the human trafficking incident starts or transits in Malaysia. Section 4 further provides for the extension of the ATIPSOM 2007 to extra-territorial offences, including offences committed on the high seas on board any ship or aircraft registered in Malaysia, or by a Malaysian citizen or permanent resident on board foreign ships or aircrafts or in any place outside and beyond limit of Malaysia. Section 5 provides that the ATIPSOM 2007 shall be an addition to and not a derogation from the existing human trafficking laws, and in the event of conflict or inconsistency, the provisions of the ATIPSOM 2007 will prevail.

Part II of the ATIPSOM 2007 pertains to the establishment of the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants. There is a wide range of representation¹⁵⁴ from government and NGOs involved in anti-human trafficking and anti-migrant smuggling including the ministries and government agencies in charge of internal security and home affairs, foreign affairs, welfare services, human resources, transport, information, defence, health, youth and sports, international trade, as well as the attorney general and the police department.¹⁵⁵ The representatives from NGOs are those who have appropriate experience, knowledge, problems and on issues on human trafficking and migrant smuggling including the protection and the support of the trafficked victims.¹⁵⁶ The function of the MAPO is stated in section 7, which will be extensively discussed in section 5.6.3.1.(i), and the Council is to meet as often as necessary,¹⁵⁷ including its specific Committee handling specific issues of human trafficking and migrant smuggling which is established under section 8.

Part III provides for the wide range of human trafficking offences, which will be elucidated in the following sections of this chapter. The ATIPSOM 2007 amendment in 2010 included additional Part IIIA pertaining to the offences of migrant smuggling, however this will be omitted from the discussion of this thesis. Part IV of the ATIPSOM 2007 is pertaining to the enforcement of the Act, and will be discussed in Chapter 6 of this thesis. Part V is about the protection

¹⁵⁴ ATIPSOM 2007, s 6.

¹⁵⁵ ATIPSOM 2007, s 6(2)(a)–(n).

¹⁵⁶ *ibid* s 6(2)(n) and (o).

¹⁵⁷ *ibid* s 9.

of trafficked victims, a part that will be dissected in the forthcoming sections of this thesis. Finally, Part VI of the ATIPSOM 2007 is on the miscellaneous matters of the Act including the power of the Minister to move the trafficked persons, restriction of the publication about the trafficked victims as well on the admissibility of evidence, general and enhanced penalties and the offences committed by the body corporate.

It seems that any attempts at assessing the ATIPSOM 2007 and its implementation must revolve around these three themes and objectives of the law. In this regard, this section will elucidate as to whether the 3P paradigm is well established in the ATIPSOM 2007. This section will also look at additional perspective of anti-human trafficking agenda namely the 'partnership' notion contained in the ATIPSOM 2007.

5.6.3. Prevention of Human Trafficking

In principle, the prevention of human trafficking refers to the positive measures to stop future trafficking from occurring.¹⁵⁸ This is to ensure the policy and activities, including laws against human trafficking, are generally those addressing the causes of human trafficking.¹⁵⁹ Prevention is of the utmost importance in the Trafficking Protocol because the purpose of the Protocol is 'to prevent and combat trafficking in persons, paying particular attention to women and children'.¹⁶⁰ This is stated as the first general principle for the purpose of the Model Law against Trafficking in Persons, a model law drafted by the UNODC in responding to the UN General Assembly in order to promote and assist the Member States to become party and implement the Trafficking Protocol.¹⁶¹

¹⁵⁸ OHCHR, *Commentary to the Principle and Guidelines on Human Rights and Human Trafficking*, (New York: UN, 2010) 95.

¹⁵⁹ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge: CUP 2010) 414.

¹⁶⁰ Trafficking Protocol, art 2.

¹⁶¹ UNODC, *Model Law Against Trafficking in Persons*, Introduction and art 3, p. 1 and 6. <www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf> accessed 10 April 2016.

As per the Trafficking Protocol's obligation for member states to take preventive measures, article 9 requires them to establish comprehensive policies, programme and measures to prevent and combat human trafficking as well as to protect trafficked victims from re-victimisation.¹⁶² State parties are also required to undertake: measures such as research, information and mass media campaigns and social and economic initiatives;¹⁶³ cooperation with non-governmental organisations, other relevant organisations and other elements of civil society,¹⁶⁴ bilateral or multilateral cooperation;¹⁶⁵ as well as educational, social or cultural measures to discourage the demand that fosters all forms of exploitation.¹⁶⁶

In responding to these requirements, the ATIPSOM 2007 long title in itself reveals the policy objectives of Parliament to establish human trafficking law in Malaysia. Similarly, the UK Modern Slavery Act 2015 (MSA 2015) places the element of prevention as one of the main objectives underlying the operation of the Act.¹⁶⁷ Accordingly, the ATIPSOM 2007 is a clear manifestation of Malaysia's determination to prevent human trafficking, as prevention is the overarching principle of the law. Although the provisions of the ATISPOM 2007 do not specifically mention the word 'prevention', the principle of prevention can be derived from the multifaceted nature of the Act in itself. The following discussion is based on the dissection of the ATISPOSM 2007.

5.6.3.1. Prevention by Way of Establishing a National Coordination Body

The UNODC Model Law provides for member states to establish a national anti-trafficking coordinating body (an inter-agency anti-trafficking task force)¹⁶⁸ for these prevention purposes. This is because without such a body, there is often poor coordination among the government agencies as well as the other anti-

¹⁶² Trafficking Protocol, 2000 art 9(1).

¹⁶³ *ibid* art 9(2).

¹⁶⁴ *ibid* art 9(3).

¹⁶⁵ *ibid* art 9(4).

¹⁶⁶ *ibid* art 9(6).

¹⁶⁷ Jason Haynes, 'The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37:1 *Statue Law Review* 33.

¹⁶⁸ UNODC, Model Law Against Trafficking in Persons (n 161) art 35.

human trafficking stakeholders, such as the lack of coordination between law enforcement and criminal justice service providers, on the one hand, and victim service providers, including NGOs, on the other.¹⁶⁹ These problems often lead to negative impacts to the prosecution and repatriation, rehabilitation and reintegration of the trafficked victims.

5.6.3.1.(i) The Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants

One of the overarching purposes of the ATIPSOM 2007 is to prevent human trafficking, but a provision pertaining to prevention is nowhere to be found in the Act. However, the functions of the Council for the Anti-Trafficking in Persons and Anti-Smuggling of Migrants (*Majlis Anti Pamerdagangan Orang dan Anti Penyeludupan Migran* – MAPO) are explicitly about human trafficking prevention.

The ATIPSOM, section 6, provides for the establishment of the MAPO for the purpose of the ATIPSOM 2007, as outlined in the long title. The MAPO was established in 2008 as soon as the ATIPSOM 2007 came into force in October 2007.¹⁷⁰ The overarching objective of the establishment of MAPO is that it functions as a body to coordinate the implementation of the ATIPSOM 2007, as well as other activities related to efforts including formulating policies and programmes to prevent and suppress human trafficking in Malaysia.¹⁷¹ Other functions and powers of the MAPO are outlined in ATIPSOM 2007 section 7 as follows. First, it formulates and oversees the implementation of a national action plan¹⁷² on the prevention and suppression of human trafficking including the support and protection of trafficked victims.¹⁷³ This is reflected in the National

¹⁶⁹ UN, UN Global Initiative to Combat Human Trafficking (UN.GIFT), Background paper of the Secretary-General, *Improving the Coordination of Efforts against Trafficking in Persons*, 12-13 <www.ungift.org/doc/knowledgehub/resource-centre/ICAT/SG_back_groundpaper.pdf> accessed 13 April 2016.

¹⁷⁰ Interview with Policy 2.

¹⁷¹ Interview with Policy 1.

¹⁷² The first five year National Action Plan 2010-2015 outlines the strategies and focus of the anti-human trafficking efforts. At the time of writing, the MAPO is in the process of drafting the second five year National Action Plan 2016-2020 in enforcing several new elements of the 2015's amendments of the ATIPSOM.2007.

¹⁷³ ATIPSOM 2007, s 7(1)(a).

Action Plans (NAPs) 2010-2015 and 2016-2020. The discussion pertaining to the NAPs was taken place in 4.6.2.

Second, the MAPO is entrusted to make recommendations to the Minister of Home Affairs on all aspects of prevention and suppression of human trafficking.¹⁷⁴ Therefore the Secretariat of MAPO is placed under the Ministry of Home Affairs, and chaired by the Secretary General of that Ministry.¹⁷⁵

Third, it shall monitor the immigration and emigration patterns in Malaysia for evidence of human trafficking and to secure the prompt response of the relevant government agencies and NGOs on human trafficking issues brought to them.¹⁷⁶

Fourth, MAPO coordinates the formulation of policies and monitors their implementation with the relevant government agencies and NGOs.¹⁷⁷ This is manifested through the issuance of the five year National Action Plan (NAP) 2010-2015 that outlined the implementation strategies of anti-human trafficking efforts. Further, the NAP 2016-2020 is a continuation of and resembles the NAP 2010-2015 with some changes arising from the amendment of the ATIPSOM 2007 in 2015.¹⁷⁸

Beside the NAPs, there is no other strategic paper written and published by the MAPO. However, the Standard Operating Procedures (SOPs) are available for the respective enforcement, prosecution and protection agencies to refer to, including the one to be manned by NGOs. This is inclusive of the 'Guidelines on the Indicators for the Work Exploitation and Forced Labour' issued by the Labour Department.

Fifth, MAPO formulates and coordinates measures to inform the public by way of public awareness and education programmes about the causes and

¹⁷⁴ ATIPSOM 2007 s 7(1)(g).

¹⁷⁵ *ibid* s 6(2)(a).

¹⁷⁶ *ibid* s 7(1)(c).

¹⁷⁷ *ibid* s 7(1)(e).

¹⁷⁸ Interview with Policy 1.

consequences of human trafficking.¹⁷⁹ MAPO is also duty bound to coordinate the formulation and monitor the implementation of the policies on human trafficking with the relevant government agencies and NGOs.¹⁸⁰ MAPO is also to cooperate and coordinate with governments and international organisations¹⁸¹ as well as collecting and collating data and information, and authorising research in relation to the prevention and combating of human trafficking.¹⁸²

5.6.3.1(ii). High Level Committee (HLC)

The idea of a centralised coordinating body to address human trafficking is further enhanced by the establishment of the High Level Committee (HLC) when the ATIPSOM 2007 was amended in 2015. A positive response to the recommendation was issued by the US TIP Report 2014.¹⁸³ Upon amendment, Part 1A in the ATIPSOM 2007 established the HLC consisting of the ministers of the Ministries represented in the MAPO.¹⁸⁴ The HLC is expected to meet as often possible¹⁸⁵ and deliberate and decide on the recommendations made by the Council.¹⁸⁶ The HLC is another way forward for Malaysia in addressing recommendations made by the US TIP Report.¹⁸⁷ A question arises as to whether the establishment of the HLC on top of the MAPO will create another level of bureaucracy that will hinder the effective implementation of anti-human trafficking efforts. An interviewee clarified that the HLC is not aimed to create another level of bureaucracy but to help the MAPO to ensure its recommendations are accepted and decided by the highest level of decision-making consisting of the cabinet ministers. It is chaired by the Home Minister. Prior to the establishment of the HLC, MAPO's recommendation will only reach the Home Minister and he would have to put in the recommendation to the

¹⁷⁹ ATIPSOM 2007, s 7(1)(d).

¹⁸⁰ *ibid* s 7(1)(h).

¹⁸¹ *ibid* s 7(1)(i).

¹⁸² *ibid* s 7(1)(j).

¹⁸³ Interview with Policy 1.

¹⁸⁴ ATIPSOM 2007, s 5A.

¹⁸⁵ *ibid* s 5B.

¹⁸⁶ *ibid* s 5C.

¹⁸⁷ Koi Kye Lee and Kristy Inus, 'High-level Panel to Tackle Human Trafficking' *The New Straits Times* (Sepang, 11 July 2014).

Cabinet for approval, normally pertaining to the delicate policy issues. With the representation of various cabinet ministers, the decisions can promptly and easily be made.¹⁸⁸

The creation of the HLC is a manifestation of the seriousness on the part of the Malaysian government to address human trafficking problem. According to another interviewee, 'the Home Minister, by convention, is one of the most senior and influential cabinet ministers. Coincidentally, the current minister is also the Deputy Prime Minister.'¹⁸⁹

The first meeting of the HLC took place on 21 December 2015, slightly over a month since the amendment of the ATIPSOM 2007 in 2015 began to be enforceable, in which, as was reported, the US Ambassador to Malaysia, 'was upbeat to see Malaysia's commitment to address the human trafficking issues'.¹⁹⁰

5.6.3.2. Prevention by Way of Wide Scope of Application

Although an individual within the domestic territory of a country may commit human trafficking crimes, human trafficking is a form of transnational organised crime, committed by criminal groups structured in variety of ways such as pyramidal structures or decentralised networks with loose connections between links and trafficking chains.¹⁹¹ Human trafficking has become a more lucrative illicit business because it is low risk with high income¹⁹² and the traffickers are able to branch out beyond traditional parameters by extending their business to new geographic areas so long as there is an avenue for them to generate profit. Therefore, the jurisdictional scope of application of the domestic anti-trafficking law ought to be enlarged.

¹⁸⁸ Interview with Policy 1.

¹⁸⁹ Interview with Policy 2.

¹⁹⁰ Azura Abas, 'Malaysia aims to be on Tier 1 of US State Dept's Trafficking in Persons Report by 2020' *The New Straits Times* (Putrajaya 21 December 2015).

¹⁹¹ Louise Shelley, *Human Trafficking: A Global Perspective* (New York: CUP 2010) 84.

¹⁹² Maggie Lee, *Human Trafficking* (2nd edn, London: Routledge 2011) 116.

Under the ATIPSOM 2007, the scope of its application was made wider to cover forbidden activities whatever the nationality or citizenship of the offenders regardless of whether the conduct constituting the offence took place inside Malaysia or otherwise.¹⁹³ Further, the ATIPSOM 2007 applies whether Malaysia is the receiving or transit country, or the exploitation occurs in Malaysia, or the receiving or transit country is a foreign country but the trafficking starts or transits in Malaysia.¹⁹⁴ But enforcing these provisions needs strong cooperation and coordination with other sovereign countries. This aspect will be discussed in Chapter Six.

5.6.3.3. Prevention Through Supplemental Laws to ATIPSOM

Although the ATIPSOM 2007 is the specialised anti-human trafficking legislation in Malaysia, section 5 provides that the ATIPSOM 2007 shall be an addition to, and not in derogation of, any provisions of any other existing written laws prevailing to human trafficking. In some situations, the trafficking cases will be investigated together with, or under, any supplementary legislation in the following circumstances.

First, if the suspect is a foreign national, his/her status will also be investigated under the Immigration Act 1959/63.¹⁹⁵ Second, if the suspected victims are foreign nationals, the investigation may also be conducted under the migrant smuggling provisions of the ATIPSOM 2007. Third, supplemental laws also applicable in the event that ATIPSOM 2007 offences are committed together with other offences in such supplemented legislation such as poaching, drug smuggling or smuggling of goods by sea.¹⁹⁶ Fourth, supplemental laws will be used if there are offences that are not governed or expectedly could not be proven under the ATIPSOM 2007, but the offence might contribute to trafficking or has been committed under different legislation.¹⁹⁷ Fifth, such laws can be invoked if the ingredients of the offence could not satisfy the elements of human

¹⁹³ ATIPSOM 2007, s 3.

¹⁹⁴ *ibid* s 3(a) and (b).

¹⁹⁵ Interview with Prosecution 1.

¹⁹⁶ Interview with Enforcement 3

¹⁹⁷ Interview with Prosecution 1.

trafficking definition. For example, in the case of kidnapping or abduction, the act may have fulfilled the elements of act and means but the element of exploitation may be missing. In this case, the Penal Code's provision pertaining to kidnapping and the relevant sections of the Child Act 2001 pertaining to kidnapping of a child may be useful to address the issue.

In this regard, these supplemental pieces of legislation can support the ATIPSOM 2007 in preventing human trafficking and other criminal offences that possibly lead to or be connected to human trafficking. In the case of *Siti Rashidah Razali & Ors v PP*,¹⁹⁸ the High Court could not find the existence of the element of 'exploitation' as defined under section 2 for the human trafficking charges under ATIPSOM 2007. Instead, the learned judge found that the offence was for harbouring illegal migrants under section 56(1)(d) of the Immigration Act 1959. Consequently, the conviction and sentence meted by the trial court were struck out and was substituted with a conviction under the Immigration Act 1959.¹⁹⁹

The laws pertaining to sexual exploitation may also applicable in this instant. For example, in cases where the element of human trafficking could not be fully established, the prosecution may also invoke the provisions pertaining to the exploitation for the purpose of prostitution under the Penal Code.²⁰⁰ This includes the offences pertaining to persons living or trading in prostitution²⁰¹ or soliciting for the purpose of prostitution.²⁰²

5.6.3.4. Prevention by way of Criminalising Human Trafficking

Prevention measures in the form of criminalising offences of human trafficking can be seen in the provisions under Part III of the ATIPSOM 2007. This is because one of the major purposes of criminal law is to forbid and prevent conducts that unjustifiably and inexcusably inflicts or threatens substantial harm

¹⁹⁸ [2011] 6 MLJ 417.

¹⁹⁹ *ibid* para 34.

²⁰⁰ Penal Code s 372.

²⁰¹ *ibid* s 372A.

²⁰² *ibid* s 372B.

to individual or public interest.²⁰³ There are two aspects of criminalising human trafficking that can lead to prevention, namely the criminalisation in itself and harsh punishment.

Firstly, the main human trafficking offences are contained in sections 12, 13 and 14. Prevention may also take part in the form of other ancillary offences of human trafficking such as profiting from exploitation,²⁰⁴ facilitating the trafficking in transit,²⁰⁵ facilitating fraudulent documents for the purpose of the trafficking,²⁰⁶ providing facilities²⁰⁷ and services²⁰⁸ in support and for the purpose of trafficking, harbouring traffickers²⁰⁹ as well as failure to give information,²¹⁰ all contained in Part III of the ATIPSOM 2007. The law also imposes an obligation for the owner, operator or master of conveyance to ensure every person travelling with them is in possession of lawful documents, failing which they are committing a crime under the ATIPSOM 2007.²¹¹

The ATIPSOM 2007 also provides prevention measures by addressing an open-ended form of exploitation by human trafficking. The Trafficking Protocol does not define 'exploitation' but forms of exploitation listed in the Trafficking Protocol are an integral part of its substantive content. The substance and scope of these forms, taken together, provide the minimum parameters of the 'exploitation' element in the Protocol's definition.²¹² Critically the stipulated forms constitute a minimum list of exploitative purposes. State parties are required to at least include these forms of exploitation but may also target other forms of exploitation.²¹³ So, the ATIPSOM 2007, section 2, does not specifically define 'exploitation'. There is an open-ended list of activities of 'exploitation' being 'all

²⁰³ David Ormerod, *Smith and Hogan's Criminal Law* (Oxford: OUP 2011) 4.

²⁰⁴ ATIPSOM 2007 s 15.

²⁰⁵ *ibid* s 15A.

²⁰⁶ ATIPSOM 2007, s 16.

²⁰⁷ *ibid* s 20.

²⁰⁸ *ibid* s 21.

²⁰⁹ *ibid* s 22.

²¹⁰ *Ibid* s 24.

²¹¹ *Ibid* s 23.

²¹² UNODC, *The Concepts of Exploitation in the Trafficking in Persons Protocol* (Vienna: United Nations 2015) 27.

²¹³ Gallagher (n 159) 33.

forms' of sexual exploitation, forced labour or services, slavery or any practice similar to slavery, any illegal activity or the removal of human organs. In addition to the Trafficking Protocol 2000, the ATIPSOM 2007 also includes the type of exploitation in the form of 'any illegal activity'. It is argued that the inclusion of the phrase could 'allow the prosecution to interpret the crime without having to depend on the rigid interpretation of the Act'.²¹⁴ This is because illegal activities in this instance may also exist in the form of other kind of unconventional exploitation,²¹⁵ such as child begging, mail to order brides or women who were forced to become surrogate mothers.²¹⁶ Human trafficking is expanding and dynamic, thus the ATIPSOM 2007 require frequent improvement and amendment.²¹⁷ This is one of the reasons why the ATIPSOM 2007 provides for the open-ended definition because 'we can save time and provide justice to the victims without having to amend the law. Amending the law will take time and the process is stringent'.²¹⁸

Secondly, prevention measures also take the form of severe punishment against the traffickers. This is why the criminal approach is often emphasised in the efforts to eradicate human trafficking, both by international treaty and the view of scholars.²¹⁹ But in principle, punishment under criminal law can serve as deterrence; first aimed as a special deterrence, that is dissuading a specific criminal from committing future crimes and secondly as a general deterrence that dissuades others from offending by making an example of the particular offender,²²⁰ hence preventing potential perpetrators of human trafficking.

The UN Convention 2000 also requires that the discretionary legal powers with regard to sentencing be exercised in a way that maximise the effectiveness of law enforcement measures and give due regard to the need to deter human

²¹⁴ Interview with Prosecution 2.

²¹⁵ Lo (n 152).

²¹⁶ Interview with NGO 4.

²¹⁷ Interview with Policy 2.

²¹⁸ Interview with Policy 1.

²¹⁹ Maria Eriksson, 'The Prevention of Human Trafficking – Regulating Domestic Criminal Legislation Through the European Convention of Human Rights' (2013) 82 *Nordic Journal of International Law* 339.

²²⁰ Black's Legal Dictionary 260 (9th edn, 2009).

trafficking offences.²²¹ Therefore, the ATIPSOM 2007 provides for imprisonment of up to fifteen years and a fine for the offence under section 12 and imprisonment of up to 20 years and fines for the offences under section 13 and 14. Some ancillary offences²²² to human trafficking impose years of imprisonment under the ATIPSOM 2007. The grievousness of human trafficking cases is highlighted in the case of *Kwong Tuck Choy & Anor v PP*,²²³ where the Court was of the view that the fact that there is a mandatory minimum imprisonment term of three years upon conviction provided by ATIPSOM 2007, section 13, it 'reflects the seriousness of the offence for which the appellants had been convicted.'²²⁴

5.6.3.5. Prevention by Way of Prioritising the ATIPSOM 2007 over other Legislation

Prevention can be undertaken by the effective enforcement of the legal provisions of the ATIPSOM 2007. They can be implemented by the various agencies entrusted to enforce the law such as the police, the Immigration Department, the Maritime Enforcement Agency, the Labour Department, as well as the Customs Department. Although the jurisdiction of the aforesaid enforcement agencies operate based on their own laws, the ATIPSOM 2007 has priority over any other laws when it comes to suspected human trafficking cases.²²⁵ The Standard Operating Procedure for Enforcement, for example, clearly states that the enforcement agencies must apply all human trafficking cases according to the ATIPSOM 2007.²²⁶ In this aspect, the ATIPSOM 2007, section 5(2), provides that 'in the event of any conflict or inconsistency between the provisions of this Act and those of other written laws, the provisions of this

²²¹ UN Convention 2000, art 11.

²²² Ancillary offences to human trafficking will be discussed further in the later section of this chapter.

²²³ Criminal Appeal No: 42(S)-164-05/2011. The case is unreported but retrievable from the Malaysian Judiciary website

<http://kl.kehakiman.gov.my/sites/kl.kehakiman.gov.my/attachments/Cr_Appeal_-_Kwong_Tuck_Choy_&_Anor.pdf> accessed 16 April 2016.

²²⁴ *ibid* para 36.

²²⁵ Interview with Enforcement 1.

²²⁶ MAPO, Procedure for the Enforcement Agencies under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.

Act shall prevail and the conflicting of inconsistent provisions of the other laws shall, to the extent of the conflict or incontinency, be deemed to be superseded.'

5.6.4. Criminalisation and Prosecution of Human Trafficking in Malaysia

The Trafficking Protocol, article 5(1), provides for the use of domestic legislation as a tool to create new laws expressly criminalising human trafficking, and to ensure the offenders are punished. Further, articles 5(2)(a)-(c) provide for the establishment of criminal offences for attempts to commit human trafficking offences, participating as an accomplice and organising or directing other persons to commit the crime. The ATIPSOM 2007 does not provide for the offences stated by articles 5(2)(a)-(c) above, but the ATIPSOM 2007, section 5, allows for the application of other legislation. Therefore, the offences under the aforesaid Trafficking Protocol 2000 can be prosecuted under the relevant Penal Code provisions read together with the ATIPSOM 2007.

Nevertheless, there are no provisions in the Trafficking Protocol 2000 to obligate the domestic legislation to follow in verbatim the language of the Protocol,²²⁷ but measures should be adapted in accordance with domestic legal systems to give effect and provide a level of consistency around the world with the concepts contained in the Trafficking Protocol 2000.²²⁸ In the context of Malaysia, although there are several provisions of laws which resemble prohibition and criminalisation against human trafficking, the transplantation of the anti-human trafficking principles in accordance with the Trafficking Protocol 2000 into domestic legislation only effectively took place upon the promulgation of the ATIPSOM 2007.

²²⁷ UNODC, Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York: UN 2004) para 13.

²²⁸ UNODC, Anti-human Trafficking Manual for Criminal Justice Practitioners (New York: UN 2009) 2-3.

5.6.4.1. Human Trafficking as a Crime

The human trafficking definition provided by Trafficking Protocol 2000, article 3(a), seeks to provide for consistency and consensus around the world on the phenomenon of human trafficking.²²⁹ In this regard, state parties should consider adopting and consistently using the international agreed definition contained in the said Protocol.²³⁰ Although it is not the intention of this chapter to reiterate the definition in the Trafficking Protocol, it is essential to underscore the three elements of the human trafficking that must involve the acts associated with moving people, either across or within national borders; there is coercive or deceptive means; and there must be the purpose of exploiting the victims.²³¹ Therefore, these three elements must be established and co-exist in order to constitute the crime of human trafficking.

The question now is whether the human trafficking definition in the ATIPSOM 2007 fulfils the requirements set by the Trafficking Protocol 2000. The ATIPSOM 2007 defines human trafficking as follows, 'trafficking in persons means all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purpose of this Act'.²³²

The definition of 'trafficking in persons' provided in the ATIPSOM 2007 seems to omit the issue of exploitation, but 'exploitation' in itself is defined to mean 'all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal or organs'.²³³ Further, various criminal-related provisions in the ATIPSOM 2007 added that in

²²⁹ UNODC, 'Human Trafficking' <www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> accessed 4 September 2015.

²³⁰ UN High Commission for Human Rights, *Principles and Guidelines on Human Right and Trafficking* E/2002/68/Add. 1 (2002) Guideline 3(1).

²³¹ Bernadette McSherry, 'Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences' (2006-2007) 18:3 *Current Issues in Criminal Justice* 385.

²³² ATIPSOM 2007 s 2.

²³³ *ibid.*

order for a human trafficking offence to occur, the act is committed for the 'purpose' of the ATIPSOM 2007 which eventually results in 'exploitation'.²³⁴

The criminalisation of human trafficking is provided in Part III of the ATIPSOM 2007. Generally, the 'crime' of human trafficking under the ATIPSOM 2007 involves various offences related to human trafficking; including the trafficking itself which is contained in sections 12 and 13, while section 14 involves an offence of trafficking of children.

The ATIPSOM 2007, section 12, provides that 'any person, who traffics in person not being a child, for the purpose of exploitation, commits an offence and shall, on conviction be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine.'

The ATIPSOM 2007, section 13, further provides that, '... any person, who traffics in person not being a child, for the purpose of exploitation, by one or more of the following means: (a) threat; (b) use of force or other forms of coercion; (c) abduction; (d) fraud; (e) deception; (f) abuse of power; (g) abuse of the position of vulnerability of a person to an act of trafficking in persons; or (h) the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.'

Section 14 provides for the trafficking in children for the purpose of exploitation and punishable with imprisonment term and fines similar to section 13, '... any person who traffics in persons being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine'.

²³⁴ Reference is made to the definition of trafficking in persons as in ATIPSOM 2007 s 2.

Based on the above formulations, there ought to be three main ingredients in the crime of human trafficking. First, there must be 'acts' of 'acquiring or maintaining the labour or services of a person through the act or by way of process of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purpose of the ATIPSOM 2007. This is the *actus reus* of human trafficking.

Second, the 'means' must be by way of 'coercion'. Section 12 requires only coercion as the straightforward means of coercion. The definition in section 2 provides for 'coercion' in three circumstances. First, there is a threat of serious harm or physical restraint (physical violent). Second, it is a scheme, plan or pattern to cause a person to believe that failure to perform an act would result in physical harm (psychological violent), and third, the abuse or threatened abuse of the legal process. Meanwhile, section 13 requires severe forms of 'coercion', that such acts of trafficking must be accompanied with other means such as threat, use of force or other forms of coercion; abduction; fraud; deception; abuse of power; abuse of the position of vulnerability of a person to an act of trafficking in persons; or the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person.²³⁵ The aforesaid means are simply the process of causing or taking advantage of the powerlessness of the victims so that he or she has no alternative but submit to labour or services demanded.

The third ingredient for human trafficking in the ATIPSOM 2007 definition is that of the 'purpose' or the *mens rea*. The 'act' and 'means' must be for the purpose of exploitation as defined in section 2 to construct the human trafficking offences.

5.6.4.1(i). Issue of Consent in Human Trafficking

The most glaring difference between sections 12 and 13 is that the former requires only 'coercion' as the 'means' of the criminal act, while section 13

²³⁵ ATIPSOM 2007 s 13(a-h).

covers a wider spectrum of 'means' of the human trafficking offences. But such 'means' must manifest the absence of the element of consent at the part of the trafficking victims in order for a human trafficking offence to be established. This is because the underlying principle of *volenti non fit injuria*²³⁶ would serve as a defence in human trafficking cases. However, the rule has been modified over the years to permit certain exceptions often to actions that involve serious bodily harm or are otherwise considered to be harmful to society as a whole.²³⁷ This is a result of the new shift of public dimension to private harm that 'the individual lost the power to consent to what the state regarded as harm to itself'.²³⁸

Under the ATIPSOM 2007, section 16, in the prosecution of human trafficking offence under sections 12, 13 and 14, there is no defence even if the accused claimed that the trafficked victims consented to the act of trafficking in person. This principle is derived from Trafficking Protocol, article 3(b), that consent of the victim to the intended exploitation is irrelevant when any of the stipulated 'means' have been used. The Trafficking Protocol 2000 further provides that the element of means is not required in cases involving trafficking of children. However, the ATIPSOM 2007 is silent about the non-requirement of the means element in the trafficking of children.

It seems that although the ATIPSOM 2007 distinguishes mere 'coercion' and other forms of means, it does not make the provisions of the ATIPSOM 2007 depart from the component of 'means' under the Trafficking Protocol 2000. According an interviewee, the means of coercion in the ATIPSOM 2007 is an essential part of the definition of trafficking, but the other forms of means as stated in section 13 could be assumed as a more serious form of human trafficking offence,²³⁹ hence the difference in the length of imprisonment and the quantum of fines.

²³⁶ Jonathan Law and Elizabeth A Martin, *A Dictionary of Law* (Oxford: OUP 2009) 580.

²³⁷ UNODC, *The Role of Consent in Trafficking in Persons Protocol* (Vienna: UN, 2014) 21.

²³⁸ Vera Bergelson, 'The Right To Be Hurt Testing The Boundaries Of Consent' (2007) 75 *George Washington Law Review* 165.

²³⁹ Interview with Prosecution 2.

The prevalence of 'coercion' as the means to human trafficking offences can be seen from the nature of how the victims were required to work or serve. In *R v Lorenc Roci and Vullnet Ismailaj*,²⁴⁰ the Court, while accepting that the adult victims voluntarily came to the UK to work as prostitutes, noted that the events that took place upon their arrival, such as the conditions they were forced to work in, showed them to be coerced. The court recognised 'some evidence of threats and inhuman treatment and restriction of the women's liberties and confiscation of their passport'.²⁴¹

To test this principle, a number of cases from Malaysia can be examined. In *PP v Boon Fui Yan*,²⁴² the alleged trafficked victims claimed that they were coerced to work as masseuses at the accused's beauty salon. The trial court held that the prosecution established all the ingredients of human trafficking definition and convicted the accused. On appeal, the High Court held that the alleged trafficked victims were not forced or coerced based on the fact that there was no restraint of movements or communications imposed on the victims. This is because they were free to move and held mobile phones on their own. There was no evidence of any attempt to escape from the accused persons, contrary to the accusation that they were only fed once a day during lunch, the court found out that they were allowed to cook for themselves, as well as that they were free to leave their jobs. The Court also found that the retention of the alleged trafficked victims' passport would not have real effect on the workers should they want to escape from the employer. Therefore the element of coercion was not established.

In *PP v Hwong Yu Hee & Ors*,²⁴³ the alleged trafficked victims claimed that they were forced to work at a pub operated by a co-accused and were asked to entertain the customers, including providing sexual services and payment for which was divided between the employer and themselves. The Court did not find any element of coercion towards the sexual exploitation against the alleged

²⁴⁰ [2005] EWCA Crim 3404.

²⁴¹ *ibid* para 15.

²⁴² [2015] MLJU 999.

²⁴³ [2012] MLJU 1554.

trafficked victims because there was no evidence that their movements and communications were restrained. The Court also found that they were not denied freedom to any degree by the accused. There was also no evidence that they had at any time attempted to protest against being asked to work as prostitutes. In this regard, the Court also took note of the fact that the alleged victims were previously arrested and detained by the police, but did not take the opportunity to inform the authorities that they were being prostituted that would enable them to be saved and rescued. Therefore, the Court found that they were willing prostitutes, hence lack the proof of the element of coercion.

Contrary to the above Malaysian cases, in the case of *Kong Kok Kyt & Anor v PP*,²⁴⁴ the Court found the accused guilty based on the fact that the victims were deceived and tricked to prostitute themselves. This is due to the fact that the accused retained the passports of the victims as a 'guarantee' that they will not abscond from the accused. Based on the facts of the case, their passports were withheld even during their journey from Vietnam to Malaysia. The Court was also satisfied that the victims had escaped from the locked premises of the accused, hence showing that there was an element of physical coercion onto the victims.

The decisions in *Boon Fui Yan* and *Hwong Yu Hee* are subject to criticism. Although the victims were not physically restrained, they may be affected by psychological coercion. It will instil fear in the victims as a major method of control utilised by the traffickers. They also take advantage of the victims' lack of knowledge of laws and legal process as means of control. This happens when they retain the victims' passports. Another perspective of criticism in this case is that the retention of the passport is an offence pursuant to the Passport Act 1966 section 12(1)(f) where an offence is committed in the event that a person, without lawful authority, has in his possession any passport or internal travel document issued for the use of some person other than himself.

²⁴⁴ [2014] 10 MLJ 99.

5.6.4.1.(ii). Exploitation

Similar to the Trafficking Protocol 2000, the ATISPOM 2007 requires a definition of human trafficking to include the action and means that would result into the exploitation of the trafficked victims; that is the 'purpose', which introduces the *means rea* requirement of the human trafficking definition,²⁴⁵ hence making human trafficking a crime of special intent (*dolus specialis*).²⁴⁶ The *dolus specialis* in trafficking is defined by the United Nations Office of Drugs and Crimes (UNODC) as 'the purpose aimed at by the perpetrator when committing the material acts of the offence'.²⁴⁷

The Trafficking Protocol article 3 provides an open ended list of what is defined as exploitation, that it shall include, 'at the minimum' the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or service or practices similar to slavery, servitude or removal of organs. Based on the *Travaux Préparatoires* of the Trafficking Protocol 2000, some delegations, during the negotiations, favoured the definition of exploitation to be open-ended by way of putting the word 'at the minimum' to ensure that unnamed or new forms of exploitation would not be excluded in the implication.²⁴⁸

The ATIPSOM, however, does not include the word 'exploitation' in the definition of trafficking in persons *per se*. Similar to the Trafficking Protocol, the ATIPSOM 2007 contains an open-ended list of what is termed as 'exploitation' in section 2 whereby it defines exploitation to mean 'all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs'.²⁴⁹

Despite the word 'exploitation' being separated from the definition of human trafficking, the human trafficking offences require the end result being the

²⁴⁵ Gallagher (n 159) 34.

²⁴⁶ UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (n 228) 4.

²⁴⁷ UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (n 228) 4.

²⁴⁸ UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York: UN 2006) 344.

²⁴⁹ ATIPSOM 2007, s 2.

'purpose of the perpetrator when committing the material acts of the offence'.²⁵⁰ Accordingly, the end result of the process of human trafficking in the ATIPSOM 2007 must be confined to section 2. Notwithstanding, the *dolus specialis* in trafficking does not require the intended aim to be actually achieved. This is because the most practical result of this is that a combination of the 'act' and 'means' will suffice to establish a situation of human trafficking without exploitation to really happen.²⁵¹

The issue of exploitation was elucidated in the case of *Siti Rashidah Razali & Ors v PP*.²⁵² In this case, the accused persons were caught harbouring several Burmese nationals for the purpose of exploitation. The Court scrutinised the definition of exploitation under ATIPSOM 2007, section 2, and concluded that such means that led to exploitation must be by way of coercion, force or suppression, among other things. Hence, the accused persons harbouring the Burmese illegal migrants were not considered as exploiting them because there was no element of coercion, force or suppression against them. The Court held that the charges were defective, and the accused ought not to be charged under the ATIPSOM 2007 but under the Immigration Act instead, for an offence of harbouring the illegal immigrants.

5.6.4.2. Indirect Human Trafficking

The ATIPSOM 2007 also provides for other ancillary offences of human trafficking, the discussion which were taken place in section 4.6.3.4. above. The Act also imposes an obligation to the owner, operator or master of conveyance to ensure every persons travelling with them are in possession of lawful documents, failing which they are committing crime under the ATIPSOM 2007.²⁵³

²⁵⁰ UNODC, Anti-Human Trafficking Manual for Criminal Justice Practitioners (n 228) 4.

²⁵¹ UNODC, Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organised Crimes and the Protocols Thereto (New York: UN 2004).

²⁵² [2011] 6 MLJ 417.

²⁵³ ATIPSOM 2007 s 23.

5.6.5. Victim Care and Protection

One of the basic purposes of the Trafficking Protocol 2007, articulated by article 2, pertains to the protection and support for victims of trafficking. One of the elementary principles of trafficking victims is that any human being, regardless of age or gender, could become a victim and that all forms of trafficking should be covered by the Trafficking Protocol 2007.²⁵⁴ An effective anti-trafficking strategy must address issues pertaining to victims. The anti-trafficking law that focuses primarily on the enforcement provision without comprehensively protecting the victims' rights will fail because they have no incentive to come forward and assist in prosecutions, as they are promised no protection if they do.²⁵⁵ In certain cases, victims are being criminalised for offences they may not intend to do, as they often forced or made to infringe other laws, for example immigration laws such as overstay or infringement of labour law. Before the establishment of the ATIPSOM 2007, this aspect of understanding about human trafficking in Malaysia was lacking. Some victims were even punished. According to one interviewee:

‘... it all started when we interviewed inmates in *Penjara Wanita* (Women’s Prison) in Kajang in 2003. When we interviewed them, we realised that they were just not normal prisoners. There was something wrong with their detention. They were not criminal. They were supposed to be victims of human trafficking instead, and they should be treated differently than the normal inmates.’²⁵⁶

Many victims of human trafficking in Malaysia are women including those who are coerced into sexual exploitation and as domestic helpers.²⁵⁷ However, there are also male victims, mostly those who are in the manufacturing, plantation and construction industries. However, they are ‘exploited’ mostly due to non-

²⁵⁴ Trafficking Protocol 2000, art 2(a).

²⁵⁵ Kelly E Hyland, ‘Protecting Human Victims of Trafficking: An American Framework’ (2011) 16 *Berkeley Women’s Law Journal* 29.

²⁵⁶ Interview with NGO 2.

²⁵⁷ Interview with Enforcement 1.

payment of wages, or retention of travel documents which have also been considered as indicators of trafficking.²⁵⁸

So, the types of human trafficking victims are comprehensive, because according to one interviewee:

‘... the types of human trafficking in Malaysia involves) sex trafficking, labour trafficking, women who were brought in to make babies (surrogate mothers), trafficked fishermen, mail order brides. In a lesser extent, we have also received report of organ harvesting. This is the case at the border recently where the victims have their body organs taken out and were left to die.’²⁵⁹

Contrary to other criminal legislation, the ATIPSOM 2007 is a specialised law duly established to deal comprehensively with human trafficking. The striking differences and characteristics of the ATIPSOM 2007 as compared to other laws are that the ATIPSOM 2007 provides for the protection of the victims. The provisions pertaining to the care and protection of the trafficked persons in the ATIPSOM 2007 contained in its Part V include five important principles such as provisions for the place of refuge or shelter, non-criminalisation against the victims; release and repatriation; and free movement and work.²⁶⁰ Further, ATIPSOM 2007 Part VI provides for remedies to the victims. Sections 66(a) and (b) have included new provisions pertaining to compensation for the victims and payment of wages arrears in the case of conviction against the accused persons.²⁶¹

The important initial element of victim protection is identifying victims as such. This is because it is identification of victims that is a critical factor to distinguish between the trafficked victims, smuggled migrants or victims of other

²⁵⁸ Interview with Protection 1.

²⁵⁹ Interview with NGO 4.

²⁶⁰ This provision was included upon the amendment of the ATIPSOM in 2015.

²⁶¹ *ibid.*

offences.²⁶² Therefore the first task for the enforcement agencies is to identify the victim. The ATIPSOM 2007 empowers the 'Minister to make any regulations necessary or expedient to give effect to, or for carrying out, the provisions of the ATIPSOM 2007',²⁶³ including to 'provide for any matter which is requires or permitted to be prescribed or which is necessary or expedient to be prescribed'.²⁶⁴ Under the ATIPSOM 2007, the definition of 'trafficked persons' means any persons who is the victim or object of an act of trafficking in persons.²⁶⁵

Compared to the position in the Trafficking Victim Protection Act (TVPA) 2000, the US law only covers protection to the victims of 'severe forms of trafficking' which is defined in its section 103(8) as covering 'sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age;²⁶⁶ or the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.²⁶⁷ Under the MSA 2015, the human trafficking victims are those who are being victimised under the offence stated in section 2 of the MSA 2015,²⁶⁸ by which the 'perpetrator arranges or facilitates the travel of another person with a view to such person being exploited'. Further, the definition of human trafficking in the UK varies because such offences are being defined separately under the various legislation stated in the Schedule 1 of the MSA 2015.

Based on the above, the protection of human trafficking victims in Malaysia, as compared to the US, would cover a much wider spectrum of victims. This is because the definition of 'exploitation' which forms an essential part of the human trafficking definition under ATIPSOM 2007, section 2, is quite general

²⁶² UNHCR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 2. UN Doc: E/2002/68/Add.1.

²⁶³ ATIPSOM 2007 s 66(1).

²⁶⁴ ATIPSOM s 66(12)(g).

²⁶⁵ *ibid* s 2.

²⁶⁶ TVPA 2000 s 103(8)(A).

²⁶⁷ *ibid* s 103(8)(B).

²⁶⁸ MSA 2015 s 56(2).

and open ended. This is because such definition covers 'all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs'. The words 'illegal activity' thus can be interpreted in many ways and is not just strictly confined to sexual exploitation, slavery or removal of organs as compared to the TVPA 2000. The discussion about 'exploitation' made in different sections pertaining to the 'criminalisation and prosecution' appears later in this chapter.

Although the definition of trafficking victims is provided in the ATIPSOM 2007, there is no specific provision pertaining to the victims' identification as such. However, the identification of human trafficking victims in Malaysia is prescribed in the Standard Operating Procedure (SOP) issued by the MAPO. Under this SOP, the enforcement personnel will have to identify the existence of 'exploitation'²⁶⁹ by evaluating the condition of the location suspected for exploitation activities such as: the brothels for prostitution activities; plantation areas for the suspected forced labours; and transactions related to the selling of organs. Secondly, the evaluation of the physical conditions of the suspected victims is divided into six categories including poor living conditions, unsuitability of the place to stay, lack of nutrition, physical and mental abuse, workplaces that are exposed to danger, and lack of medical supply and equipment.

The physical and mental conditions of the victims are evaluated based on the following conditions: first, debt bondage, that includes financial obligations, honour-bound to satisfy debt; second, isolation from the public and family – limiting contact with outsiders and making sure that any contact is monitored or superficial in nature; third, confiscation of passports, visas and/or identification documents; fourth, the use or threat of violence toward victims and/or families of victims and the threat of shaming victims by exposing circumstances to family, as well as telling the victims they will be imprisoned or deported for immigration violations if they contact authorities; and fifth, the control of the victims' money

²⁶⁹ MAPO, Standard Operating Procedure for Enforcement Under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 para 10 (unpublished).

or income.²⁷⁰ Details about enforcement mechanisms based on the Malaysian laws, including the ATIPSOM 2007 will be discussed further in Chapter Six.

5.6.5.1. Place of Refuge

The provision pertaining to the establishment of the place for refuge is provided by the ATIPSOM 2007 as follows, ‘... the Minister may, declare any house, building or place, or any part thereof, to be a place of refuge for the care and protection or trafficked persons and may, in like manner, declare that such place of refuge ceases to be a place of refuge’.²⁷¹

At the time of the writing of this thesis, the places of refuge, called shelter homes, for the trafficked victims in Malaysia are being managed by the government. The homes function as detention centres where victims are held for their safety while prosecution of suspected traffickers takes place.²⁷² So far, there are seven places notified by gazette by the government to operate as places to protect human trafficking victims, comprising of one each in Kuala Lumpur, Selangor Johor and Sabah. These shelter houses are for women only. A centre located in Johor is for boys, one in Melaka is for men and a centre in Negeri Sembilan is for young girls only. Each shelter house can accommodate between 40 to 60 victims, with exception of the one in Melaka which can accommodate 150 victims.²⁷³

The control over, and responsibility for, the care and protection of the trafficked victims are being vested in protection officers who are appointed under ATIPSOM 2007, section 43. However, upon amendment of the ATIPSOM 2007 in 2015, the government has agreed and is ready to allow some authorised NGOs to run their own place of refuge or shelter homes and for their representatives to become protection officers.

²⁷⁰ MAPO (n 269) para 11.

²⁷¹ ATIPSOM 2007 s 42.

²⁷² Jonathan Edward, ‘Shelter homes a temporary haven for sex-trafficking victims’ *The Malay Mail* (Alor Setar, 18 April 2016).

²⁷³ Interview with Protection 1.

These shelter homes provide shelter to victims in two circumstances. First, for those who the enforcement officers reasonably suspect to be a trafficked persons, they will be brought to a magistrate within twenty four hours after being rescued, and the magistrate shall make an interim protection order for such a person to be placed at a place of refuge for a period of 21 days.²⁷⁴ The 21 day period is to allow the enforcement officers to carry out an investigation and enquiry²⁷⁵ to determine whether the person is a trafficked victim or otherwise.²⁷⁶ According to one interviewee, 21 days would be sufficient for them to conduct their investigation on the alleged human trafficking cases.²⁷⁷

Secondly, the shelter homes also house those who are issued with a protection order. Such an order is issued by a magistrate upon completion of the investigation and enquiries in the event that he/she is satisfied that the person is a trafficked person and in need of care and protection. There are two types of protection order. First, for trafficked persons who are Malaysian citizens or the permanent residents of Malaysia, the victim will be placed in the shelter home for a period of not exceeding three months from the date of the order.²⁷⁸ Second, for the victims who are a foreign national, the person will be placed at the shelter home for a period not exceeding three months before the victim is to be released to the immigration officer for safe return to their origin country.²⁷⁹ In most cases, according to an interviewee, 'most of them just want to go back to their countries as soon as possible'. Nevertheless, the protection officer may apply to the magistrate that the protection order to be extended.²⁸⁰

Notwithstanding the need for the person to be brought to a magistrate within twenty-four hours, if there is a requirement, the person may be brought to the medical officer for treatment or medical examination under ATIPSOM 2007 section 45 and will be provided with the necessary treatment. The issues

²⁷⁴ ATIPSOM 2007, s 44(1) and (2).

²⁷⁵ *ibid* s 44(2).

²⁷⁶ *ibid* s 51.

²⁷⁷ Interview with Enforcement 1.

²⁷⁸ ATIPSOM 2007, s 51(3)(a)(i).

²⁷⁹ *ibid* s 51(3)(a)(ii).

²⁸⁰ *ibid* s 51(4).

pertaining to hospitalisation and treatment are provided under ATIPSOM 2007 sections 47 and 48.

The ATIPSOM 2007 was amended in 2015 to allow the victims to move freely and to be employed, engaged, or contracted with to carry out work in any occupation during the period of the interim protection order or the protection order.²⁸¹ The amendment and inclusion of this provision was made upon recommendation by the US TIP Report 2014 that Malaysia 'sign into law and implement amendments to the anti-trafficking law to allow trafficking victims to travel, work, and reside outside government facilities, including while under protection orders'.²⁸² However the protection officers have themselves initiated a few income generating activities for the victims. Such activities were initiated to enable the trafficked victims generate income during the protection order in the shelter houses.²⁸³

The criticism against the place of refuge system is that some perceive it does not provide much freedom to the victims because they may feel like they are being imprisoned. This is because these places are cordoned and guarded. Based on the researcher's personal experience, the place is unmarked with no sign boards or description, and is surrounded by secured fences. Based on the researcher's personal experience, entry to such a place has to be made by way of prior approval and the visitor will have to surrender their identity card. However, it has been the intention of the government to ensure that the places remain unknown. According to one of the interviewees, '... we have been using unmarked bungalows to accommodate them with ample security and safety measures. There have been reports that some perpetrators have dispatched their men to monitor the on-goings in the shelter houses but they are not able to enter the area due to the police and security control.'²⁸⁴ Further, according to another interviewee, '... we are aware about the criticism. However, our main

²⁸¹ ATIPSOM 2007, s 51A.

²⁸² US DoS, *TIP Report Country Narrative: Malaysia* 234

<www.state.gov/documents/organization/243560.pdf> accessed 8 June 2016.

²⁸³ Interview with Protection 1.

²⁸⁴ *ibid.*

priority is the victims' safety and security so that they will not be disturbed, and to avoid possible re-victimisation.'²⁸⁵

Notwithstanding to the above, NGOs are preparing to offer their services as protection officers. According to one interviewee who has been involved with the protection activities:

'... we have a case management system. We operate two shelters. Currently we have seventeen victims in Kuala Lumpur and eight in Penang. These shelters are confidential and secret. We do not allow public to know because we have had experience that the traffickers disturbed us.'²⁸⁶

However, these victims will not be considered as trafficked victims in accordance with the ATIPSOM 2007. This is because they were not granted the protection order under the law. Most of these 'victims' can have safe-repatriation to their home countries, without getting much other assistance from the authorities.

5.6.5.2. Non-Criminalisation of Trafficked Victims

There is no specific provision in the Trafficking Protocol pertaining to the non-criminalisation of trafficked victims. However, based on Article 2(b), one of the purposes of the Trafficking Protocol is 'to protect and assist the victims of such trafficking, with full respect for their human rights'. The provision of Article 2(b) can be an implicit statement of such non-criminalisation of the victims. This is because the recognition of the victim status of trafficked persons requires the application of the principle of non-criminalisation.²⁸⁷ This is because criminalisation of victims is the antithesis of the victim centred approach,

²⁸⁵ Interview with Protection 2.

²⁸⁶ Interview with NGO 2.

²⁸⁷ Bijan Hoshi, 'The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law' (2013) 1:2 *Groningen Journal of International Law* 54.

inevitably operating to deny trafficked persons the rights to which they are entitled under international law.²⁸⁸

The Working Group on Trafficking in Persons, which advises the Conference of the Parties to the UN Convention against Transnational Organized Crime, in its report in 2009 recommended that, ‘... with regard to ensuring the non-punishment and non-prosecution of trafficked persons, States parties should: (a) Establish appropriate procedures for identifying victims of trafficking in persons and for giving such victims support; (b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.’²⁸⁹

Based on the importance of the issue, the ATIPSOM 2007 provides for the immunity of the trafficked victims from criminal prosecution in respect of the following: illegal entry into the receiving country or transit country; period of unlawful residence in the receiving country or transit country; his or her procurement or possession of any fraudulent travel or identity document obtained, or supplied, for the purpose of entering the receiving country or transit country.²⁹⁰ It seems that the principle of criminal immunity for the trafficked victims based on the ATIPSOM 2007’s provisions only extends to travel or immigration offences, and not to all offences by the victim as a consequences of their trafficking, especially prostitution and labour offences.

Notwithstanding the lack of specific provision in the ATIPSOM 2007, possible exemption from more criminal offences may arise under section 94 of the Penal Code pertaining to acts which a person is compelled to perform by threats. However, the plea under section 94 of the Penal Code can only be made under the conditions stated in the case of *Chu Tak Fai v Public Prosecutor*²⁹¹ that ‘...

²⁸⁸ Mohamed Y Mattar, ‘Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention’ (2005) 14 *Tulane Journal of International and Comparative Law* 357.

²⁸⁹ Report on the meeting of the Working Group on Trafficking in Persons, 14-15 April 2009, UN Doc: CTOC/COP/WG.4/2009/2.

²⁹⁰ ATISPOM 2007, s 25 (a)-(c).

²⁹¹ [1998] 4 MLJ 246, 264.

it was settled law since *Tan Seng Aun v Public Prosecutor*²⁹² that a plea of duress under section 94 of the Penal Code ... to be successful, must be imminent, extreme and persistent at the time of commission of the offence ...'

Malaysian law appears to diverge from English law because the latter recognises as duress the threat of grievous bodily harm which are directed at someone other than the accused,²⁹³ while the Penal Code, section 94, is restricted to death threats towards the accused alone. Section 94 reads as follows:

'Except murder, offences included in Chapter VI punishable with death and of offences included in Chapter VIA, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:

Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.'

The features of the Penal Code, section 94, are that the consequence of the threat must be of death of the accused person; the threat must exist at the time when the accused committed the crime charged; and he/she must not have placed himself in the situation by which he/she became subject of the threat.

In this regard, it is pertinent to dissect section 94. The language of the Penal Code indicates that the threat must be of 'instant' death of the accused. The definition of instant would mean 'happening or coming immediately'²⁹⁴ thus indicating it must be within a short space of time or moment. However, the

²⁹² [1949] 1 MLJ 87.

²⁹³ Stanley Yeo, 'Duress under the Indian Penal Code: Insights from Malaysia and Singapore' (2009) 51:4, *Journal of the Indian Law Institute* 494.

²⁹⁴ Oxford Dictionary <www.oxforddictionaries.com/definition/english/instant> accessed 15 June 2016.

development of the Malaysian cases has substituted 'instant' with 'imminent,' which permits a longer time interval for the threat to be carried from the accused person refusing to comply with the wishes of the threatener.²⁹⁵ This is reflected in *Tan Seng Aun* when the court said that 'it is clear from section 94 itself from decided cases that duress to be pleaded successfully must be imminent, extreme and persistent'.²⁹⁶

Section 94 also expressly requires that the threat must be directed at the accused alone. Therefore, the defence would fail should the accused contend that the threat was made against anyone else, for example, family members. This restriction is unduly severe and runs against the trends of elsewhere. For example, the Indian Penal Code has departed from these restrictions. The Law Commission of India in reviewing their Penal Code has proposed to extend the threats to include against 'any near relative of the accused covering parents, spouse, son or daughter'.²⁹⁷ Even the Singapore Penal Code include threats against the accused 'or any other persons'.²⁹⁸ This is also reflected in English law where the House of Lords in *R v Hasan*²⁹⁹ summarised the element of duress to include threats directed to the accused, or his/her immediate family, or someone close to him/her, or someone from whom he/she would reasonably regard himself as responsible.

While the Penal Code emphasises the non-criminalisation of the trafficked victim due to duress of threat, English law has developed a further concept of duress of circumstances³⁰⁰ arising from the fact that the accused does the act alleged to constitute the crime, feeling compelled to do so out of fear, but without someone demanding him/her to do it,³⁰¹ as opposed to duress of threat. In this regard, the accused does the act because he/she reasonably believes

²⁹⁵ Yeo (n 293).

²⁹⁶ *Tan Seng Aun* (n 292) 88.

²⁹⁷ The Law Commission of India, *42nd Report on Indian Penal Code* (New Delhi: The Government of India 1971). Notwithstanding the report, the recommendation has not been implemented yet.

²⁹⁸ Singapore Penal Code (Amendment) Act 2007 (No. 51 of 2007).

²⁹⁹ [2005] UKHL 22, 37.

³⁰⁰ Ormerod (n 203) 343.

³⁰¹ *R v Cole* [1994] Crim LR 582.

him/herself to be threatened with death or serious injury and that his/her only reasonable way of escaping the threat is to perform the conduct element of the offence.³⁰² The concept of duress of circumstances was first recognised more or less by accident³⁰³ in the case of *R v Willer*³⁰⁴ when the appellant was found guilty for driving his car on the pavement in front of a shopping precinct. The appellant alleged that it was the only way for him to escape from a gang of youths who had already banged his car and threatened to kill him. In allowing his appeal, the Appellate Court stated that he could have used the defence of duress.

Next, in the case of *R v Conway*³⁰⁵ the accused was asked to 'drive off' by his passenger, Tonna, who was pursued by two young men in civilian clothes, who appeared later to be police officers who wished to interview him. The accused drove off because he feared a deadly attack on his passenger, in a way which the jury in the trial case adjudged to be reckless. His conviction was quashed because the defence of duress of circumstances had not been left to the jury. According to Wolf LJ:

‘... as the learned editors point out in Smith and Hogan, Criminal Law (6th edn, 1988) p 225, to admit a defence of ‘duress of circumstances’ is a logical consequence of the existence of the defence of duress as that term is ordinarily understood, i.e. ‘do this or else’. This approach does no more than recognise that duress is an example of necessity. Whether ‘duress of circumstances’ is called ‘duress’ or ‘necessity’ does not matter. What is important is that, whatever it is called, it is subject to the same limitations as the ‘do this or else’ species of duress.’

Similarly, in *R v Martin*,³⁰⁶ the accused, while disqualified, drove his stepson, who overslept, to work. He said that he did so because his wife feared that the boy could lose his job if he was late. She threatened to commit suicide should

³⁰² Ormerod (n 203) 343.

³⁰³ *ibid* 362.

³⁰⁴ [1986] 83 Cr. App R 225.

³⁰⁵ [1989] QB 290.

³⁰⁶ [1989] 1 All ER 652.

the accused not drive him. The wife had suicidal tendencies and the doctor expressed that the opinion that 'in view of her mental condition it is likely that Mrs Martin would have attempted suicide if her husband did not drive her son to work'.³⁰⁷ Simon Brown J summarises the principle of duress of circumstances as follows:

'The principles may be summarised thus: First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances.

Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted, if the answer to both those questions was yes, then the jury would acquit: the defence of necessity would have been established.'³⁰⁸

By contrast, the ATIPSOM 2007 grants immunity from criminalisation for the trafficked victims only in the travel and immigration offence circumstances but

³⁰⁷ *Martin* (n 306) 653.

³⁰⁸ *ibid* 653-654.

is silent for other offences. The classical idea of duress under the common law, which is transplanted into the Penal Code, is of a 'threat' which is strong and imminent, thus compelling someone to commit the crime. But such defence will only be applied under the Penal Code should the duress involve a threat of death to the victim. In essence, these threats take away someone's responsibility. But these would not excuse someone from murder.

However, in human trafficking, there is a possibility of discussing duress in an alternative way by invoking the defence of duress of circumstance. This is when somebody creates a coercive atmosphere or environment of 'duress' that prompted the victims to commit crimes as a result of being trafficked. It may not be an immediate threat but it will put a victim into an impossible situation where he will lose control and responsibility. In this regard, it may be worth to consider the inclusion of these principles in the ATIPSOM 2007 as additional provisions to section 25.

The idea that trafficked victims should be exempted from criminal offences in certain circumstances is based on the fact that they are not free agents, and that they are being compelled to commit unlawful and illegal acts by those who control and exploit them, that they are victims of crime rather than criminals, that they are acting under duress and are in no position to object. This is because according to *Rantsev v Cyprus and Russia*:³⁰⁹

'... trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere... It implies close surveillance of the activities of victims, whose movements are often circumscribed... It involves the use of violence and threats against victims, who live and work under poor conditions.'³¹⁰

³⁰⁹ European Court of Human Rights, Application No. 25965/04, Judgment of 7 January 2010.

³¹⁰ *Rantsev* (n 309) 281.

Despite the legal changes in the UK, the courts are still sometimes criticised for their unsympathetic manner in handling some cases of punishment of trafficked victims who have committed unlawful activities as a result of having been trafficked.³¹¹ In *R v HTB*,³¹² the prosecution secured a conviction against a Vietnamese girl who was initially a trafficked victim in the UK and subsequently exploited for the purpose of cannabis cultivation. However, the Court of Appeal, in exercising the jurisdiction to 'stay' proceedings on the 'abuse of process', ultimately quashed the conviction on the reason that she had been compelled to commit the offence as part of her trafficking ordeal. The position in the UK may be different in the future with the introduction of the non-criminalisation clause under the MSA 2015 section 45.

5.6.5.3. Release and Repatriation

The ATIPSOM 2007 provides for trafficked victims under a protection order to be placed at the designated places of refuge for two years in the case of citizens and permanent residents,³¹³ and three months for non-citizens of Malaysia; whereby upon completion of such an order, they will be released. For the non-citizens, they will be released to the immigration officer for their return to their respective countries.³¹⁴ The immigration officer then will take all the necessary steps to facilitate their return to their origin country without any unnecessary delay,³¹⁵ provided that the court may extend the protection order if it is satisfied that the victim needs further care and protection. The protection officer must make the application³¹⁶ on behalf of the victims.

The provisions of the ATIPSOM 2007 above indicate that the Malaysian law warrants the trafficked victims to be returned to their home country. This is because the state retains a considerable degree of discretion to decide whether and when to remove unlawful immigrants, subject to subjective and procedural

³¹¹ Haynes (n 167).

³¹² [2012] EWCA Crim 211.

³¹³ ATIPSOM 2007, ss 51(3)(a) and 54(1)(a).

³¹⁴ *ibid* ss 51(3)(b) and 54(1)(b).

³¹⁵ *ibid* s 54(2).

³¹⁶ *ibid* s 54(3).

guarantees of expulsion.³¹⁷ Notwithstanding the above, Malaysia may be bound by the principle of *non-refoulement*.

Despite that the *non-refoulement* principle is generally applicable to the refugee law, it is widely recognised as customary international law in the Convention Relating to Status of refugee (Refugee Convention) 1951.³¹⁸ This principle is applied in the case where the victim is able to prove that she or he has a 'well-founded fear of being persecuted due to reasons of race, religion, nationality, membership of a particular social group or political opinion ... and [is] unwilling to return to the country of his nationality'.³¹⁹ In such circumstances, a state shall not expel or return a refugee to their place of origin.³²⁰ Some commentators have argued that the term 'owing to well-founded fear to persecution' may not only be applicable to those recognised as 'refugees' but to all who can prove to be under such 'well founded persecution' circumstances³²¹ and may include trafficked victims who have to suffer daily rigours of sexual exploitation and forced labour, physical confinement, risks of contracting diseases including AIDS,³²² the process of trafficking including rape, abduction and beatings,³²³ as well as the fear of being re-victimised if returned to their home country. These render them being 'persecuted'.

Nevertheless, there is an exception to this principle. The refugee will lose protection from *refoulement* if she or he falls under the Refugee Convention

³¹⁷ Gallagher (n 159) 247.

³¹⁸ Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection* (Cambridge: CUP 2003) 90 and 178.

³¹⁹ Refugee Convention 1951, art 1A(2).

³²⁰ *ibid* art 33.

³²¹ Lauterpacht and Bethlehem (n 318) 116. See also Guidelines On International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked (UNHCR Trafficking Guidelines) 2006 art 23. UN Doc HCR/GIP/06/07.

³²² Calvin C Cheung, 'Protecting Sex Trafficking Victims: Establishing the Persecution Element' 2007 14 *Asian American Law Journal* 31.

³²³ Udara Jayasinghe and Sasha Baglay, 'Protecting Victims of Human Trafficking within the "Non-Refoulement" Framework: is Complementary Protection an Affective Alternative in Canada and Australia?' (2011) 23:3 *International Journal of Refugee Law* 489.

article 22(2).³²⁴ This is founded in the Refugee Convention article 1F, which as reference to its *travaux preparatoires* partly aimed that the status of refugee has to be protected from abuse by its grant to undeserving cases.³²⁵

The status of Malaysia is not a contracting state to the Refugee Convention 1951, and has shown some minimal resistance to accept it as binding,³²⁶ based on the fact that such a rule had not been incorporated into the national legislation. However, since 2012, the government has changed its policy by allowing trafficked victims to take up employment after their completion of the protection order. In 2015, the first group of 33 Bangladeshis took up job offers and there are victims who were able to work as maids.³²⁷ In furtherance to the said policy, following amendment in 2015, the ATIPSOM 2007 permits the trafficked victims to move freely and to seek employment. But such permission is only applicable to the victims who are under the protection order. However, the Malaysian government may allow the victims to remain and work in the country even after the expiry of the protection order.³²⁸ This is in accordance with the ATIPSOM 2007, section 51A pertaining to the freedom of movement and employment for the trafficked victims.

5.6.5.4. Redressing the Victims

Under the Trafficking Protocol, compensation and restitution are an integral part of effective remedies for the victims of human trafficking.³²⁹ Based on this international instrument as well as the US TIP Report 2014,³³⁰ the ATIPSOM 2007 was amended in 2015 to allow for victims to claim for compensation and wages in arrears.

³²⁴ Geoff Gilbert, 'Current Issues in the Application of the Exclusion Clause' in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection* (Cambridge: CUP 2003) 426.

³²⁵ *ibid* 428.

³²⁶ Dina I Supaat, 'Escaping the Principle of Non-Refoulement' (2013) 2:3 *International Journal of Business, Economic and Law* 86.

³²⁷ Interview with Policy 2.

³²⁸ Interview with Policy 2.

³²⁹ Trafficking Protocol 2000, art 6(6). The issue of compensation and restitution is also stated in the Recommended Principles and Guidelines on Human Rights and Human Trafficking, guidelines 9.

³³⁰ US DoS (n 282).284.

5.6.5.4(i). Compensation for Being a Trafficked Victim

Prior to the amendment of the ATIPSOM, the victims of trafficking may institute claims for compensation under section 426 of the Criminal Procedure Code. The Code provides that the court, upon application by the public prosecutor, make an order for the convicted accused to pay a sum of money to be fixed by the court to the victims of the offence committed by him/her.³³¹ The payment may also be made to the representative of the victim in case of him/her being deceased.³³² In this regard, the court will consider a few factors such as the nature of the offence, the injury sustained, the cost incurred by the victim and other factors in order for it to fix the amount.³³³

The amendment of the ATIPSOM 2007 in 2015 provides as follows:

(1)The Court before which a person is convicted of an offence under this Act may make an order for the payment of a sum fixed by the Court by way of compensation by the convicted person to the trafficked person. (2) In relation to the order of the payment of compensation, subsections 426(1A), (1B), (1C) and (1D) of the Criminal Procedure Code [Act 593] shall apply. (3) For the purposes of payment of compensation, section 432 of the Criminal Procedure Code shall apply. (4) The order of payment of compensation under this section shall not prevent the commencement of any civil action in Court by the trafficked person against the convicted person.³³⁴

The amendment of the ATIPSOM 2007 provides for the trafficked victims to institute civil claims for compensation against the traffickers. The 2015 amendment is seen to be in line with the Trafficking Protocol 2000 article 696 that imposes the state parties to ensure their domestic legal system contains measures to offer trafficked victims a way to obtain compensation for the

³³¹ Criminal Procedure Code, s 426(IA).

³³² *ibid* s 426(IB).

³³³ *ibid* s 426(IC).

³³⁴ ATIPSOM 2007, s 66A.

damage suffered. This provision is important because it provides for the mechanism for the victims to rebuild their lives, and can catapult them forward on the path of survival.³³⁵ Compensation to the trafficked victims is necessary. This is because the exploitation in human trafficking deprived the victims of pay they should earn. Compensation also provides support to a victim's recovery. Compensation is also acknowledging victimhood, symbolising restoration of justice to the victims and providing means for them to rebuild their lives and prevent re-victimisation.³³⁶

5.6.5.4(ii). Payment of Wages in Arrears

The ATIPSOM 2007 also provides for the recovery of unpaid wages by the victims. Prior to the amendment of the ATIPSOM 2007, the victims may raise claims against their employers through either of two administrative processes, first before the Labour Department for claims concerning wages or any other payments in cash to them, and secondly through the Industrial Relations Department and Industrial Court for unfair dismissal.³³⁷ However, this mechanism is not applicable to domestic maids in Malaysia, and this excludes them from key labour protection, and also deprives them from a comprehensive protection when they are exploited as human trafficking victims.³³⁸

However, upon amendment of the ATIPSOM 2007 in 2015, 'in the case of no conviction of an offence under this Act, where payment of wages is in arrears to an alleged trafficked person, the Court shall make an order for the payment of such wages in arrears of a sum fixed by the Court to the alleged trafficked

³³⁵ Martina E Vanderberg, 'Palermo Promise: Victims' Rights and Human Trafficking' (2016) 6 *Human Trafficking Review* 138.

³³⁶ La Strada International, 'Findings and Results of the European Actions for Compensation for Trafficked Victims' 16
<<http://lastradainternational.org/lsidocs/Findings%20and%20results%20of%20Comp.Act.pdf>>
accessed 2 March 2017.

³³⁷ UN Human Rights Council, Report of the Special Rapporteur in Trafficking in Persons, Especially Women and Children, Maria Giammarinaro, Addendum: Mission to Malaysia, UN Doc: A/HRC/29/38/Add 1.

³³⁸ Evelyn S Devadason and Chai Wai Meng, 'Policies and Laws Regulating Workers in Malaysia: A Critical Appraisal (2014) 44:1 *Journal of Contemporary Asia* 19.

person upon application of the Public Prosecutor after conducting an inquiry by the Court'.³³⁹

5.7. Assessment of ATIPSOM 2007 and Conclusions

In assessing the ATIPSOM 2007, two main issues are considered. Firstly, whether the provisions in the ATIPSOM 2007 comply with the requirements of the Trafficking Protocol. Secondly, whether in its application and enforcement in Malaysia, ATIPSOM 2007 is fair and effective to address human trafficking problems.

5.7.1. ATIPSOM 2007 and the Trafficking Protocol

At the outset, it is worth noting that as Malaysia adopts a dualist legal system, the principles containing in the Trafficking Protocol 2000, in order to be effectively applicable in the domestic law, must be transplanted into domestic legislation. Malaysia chose to become a member to international treaties namely the UN Convention and the Trafficking Protocol as well as enacting the ATIPSOM 2007. These actions manifest Malaysia's adherence to the requirements and principles of the Trafficking Protocol 2000 as well as its determination to combat human trafficking. Certainly the older international treaties do cover issues of slavery, trafficking of women and children as well as forced labour, but these treaties do not provide comprehensive provisions pertaining to human trafficking. However, in interpreting provisions of the Trafficking Protocol 2000, the older treaties must be supplemented, for example the definitions of slavery or slavery practice as well as forced labour are not specified in the Trafficking Protocol 2000. Although Malaysia is a signatory to the older treaties, they are yet to provide the comprehensive provisions pertaining to human trafficking. Therefore, the Trafficking Protocol and adherence to the provisions thereto on the part of Malaysia are important to address the human trafficking problem in the country.

³³⁹ ATIPSOM 2007, s 66B.

According to the Trafficking Protocol 2000 article 4, its application to the member states is for the prevention, investigation and prosecution of the offences and the protection of the victims. Therefore, in considering the ATIPSOM 2007 vis-à-vis the Trafficking Protocol 2000, it is important to investigate whether the agenda set out in the latter is well recognised in the former.

It is important to consider whether the definition of human trafficking is similar. This is because the parties to the UN Convention 2000 and the Trafficking Protocol 2000 must bring its definition of trafficking in persons in its national criminal code or in line with the Protocol.³⁴⁰ However, the precise wording of that definition may differ from that contained in the Trafficking Protocol 2000, but the conduct of trafficking must be criminalised.³⁴¹

The first step in the creation of criminal law on trafficking in persons is a clear definition of the crime.³⁴² In this regard, the ATIPSOM 2007's definition of human trafficking can be construed as complementing the Trafficking Protocol as the three main ingredients constituting human trafficking are well placed in the Act. The Malaysian law further includes the words 'any criminal activity' in addition to the already open-ended list of exploitative acts and means that constitute human trafficking.

The main purpose of the ATIPSOM 2007 is to prevent human trafficking in Malaysia. It can be observed from the long title and the overall character of the ATIPSOM 2007. This is because the ATIPSOM 2007 does not specifically have a provision on prevention but the overarching objective of the ATIPSOM 2007 is to prevent human trafficking. The establishment of the MAPO is the obvious example for it to steer the effort to prevent and eradicate crimes through the

³⁴⁰ UNODC, *The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation* (Vienna: UN.GIFT 2008) 4.

³⁴¹ Trafficking Protocol, art 5.

³⁴² University of Minnesota, 'Trafficking in Women Legal and Policy: The Domestic Legal Framework'

<www1.umn.edu/humanrts/svaw/trafficking/law/domestic.htm> accessed 11 May 2015.

enforcement of the ATIPSOM 2007.³⁴³ However, the issue of effective implementation of the policy, strategy and the law in preventing human trafficking is subject to a different chapter in this thesis.

The Trafficking Protocol 2000 also emphasises the protection of all victims of human trafficking including legal protection, physical, psychological and social recovery as well as measures for the victims to obtain compensation from their perpetrators. These issues are reflected in the ATIPSOM 2007. The only concern is that the mode of physical protection is different to one promoted by the US TIP Report because Malaysia, at this point in time still place the victims at the seven government-run shelter houses. But the ATIPSOM 2007 has been amended to allow NGOs to run their own government-approved shelter houses.

Notwithstanding the purpose of the Trafficking Protocol 2000 in promoting cooperation among state parties,³⁴⁴ the ATIPSOM 2007 does not provide for cooperation between Malaysia and other countries at the bilateral and multilateral level in accordance to the Trafficking Protocol 2000 article 9. However, the ATIPSOM 2007 implicitly provides for the matter in section 7 as part of the functions of the MAPO. The disadvantage of such a mode of legislative provision is that it gives the impression that human trafficking efforts shall only be confined to the MAPO. The effectiveness of implementation will be discussed in Chapter Six of this thesis.

5.7.2 Overall Assessment of ATIPSOM 2007 – Fair and Effective?

The ATIPSOM 2007 was promulgated to deal with the specialised forms of criminality characterised by human trafficking³⁴⁵ with the purpose of combating human trafficking problems and providing protection to victims of trafficking. The enactment of the law is also an implementation of Malaysia's obligation under the Trafficking Protocol 2000. While the ATIPSOM 2007 is a clear reflection of

³⁴³ Nik R W Abdullah, 'The Public Bureaucracy Role in Policy Implementation in Malaysia' in Jon ST Quah (ed), *The Role of Public Bureaucracy in Policy Implementation in Five ASEAN Countries* (Cambridge: CUP 2016) 222.

³⁴⁴ Trafficking Protocol 2000, art 2.

³⁴⁵ Nazeri (n 127).

the requirements underlined by the Trafficking Protocol, the question is whether it is fair and effective to combat human trafficking problem in Malaysia.

This assessment is based on the written provisions of the ATIPSOM 2007 with the purpose to evaluate whether the current positions suits the conditions prevalent in Malaysia. The implementation of the law shall be discussed in a different chapter.

Overall, the ATIPSOM 2007 possesses all the basic elements of the 3P anti human trafficking paradigm – to prevent, protect and prosecute. However, the ATIPSOM 2007 is prone to the impact of immigration law, particularly for foreign victims. This is reflected in section 54 which requires a victim to be released to an immigration officer for the purpose returning him or her to home country. It seems that the ultimate aim of the ATIPSOM 2007 is to ensure that the victims leave the country once rescued and they have cooperated with the authorities, in case their service is needed in the investigation and prosecution of human trafficking cases. This issue arises due to the fact that human trafficking cases in Malaysia only involve foreign nationals.³⁴⁶

The situation in the UK is different. The UK ratified the Council of Europe Convention on Action Against Trafficking in Human Beings in 2008. Further, the EU Trafficking Directive provides for human trafficking victims, granting minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted pursuant to Council Directives 2004/83/EC and 2005/85/EC. Further the MSA 2015 section 47 amended the Sentencing and Punishment of Offenders Act 2012 section 32 to provide for civil legal services to an individual in relation to an application by the individual for leave to enter, or to remain in, the United Kingdom. But in contrast to Malaysia, the UK law provides for those who were granted the leave to remain to be able to work in a private household, and he or she will be able to change employers.³⁴⁷ This will boost the confidence of victims to cooperate with

³⁴⁶ Interviews with Enforcement 1 and 4.

³⁴⁷ MSA 2015, s 53(3).

employers, and has the potential to alleviate the exploitative conditions that they have endured as well as encourage those who were subject to exploitation to self-identify,³⁴⁸ and exposing the recalcitrant employers which might have gone unnoticed³⁴⁹ should the employees plights be hidden.

The inclusion of new provisions in the ATIPSOM 2007 after the 2015 amendment to allow the payment of compensation and wages in arrears is timely. It shows that the ATIPSOM is not purely criminalisation-centric legislation that only focused on prosecuting offenders. Since Malaysia's human trafficking cases are greatly due to the pull and push factor, involve foreign citizens who were cheated by employers or those who were held as a forced labourer, including maid abuse,³⁵⁰ the main motivation for the foreign workers to arrive in Malaysia is for economic gain, which will be repatriated to their families in their home countries. Therefore, the victim-centric law should not only provide for the rescue and protection of the victims, but also allow them to reclaim their unpaid salary that they deserved, or claim compensation from the perpetrators for the hardship that they have endured. This will ensure the explicit recognition of victimhood and the manifestation of protection of rights.

The establishment of the MAPO is another good move towards addressing human trafficking in Malaysia. However, it seems that MAPO is nothing more than just an administrative organ of the government and has no relevant authoritative power. The only exception is that MAPO is chaired by the Secretary General of the Ministry of Home Affairs where consequently he commands the role of the executive head of the Police Department and Immigration Department. Notwithstanding, the actual enforcement, protection and prosecution activities rest on the individual departments with financial budgets confined to the respective department's primary role and function. Apparently, the budget for anti-human trafficking activities is far from sufficient.

³⁴⁸ Haynes (n 167).

³⁴⁹ Karen Bradley, 'House of Commons Debate on Modern Slavery Bill', House of Commons, 17 March 2015, Vol 549
<<https://hansard.parliament.uk/commons/2015-03-17/debates/15031750000002/ModernSlaveryBill>> accessed 17 June 2016.

³⁵⁰ Interview with Policy 2.

The creation of the HLC is also seen to be an addition of another bureaucratic level for human trafficking activities.

The ATIPSOM 2007 does not provide for the self-assessment of its implementation. The successful operation of a domestic anti-human trafficking framework that is victim-centric in nature can only be attained should it be coherent, consistent, transparent and accountable.³⁵¹ In the case of Malaysia, often a third party makes the assessment, especially the TIP Report. The UNODC Trafficking Report, however, is made based on the voluntary response and report by the respective country. At the same time, the Human Trafficking Special Rapporteur's visit and report to the United Nations is based on invitation, and the report is not regular. Contrary to Malaysia, the UK Modern Slavery Act 2015 provides for the establishment of an Independent Anti-Slavery Commissioner with several roles and functions including assessing and recommending best practices to the UK government.³⁵²

The establishment of an independent rapporteur in Malaysia is important to ensure that the overall activities of anti-human trafficking be monitored and reported appropriately. However, the assessment must be made by a neutral party to the government or the MAPO. This is to ensure fairness to the assessment because the law will only be fair and effective if another person assesses it. This principle sits well in Malaysia such as in the decision by Azlan Shah F.J. in *Ketua Pengarah Kastam v Ho Kwan Seng*³⁵³ that hails the principle of *nemo iudex in causa sua* – that no-one should be the judge of his/her own cause.

One good measure to ensure no involvement of human trafficking activities by commercial organisations is the transparency in supply chains. However, it is missing in the ATIPSOM 2007. In contrast, the MSA 2015 section 54 provides for the requirement for a commercial organisation earning above a specified

³⁵¹ United States Government Accountability Office, 'Human Trafficking: Better Data, strategy & Reporting Needed to Enhance U.S. Anti-Trafficking Abroad' (2006) 10:1 *Trends in Organised Crimes* 16.

³⁵² MSA 2015, ss 40 and 41.

³⁵³ [1977] 2 MLJ 152.

total turnover to publish prominently on their website of produce following a written request, a 'slavery and human trafficking statement' for each financial year.³⁵⁴ A similar provision in the ATIPSOM 2007 could be a good move to at least ensure employers, especially big corporations, adhere to the prohibition against human trafficking and prevent human trafficking practices in Malaysia.

Based on the above, it is submitted that the ATIPSOM 2007 and the related anti-human trafficking legislation in Malaysia is meeting the minimum standard and requirement of the Trafficking Protocol. It seems that being a specialised anti-human trafficking legislation, the ATIPSOM 2007 contains all the appropriate 3P elements of prevention, protection and prosecution in addressing human trafficking. The provisions of the ATIPSOM 2007 seem able to address the requirement of 'minimum standard' by the TVPA 2000. The only question now is how well are these elements are implemented to ensure effectiveness and fairness. The issue will be discussed further in Chapter Six.

³⁵⁴ MSA 2015, s 54(4).

Chapter Six

Implementation of Anti-human Trafficking Policy and Strategy in Malaysia

6.1. Introduction

The discussions in previous chapters have presented the assemblage of anti-human trafficking policy, strategy and laws in the course of combating human trafficking phenomenon and problems. However, the existence of policy, strategies and law will be rendered futile if they are not effectively implemented and enforced. This is based on the expectation that once the government makes the policy, it will be implemented and the desired result of the policy will be near those expected by the policymakers.¹ Hence the purpose of this chapter is to analyse the implementation, as well as the enforcement, of anti-human trafficking laws in Malaysia, with the aim to assess whether such implementation is fair and effective to combat human trafficking in Malaysia.

As stated in Chapter Four, 'implementation' is very much linked to policy because public policy is meant to be implemented for it to achieve its specific goals. A verb like 'implement' must have an object like 'policy'.² Moreover, Chapter Five described and analysed the anti-human trafficking laws in Malaysia. It was understood that the ATIPSOM 2007 is the main source of the legislation outlining human trafficking policy and strategy in Malaysia. To be effective, this legislation must be of a quality appropriate for achieving the policy outcome for which it was formulated and implemented.³ Thus policy and law are intertwined, and discussions about implementation should consist of these two elements. In this regard, this chapter will elucidate how such policy and strategy and laws are implemented in Malaysia.

1 Thomas B Smith, 'The Policy Implementation Process' (1973) 4 *Policy Sciences* 197.

2 Jeffrey L Pressman and Aaron Wildavsky, *Implementation* (3rd edn, Berkeley: University of California Press 1984) xxi.

3 Vim Voermans, 'Concerns about the Quality of the EU Legislation, What Kind of Problem, by what Kind of Standard?' (2009) 2:1 *Erasmus Law Review* 59.

In this regard, as introduced in the first chapter of this thesis, this chapter addresses the third part of the thesis objectives in which it will make assessment of the effectiveness and fairness of human trafficking policy, strategy and law to determine how far they help to tackle the human trafficking phenomenon and problems in Malaysia.

Since this chapter will feature an analysis of the policy implementation and the enforcement of human trafficking law in Malaysia, it focuses on relevant agencies having jurisdiction over certain aspects of anti-trafficking efforts, including their effectiveness in combating trafficking problems and in compliance with the 3P paradigm set by the Trafficking Protocol 2000. The emphasis of the chapter is to cover the implementation institutions, namely, the relevant agencies empowered with the enforcement, prosecution and victim protection. However, decided case law will be left out in this chapter because the judgments have been discussed in Chapter Five, as the legal interpretation function is vested with the Courts.

Therefore, this chapter discusses the specialised government agencies addressing human trafficking problems such as the Council for Anti-Trafficking in Persons (*Majlis Anti Pamerdagangan Orang-dan Anti Penyeludupan Migran - MAPO*), the Police, the Immigration Department, the Welfare Department and others. It provides an assessment of their effectiveness and limitations. This chapter also discusses the collaboration between the government agencies with the other stakeholders, particularly the Non-Government Organisations and civil society groups as representatives of the Malaysian public in assessing whether the policy strategy and the law against human trafficking is fair and effective.

To achieve its aim, this chapter will refer to the existing literature, and feature the views of respondents duly analysed from the data collection during the fieldwork.

6.2. The Background to Policy Implementation

It was stated in Chapter Four that that aim of public policy is for it to be implemented in order for it to achieve its goal. Implementation is the fourth phase of the policy circle⁴ in which the adopted policies come into effect. Therefore, the implementation is an integral part of the public policy process as it connected to specific policies as a response to identified problems in a society.⁵ It can involve actions taken by public or private individuals to achieve a set of objectives that have been established prior to the policy decision.⁶

The importance of implementation is highlighted by Press and Wildavsky who stated that:

‘...we can work neither with a definition of policy that excludes any implementation nor one that includes all implementation. There must be a starting point. If no action is begun, implementation cannot take place. There must be also an end point. Implementation cannot succeed or fail without a goal against which to judge it.’⁷

Implementation is often the most difficult part in the circle of policy process,⁸ and is referred to as the ‘Achilles heel’ of administrative and public management reform,⁹ because reforms mainly fail at the implementation stage.¹⁰

⁴ See Diagram 1.

⁵ Michael Hill and Peter Hupe, *Implementing Public Policy: An Introduction to the Study of Operational Governance* (2nd edn, London: SAGE 2009) 14.

⁶ Donald S Van Meter and Carl E Van Horn, ‘The Policy Implementation Process: A Conceptual Framework’ (1975) 6:4 *Administrative & Society* 445.

⁷ Pressman and Wildavsky (n 2) xxii.

⁸ Policy Process is discussed and illustrated in Chapter Four of this thesis.

⁹ ‘Public management reform’ simply refer to deliberate change to the structures and processes of public sector organisation with the objective of getting them to run better. See Christopher Pollit and Geert Bouckaert, *Public Management Reform: A Comparative Analysis* (Oxford: OUP 2000) 8.

¹⁰ Gerald E Caiden, ‘Implementation – the Achilles Heel of Administrative Reform’ in Arne F Leemans (ed), *The Management of Change in the Government* (The Hague: Martinus Nijhoff 1976) 142.

Therefore, this section will deliberate upon two important aspects of policy implementation. The first part is about ideology and how implementation is related to the rule of law and why it is so important to Malaysia. The second part considers the underlying characteristics of policy implementation in Malaysia. This will be construed according to the nature of the cultural and practices and how they are related to human trafficking in Malaysia.

6.2.1. Implementation and the Rule of Law

The basis of the policy implementation ideology is that it must be undertaken within the rule of law. The concept of rule of law imposes important limitations on the government authority.¹¹ AV Dicey famously enunciated the rule of law concept, as based on three principles. First, legal duties, and liability to punishment of all citizens, must be determined by the ordinary law and ordinary court, not by any arbitrary official sanction, government gazette and ruling, or wide discretionary-powers.¹² Secondly, Dicey preached the notion of equality - no man is above the law any disputes among citizens and government officials are to be decided by the ordinary courts applying ordinary law.¹³ Thirdly, Dicey stated that the Constitution (the law) is a result of the previous judicial decisions determining the rights of every person.¹⁴ This would mean that the fundamental rights of the citizens are rooted in fundamental judge-based law, and are not dependent on any abstract constitutional concept, declaration, or guarantee. This is because Dicey was against a basic document cataloguing human rights, but advocated legal rights are arising from the court's decisions – common law.¹⁵

¹¹ Michael L Principe, 'Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain' (2000) 22 *Loyola of Los Angeles International and Comparative Law Review* 357.

¹² Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (3rd edn, London MacMillan 1889) 175.

¹³ *ibid* 181.

¹⁴ *ibid* 183.

¹⁵ Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, Oxford: OUP 2011) 13.

In a report of the International Congress of Jurists in 1959, the International Commission of Jurist (ICJ) considered the definition of the rule of law to mean as follows:

'The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men.'¹⁶

Dicey's concept, however, received criticisms especially the third principle. This is because Dicey attempted to reconcile his rule of law concept with the parliamentary sovereignty principle. A commentator criticised this third principle and stated that parliamentary sovereignty is given life by democracy, and it only exists because it facilitates the political resolution of communal issues through representative and elected government. Therefore, if the Parliament was to legislate against democracy, it would be using its sovereignty in an unacceptable way. At this point, it was argued that the rule of law limits the sovereignty of the Parliament to its purpose of facilitating democracy, thus rendering into a substantive rather than merely procedural principle.¹⁷

To make these principles operational, there must be an effective system of horizontal accountability between government institutions to act as a check and balance on each other.¹⁸ Above all, the role of judiciary is important, and it must be independent of pressure, inducement and manipulation.¹⁹

¹⁶ Norman S Marsh, *The Rule of Law in a Free Society: A Report on the International Congress of Jurists*, New Delhi, India, January 5-10 1959 (Geneva: International Commission of Jurists 1959) 313.

¹⁷ Trevor RS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: OUP 1993) 12-18.

¹⁸ Rebecca B Chavez, 'The Rule of Law and Courts in Democratising Regimes' in Keith E Whittington, Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford: OUP 2010) 65.

¹⁹ *ibid* 69.

In Malaysia, the concept of the rule of law can be observed from various perspectives.²⁰ The rule of law permeates the Malaysian constitutional framework which provides the foundation of an independent Malaysia. The idea is enshrined in the Federal Constitution, article 4 (1), which provides for the supremacy of the Constitution in itself. The foundation of the rule of law in the Constitution is fully recognised in the case of *Ah Thian v Government of Malaysia*,²¹ where Suffian LP observed that the doctrine of parliamentary sovereignty does not apply in Malaysia because it has a written constitution. Thus, the power of the legislatures is limited by the Constitution, and the legislators cannot pass any law as they please. Suffian LP further stated that the written law may be invalid only if the laws are inconsistent with the powers given by the Constitution,²² and, in the event that the state law is inconsistent with the federal law, the latter will prevail to the extent of the inconsistency.²³

At the same time, it must be emphasised that in Malaysia, where there is a written constitution, the word 'law' has to be given a wide meaning. It should include the Constitution itself, any written law, and by definition should also include the common law of England in so far as it is applicable in Malaysia, any custom or usage having the force of law.²⁴ Therefore, it is incumbent upon both the Legislative and the Executive to act within the bounds of the power conferred by the Constitution or by any written law under which it purports to act.²⁵

Consequently, the practical manifestation of rule of law implies that all public or government officials are accountable to the law, thus making the Malaysian government also subject to the law. In the case of *Dato' Ambiga Sreenevasan & Ors v. Menteri Dalam Negeri & Ors*,²⁶ the applicants applied for judicial review

²⁰ See Muhammad Rashaad Bakashmar, *Rule of Law in Malaysia: A Developmental Perspective* (Saarbrücken: Lambert Academic Publishing 2010) 66.

²¹ [1976] 2 MLJ 112.

²² Federal Constitution, art. 74.

²³ *ibid* art. 75.

²⁴ Arifin Zakaria, 'Public Lecture: Rule of Law and Judicial System' 9.

<[www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/CJ%20-%20Integrity%20Speech%20\(NEW\).pdf](http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/CJ%20-%20Integrity%20Speech%20(NEW).pdf)> assessed 20 August 2016.

²⁵ *ibid*.

²⁶ [2012] MLJU 710.

by way of certiorari to quash the order of the Minister of Home Affairs who had declared that the Coalition for Clean and Fair Election (“BERSIH”) an unlawful society pursuant to the Societies Act 1966, section 5. While recognising the powers vested in the Minister under the Societies Act 1966 to declare unlawful any society which in his opinion is or is being used for purposes prejudicial to, or incompatible with the interest of the security of Malaysia, the High Court allowed the application on the basis that the ‘decision of the minister declaring BERSIH as an unlawful society was tainted with irrationality.’²⁷ The Court also found that the Minister’s ‘decision to outlaw BERSIH impinges on the rights guaranteed under the Federal Constitution and should not be taken in just a lackadaisical manner’²⁸ due to the fact that the conducts of the respondents, among others, in allowing a rally by BERSIH, does not cause it to be a security threat to public order and security.²⁹ In this instance, the rule of law was considered and became a determining factor to the decision by the court.

The idea of rule of law is stamped onto public consciousness by the fact that it was entrenched as one of the five basic principles of the ‘pillars of the nation’ (or *Rukunegara*)³⁰ that comprise the guiding principles towards nation building, maintaining democracy, creating just society, ensuring liberal society and building progressive society.³¹ It was proclaimed following the 1969 racial disorders with the main aim to promote national unity.³² But, according Yatim, the rule of law as expressed in the *Rukunegara* may not be similar to the ideology conceived by AV Dicey³³ or the ICJ. Further, Yatim argued that:

‘...it was not particularly concerned with the checks and balances necessary in the popular notion under a modern democratic system. It

²⁷ *Dato’ Ambiga Sreenevasan & Ors* (n 26) para 38.

²⁸ *ibid* para 37.

²⁹ *ibid*.

³⁰ The *Rukunegara* was drafted by the Department of National Unity Malaysia and was proclaimed by the Malaysian Yang diPertuan Agong on 31 August 1970; it comprises five principles: Believe in God, Loyalty to the King and Country, Upholding the Constitution, the Rule of Law, and Good Behaviour and Morality.

³¹ In-wŏn Hwang, *Personalized Politics: The Malaysian State Under Mahathir* (Singapore: ISEAS 2003) 102.

³² Rais Yatim, *Freedom under the Executive Powers in Malaysia: A Study of Executive Supremacy* (Kuala Lumpur: Endowment Publication 1995) 27.

³³ Will be discussed in a later part of this chapter.

was proclaimed to mean no more than the rules and regulations made by the government must be followed.³⁴

Beside powers vested in the legislature to debate and question policies, there is no doubt that the Malaysian government has power and capacity to design policy in various forms such as directives, executive orders, official acts, and guidelines pertaining to its policy on every matters and issues.³⁵ Notwithstanding, the absence of legal force would leave such directives, executive orders and guidelines as very limited in effect. Therefore, the government 'needs legislation to give legal effect to its policies, to clothe them with the force of law.'³⁶ This is because the law constitutes the source of legitimation *par excellence* for all public actors.³⁷ Thus, the government has to translate its policies into legislation because of the demands of legitimacy and legality.³⁸ That a public authority may not act outside its powers conferred by the law is shown by the case of *Generation Products Sdn. Bhd. v Majlis Perbandaran Klang*.³⁹ The Malaysian Federal Court held that public authorities are set up and derive their powers from statutes. The established law is that these bodies must look at the relevant provisions of the Acts to determine their powers and authorities. Therefore, 'even if the authority has the best of intentions, if its act falls outside the scope of the power conferred upon it, the exercise of power is deemed *ultra vires* and liable to be declared void.'⁴⁰

Conversely, any acts of a public servant that fall outside the law should be declared as *ultra vires*.⁴¹ This is illustrated in the case of *Datuk Bandar Kuala Lumpur v Zain Azahari Bin Zainal Abidin*,⁴² where Gopal Sri Ram JCA stated that:

³⁴ Yatim (n 32) 28.

³⁵ Peter J May, 'Policy Design and Implementation' in B Guy Peters and Jon Pierre, *Handbook of Public Administration* (London: SAGE 2003) 223.

³⁶ David R Miers and Alan C Page, *Legislation* (London: Sweet & Maxwell 1990) 11.

³⁷ Peter Knoepfel and others, *Public Policy Analysis* (Bristol: Policy Press 2007) 65.

³⁸ Ann Seidman, Robert B Seidman and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (London: Kluwer 2001) 13-14.

³⁹ [2008] 6 MLJ 325.

⁴⁰ *ibid* 332.

⁴¹ Ainul J Maidin, 'Legal Framework for Establishing Regional Planning Authority for Malaysia' (2011) *Law Review* 630.

⁴² [1997] 2 MLJ 17.

‘...[a] public decision-maker ... upon whom a power or discretion is vested by Parliament is akin to a trustee. He is under obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion.’⁴³

In reality, the situation in Malaysia can be different since the Malaysian government has been enabled to deal with security issues in constant derogation from the principles of the Constitution. This is especially so with the use of emergency powers by the Executive under the Internal Security Act (ISA) 1960.⁴⁴ The ISA 1960 was amended in 1969 following the racial riots in 1969 that resulted in the government tightening the security belt ‘to undermine any subversive elements’.⁴⁵ Among notable change set under the amendment is that it widened the concept of sedition covering matters such as with ‘a tendency...to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia’ and prescribed the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the Federal Constitution.⁴⁶ Therefore, the rule of law in Malaysia did not prevail so much because of the vagueness of these terms and the breadth of ministerial discretion.

The reality is that the rule of law in Malaysia is jostling with authoritarianism, which is attractive to a government which places greater emphasis on the governmental stability.⁴⁷ This is due to the fact that Malaysia is a country whose significant democratic and authoritarian characteristics are inextricably mixed.⁴⁸

⁴³ *Datuk Bandar Kuala Lumpur* (n 42) 31.

⁴⁴ The ISA was promulgated to replace the Emergency Ordinance 1948 after the proclamation of the end of the ‘Emergency’ in Malaya. But the 1960 Act found a new form of the expression of ‘emergency’ was to tackle what is posed as threat to political stability in the country. See Rais Yatim, *The Rule of Law and Executive Power in Malaysia – A Study of Executive Supremacy* (PhD Thesis, King’s College London 1994) 205-206.

⁴⁵ Mohd Rizal Yaakob, ‘The Emergency Law in Malaysia – Security of Liability?’ (2010) *SSRN Electronic Journal* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695727 > accessed 21 November 2016.

⁴⁶ Harold Crouch, *Government and Society in Malaysia* (Ithaca: Cornell University Press 1996) 82.

⁴⁷ Hoong Phun Lee, ‘Competing Conception of Rule of Law in Malaysia’ in Randall Peerenboom (ed), *Asian Discourse on Rule of Law: Theories and Implementation of Rule and Law in Twelve Asian Countries, France and the US* (London: Routledge 2004) 244.

⁴⁸ Crouch (n 46) 5.

Although the Federal Constitution gives assurances to the fundamental liberties, these liberties are not without limitations. This is because Part XI of the Federal Constitution provides for the special powers to the Parliament to validate any laws inconsistent with the fundamental liberties provisions as long as such laws are promulgated against any act of crimes prejudicial to the public order,⁴⁹ as well as powers for the Government to proclaim an emergency.⁵⁰ In case of *Karam Singh v Menteri Hal Ehwal Negeri Malaysia*,⁵¹ Suffian FJ (as he was then) has explained the legality of the (now repealed) Internal Security Act 1960 vis-à-vis Article 5 of the Constitution (pertaining to liberty of a person):

‘...whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.’

This blank cheque for those in power is not really consistent with the rule of law. Yet, although the legislation against the Emergency was often criticised, the Malaysian court adopted a deferential position in interpreting them. In *Loh Kooi Choon v Government of Malaysia*⁵² Raja Azlan Shah FJ (as he was then) stated that the wording of the Malaysian Constitution in itself is to be interpreted and applied, and such wording can never be overridden by the extraneous principles of other constitutions.⁵³ His Lordship further stated that Malaysia looks at other constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.⁵⁴ Next, the Malaysia courts have shown reluctance to interfere with the conduct and decisions of the executive in various sensitive areas other than national security. For example, in religious sensitive issues such as in *Titular Roman Catholic*

⁴⁹ Federal Constitution, art. 149.

⁵⁰ Federal Constitution, art. 150.

⁵¹ [1969] 3 MLJ 129.

⁵² [1977] 2 MLJ 187 at 188-189.

⁵³ His Lordship Raja Azlan Shah referred to the case of *Adegbenro v Akintola & Anor* [1963] 3 All ER 544 para 511.

⁵⁴ *Loh Kooi Choon* (n 52) 189.

Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors,⁵⁵ the Federal Court upheld the decision to ban against the use of the word 'Allah' by non-Muslims to refer to God. Similarly, in the times of economic depression, the courts have shown some level of reluctance to follow strictly the fundamental rights as enshrined in the Federal Constitution. This is reflected in the case of *Danaharta Urus Sdn. Bhd. v Kakatong Sdn. Bhd.*⁵⁶

The reality is that the situation in Malaysian is redolent of the practices of governments in many developing states. The approach of the government is typically to initially accumulate enough power to govern so as to enable them to put into motion their economic plans and reforms for the pursuit of economic development. The form of government suitable to this kind of transformation is, 'unfortunately the very antithesis of the western liberal democratic model founded on principles of accountability, impartiality and limited government.'⁵⁷ A developing state with a weak government believes it simply cannot govern.⁵⁸

Notwithstanding these dangers, the Malaysian story of policy implementation must also take into account the existence of effective institutions, leadership, and clarity of purpose, processes, and mechanisms.⁵⁹ This is because Malaysia adopts a large measure of learning by doing. Policies have often been well coordinated. There has also been a good delivery system, which is essential for the implementation of economic policies particularly.⁶⁰

⁵⁵ [2014] 4 MLJ 745.

⁵⁶ [2004] 2 MLJ 257. In this case, a question brought before the court was whether there is an infringement of the Federal Constitution, article 8 (1) by the section 72 of the Pengurusan Danaharta Nasional Berhad (Danaharta) Act 1998. Under Danarharta Act 1998, section 72 provides that the court cannot grant an order which stays, restrains or affects the powers, actions taken or proposed to be taken by the Corporation, Oversight Committee, Special Administrator or Independent Advisor formed under the auspice of under the Danaharta Act. However, the Federal Constitution, article 8 (1), guarantees equality among citizens before the law and their equal entitlement for the protection of law. The Federal Court held that the Act was a special Act to deal with economic crisis at the material time. Therefore the Court held that Danaharta Act section 72 is not inconsistent with Article 8 of the Federal Constitution.

⁵⁷ Kevin YL Tan, 'The Role of Public Law in Developing Asia' (2004) *Singapore Journal of Legal Studies* 265.

⁵⁸ *ibid.*

⁵⁹ Zainal Aznam Yusof and Deepak Bhattasali, 'Economic growth and development in Malaysia: Policy Making and Leadership,' *Commission on Growth and Development Working Paper No. 2.* (Washington DC: World Bank 2010) 37.

⁶⁰ *ibid* 38.

Turning now to human trafficking, this phenomenon is clearly a crime that violates the rule of law, threatening national jurisdictions and international law. Human trafficking is a complex manifestation of the global 'black' economy, organized crime and violations of human rights. It causes extreme hardship to the suspected millions of victims worldwide and also has an impact on the financial markets, the economies and the social structures of countries where it is allowed to exist.⁶¹ Therefore, there is a need to strengthen the rule of law in the fight against human trafficking in order to better protect victims' human rights and ensure them access to justice.⁶² This is because the prevalence of the rule of law in the human trafficking policy not only ensures the criminalisation of the traffickers but also entitles the victims to the full range of human rights, of which the characteristic of 'Protection' is highlighted as one of the most important aspects in the anti-human trafficking efforts. This is because the Trafficking Protocol 2000 states the trafficked persons are entitled to the full range of human rights, even if they are outside their country of origin.⁶³ In this respect, the Trafficking Protocol 2000 is clear that trafficked persons cannot be discriminated by a state against simply because they are non-nationals.⁶⁴ Likewise, the United Nations and its bodies have repeatedly affirmed that trafficking violates and impairs fundamental human rights, as have many of the international human rights mechanisms.⁶⁵ Nevertheless, although at times the use of several laws in Malaysia, particularly related to Emergency, are seem to be constantly derogating from the Constitution due to the security, religious harmony and the economic development, the implementation of human trafficking as policy should not be held back as it is less problematic than those issues because the level of sensitiveness are not aroused.

<documents.worldbank.org/curated/en/183111468050085348/Economic-growth-and-development-in-Malaysia-policy-making-and-leadership> accessed on 6 September 2016.

⁶¹ UNODC, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (New York: UN 2008) 10.

⁶² Organization for Security and Co-operation in Europe (OSCE), *2012 Annual Report Combating Trafficking as Modern-day Slavery: A Matter of Non-discrimination and Empowerment* (Vienna: OSCE 2012) 42-43.

⁶³ OHCHR, *Human Rights and Human Trafficking* (New York: United Nations 2014) 6.

⁶⁴ Trafficking Protocol, Part II Article 6-8. Also OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN. Doc. E/2002/68/Add.1, Guideline 6.

⁶⁵ OHCHR, *Human Rights and Human Trafficking* (n 63) 5.

Specifically in addressing human trafficking, the Malaysian government has sought to promulgate the appropriate policy by adopting the 3P paradigm – to prevent, protect and prosecute in its anti-human trafficking policy and law, as specifically provided in the ATIPSOM 2007. The elaborations in Chapter Four and Five of this thesis showed that the anti-human trafficking policy and laws are indeed being made to address human trafficking problems in Malaysia, with the provisions in the ATIPSOM 2007 covering the intrinsic aspects required by the Trafficking Protocol 2000. Recent amendments of the ATIPSOM 2007 in 2015 further strengthen victim protection.⁶⁶ The question for this chapter is how far these policy and laws are being effectively and fairly implemented.

In summary, the statutes in Malaysia must be, and are, in compliance with and grounded by the rule of law. Nevertheless, there are criticisms by the Non-Governmental Organisations (NGOs) and the US DoS about the nature and level of implementation. Without obvious complications pertaining to national security, religious sensitiveness and the economic background, the implementation of human trafficking law and policy should be more straightforward than these other policy fields, especially since they have to be in accordance with the pre-established templates in international standards that are not in any way conflict with such sensitive issues in Malaysia.

6.2.2. Malaysian Policy Implementation's Underlying Characteristics

This section deliberates upon the underlying characteristics of the policy implementation in Malaysia. The focus will be on the culture and practices.

Malaysia inherited an administrative system that is the legacy of the UK.⁶⁷ The foundation of Malaysian contemporary administration and governance system

⁶⁶ Azura Abas and Fazleena Aziz, 'Malaysia Aims to Improve Anti-Human Trafficking Ranking to Tier 1 by 2020: Zahid,' *The New Straits Times* (15 August 2016) <www.nst.com.my/news/2016/08/165699/malaysia-aims-improve-anti-human-trafficking-ranking-tier-1-2020-zahid> accessed 19 September 2016.

⁶⁷ OHCHR, *Human Rights and Human Trafficking* (n 63) 31.

was laid down by the British colonial rule.⁶⁸ Nevertheless, the system has evolved, and the 'Malaysianisation' of the political and administrative system has been implemented ever since the country gained independence from Britain in 1957.

The 'Malayanisation' of bureaucracy, that is by replacing the foreigners with the locals,⁶⁹ began just before the independence in 1956 and was fully completed in 1965,⁷⁰ and was heavily organised based on the Weberian doctrine of legal-rational administration.⁷¹ Such a system is based on the formalistic belief in the content of the law or rationality, and obedience is not given to a specific individual but to a set of uniform principles.⁷² While it embarked on its development path, Malaysia also worked on strengthening institutions, as well as rules and procedures, to support a new role of public bureaucracy as the agent of change.⁷³

In realising economic and development growth in Malaysia, the government has outlined a three-tiered cascading planning horizon, covering long, medium and short-term plans.⁷⁴ The long-term plan, outline perspective plans (OPPs), set the broad thrusts and strategies in the national development agenda over a long term. Next, the medium plan covering 5-year development plans is formulated to operationalize the OPPs. Finally the short-term plans cover the yearly budgets.⁷⁵

⁶⁸ Nik RW Abdullah, 'The Public Bureaucracy Role in in Policy Implementation in Malaysia' in Jon Quah (ed), *The Role of Public Bureaucracy in Policy Implementation in Five ASEAN Countries* (Cambridge: CUP 2016) 174.

⁶⁹ Siti NA Khalid, 'New Public Management in Malaysia: In Search of an Efficient and Effective Service Delivery' (2008) 15 *International Journal of Management Studies* 69.

⁷⁰ Norma Mansor & Raja NR Ariffin, 'Public Administration in Malaysia: Origins, Influence and Assessment' in Meredith L Weiss (ed), *Routledge Handbook of Contemporary Malaysia* (Oxon: Routledge 2014)104.

⁷¹ *ibid.*

⁷² Max Weber (Hans Gerth tran), 'The Three Types of Legitimate Rule' (1958) 4:1 *Berkeley Publications in Society and Institutions* 1.

⁷³ Mansor and Arifin (n 70) 105.

⁷⁴ Economic Planning Unit, *Development Planning in Malaysia*, (Putrajaya: EPU 2004) 2.

⁷⁵ *ibid* 3.

Aside from the emphasis on the planning, the public policy in Malaysia is pro-*Bumiputra*⁷⁶ and appears to be discriminatory against other races. This is due to the fact that the majority of the public servants are Malay and *Bumiputra* in origin.⁷⁷ This imbalance is not only because the non-*Bumiputra* are less inclined to join the public service, but also because the Federal Constitution in article 153 allows for quotas for the Malays and the *Bumiputras* in the public service. This has created a situation where the *Bumiputras* are dominating the employment in the public service⁷⁸ and are directly involved in policymaking and implementation of policies, particularly those in the law and security sector.⁷⁹ The result may be favouring the *Bumiputras*, and delivery of public policies may not be well targeted to different ethnic groups.⁸⁰

While the policy and law relating to human trafficking seem to be consistent with the requirement of the international anti-trafficking laws, such as the Trafficking Protocol 2000, the success of implementation of the domestic anti human trafficking policy and law remains questionable. In this regard, three possible problems arise around the implementation of these policies and laws. These include the nature of Malaysian public service, quest for Malaysia to become a developed nation and the corruption practices. The three issues are discussed next.

⁷⁶ *Bumiputera* is a Malay word literally means the 'son of the soil'. The Malays are the main *bumiputera* in Peninsular Malaysia, while in Sabah and Sarawak the *bumiputera* consists of the indigenous people.

⁷⁷ A study shows that the non-*Bumiputra* especially the Chinese and Indians in Malaysia are less interested to join the public service in Malaysia due to various factors such as were unattractive pay, poor promotion prospects, not an interesting and challenging job, poor image, low autonomy, high work load, and poor working environment. See Kuan Heong Woo, 'Recruitment Practices in the Malaysian Public Sector: Innovations or Political Responses?' (2015) 21:2 *Journal of Public Affairs Education* 229.

⁷⁸ Jomo KS Sundaram, 'The New Economic Policy and Interethnic Relations in Malaysia' *Identities, Conflict and Cohesion Programme Paper No. 7, September 2004* (New York: UNRISD 2004) 14.

⁷⁹ Asian Strategy and Leadership Institute (ASLI) Centre for Public Policy Studies, 'Towards a More Representative and World-Class Malaysian Civil Service' < [http://www.cpps.org.my/resource_centre/\(C\)_Malaysian_Civil_Service1_1_.pdf](http://www.cpps.org.my/resource_centre/(C)_Malaysian_Civil_Service1_1_.pdf) > accessed 17 September 2016.

⁸⁰ Lau Z Zhou, 'Reforming the Civil Service,' CPPS Policy Paper Series November 13, 2013 <http://cpps.org.my/images/articles/Reforming%20the%20Civil%20Service_Policy%20Paper_Lau.pdf> accessed 17 September 2016.

Firstly, there is the issue pertaining to the nature of the public service in Malaysia. It is argued that there is an ethnic divide within Malaysian people and it is reflected in the minority-majority attitude towards people who are not in the majority ethnic grouping. As described above, this is mirrored by the disparity in the composition of the public service and their attitude towards the non-majority. For example, out of 1.13 million public servants (exclusive the police and armed forces) in Malaysia, 88.3% are represented by the *bumiputras*, while the rest is represented by other ethnic groups such Chinese (6.2%), Indians (4.1%), and others (1.4%).⁸¹ For the police force, the statistics as of April 2016 shows that out of the total 133,212 police officers, Malays represent 80.23%, Chinese 1.96%, Indians 3.16% and others 14.65%.⁸² This is also reflected by the claim that public services can be more effectively and efficiently delivered to clients by bureaucrats from the same ethnic group.⁸³ Applying this point to the perspective of human trafficking, the victims of human trafficking are mostly non-*bumiputra* and non-citizens,⁸⁴ thus there arises the possibility of the lack of attention on the part of the policy implementers to the victims' plight. Such an attitude is recognised even by the lawmakers. For example, during the deliberations of the ATIPSOM 2007, a member of parliament questioned why there is a need for the victims to be kept in the shelter houses whereas they should be sent to their home country.⁸⁵ Another lawmaker stated that the government should not allow the use of the public money to rehabilitate foreign victims.⁸⁶ Even a minister was of the view that the victims ought to be returned to their home countries because the latter should bear responsibility to care for their own citizens.⁸⁷

The above problem raises an issue of governance, based on two issues. One question is about the 'legitimacy' - how much the majority view the interests of

⁸¹ Public Service Department, 'Statistics on Public Service Employees as of May 2015' (unpublished).

⁸² Ministry of Home Affairs, 'Statistics on Police Force as of April 2016' (unpublished).

⁸³ Lim Hong-Hai, 'Ethnic Representation in the Malaysian Bureaucracy: The Development and Effects of Malay Domination' (2007) 30 *International Journal of Public Administration* 1503.

⁸⁴ Malaysian Anti-trafficking in Persons Council, 'Statistic of Human Trafficking Cases in Malaysia 2008-2014' (unpublished).

⁸⁵ Parliament of Malaysia, *Hansard*, DR9.5.2007, 78.

⁸⁶ *ibid*

⁸⁷ Parliament of Malaysia, *Hansard*, DR9.5.2007 94, and DR.10.5.2007, 15.

minority ethnic groups. There is a perception that bureaucrats/policy implementers empathise more with their own local community. This problem may be attributed to political interference. However, the underlying issue of lack of non-*bumiputra* participation in the public service may be attributed to the constitutional guarantee pertaining to the preference for the intake of *bumiputras* in the public service in accordance to the Federal Constitution, article 153. Therefore, a fairer and more effective implementation might be achieved if the appointment of the officers from other ethnicity in the anti-human trafficking policy implementation were to be increased. Another issue on governance is that the general perception on human trafficking issue in itself. Even on scrutiny of parliamentary debates reveal that the public perception among the victims they are always aligned to sex-trafficking. This is further exacerbated by the conflation between human trafficking and migrant smuggling, with a perception that such victims at the outset are volunteer sex workers. At worse, one State Chief Minister in trying to account the lack of regulation in the sex sector, even blamed these women for choosing to put themselves in the situation to earn money from sex related work.⁸⁸

Secondly, another problem to be highlighted is due to the Government's vision to attain a better development status. The government is eager to drive the country to fulfil its Vision 2020 and the New Economic Model within a specific period to attain the status of a developed nation.⁸⁹ Therefore the government seeks to adopt various measures to achieve rapid development projects. This creates a need for a lot of cheap labourers because many projects are based on the labour intensive projects, for example infrastructural projects, which rely mostly on the low-skilled foreign workers.⁹⁰ Therefore, the Government wishes to embark on labour-intensive projects, for political reasons otherwise the Government will be seen as a failure. Yet, Malaysian authorities give less

⁸⁸ Cecilia Ng, Maznah Mohamad and Tan Beng Hui, *Feminism and the Women's Movement in Malaysia: An Unsung (R)evolution* (London: Routledge 2006) 129.

⁸⁹ Prime Minister's Department, *Government Transformation Programme: The Roadmap* (Putrajaya: PEMANDU 2010) 42.

⁹⁰ Economic Planning Unit, Prime Minister's Department, *Eleventh Malaysia Plan 2016-2020: Strategy Paper 8 Labour Market for an Advanced Nation*, 10
<<http://rmk11.epu.gov.my/pdf/strategy-paper/Strategy%20Paper%2008.pdf>> accessed 16 September 2016.

attention to the foreign victims of human trafficking because they are not seen as counting as equals and are perceived as being needed by the domestic economy.⁹¹ In this regard, and as a result of these activities of employing cheap and unskilled migrant labourers, Malaysian development could potentially drive human trafficking.

Thirdly, corruption can be an impetus to human trafficking. It has been argued that one of the reasons why human trafficking continues to thrive in the face of its nearly universal condemnation is because it involves high profit with low risks.⁹² The problem is amplified with corruption practices among enforcement officers that inhibit efforts to effectively implement human trafficking policy and law thus put counter human trafficking in jeopardy.⁹³ This is a fact admitted even by the Minister of Home Affairs who was apparently perturbed about the human trafficking and migrant smuggling activities at the Malaysian-Thai border. During a media interview, the minister proposed that these officials should be replaced by army personnel⁹⁴ due to rampant corruption practices by the police and immigration officials who have been in complicit with the trafficking syndicates.

The statement prompted a damning report by the *New Straits Times*, which cited a source from the Malaysian police that 80% of the border enforcement officers were colluding with the criminals in various activities including human trafficking.⁹⁵ Prior to such disclosure, Malaysia was taken aback to learn about the discovery of network of people smuggling and human trafficking camps hidden in the jungle along Malaysia-Thai border, that included mass graves

⁹¹ Yoichiro Sato, 'Perceptions of Transnational Security Threats in Malaysia and Singapore: Windows of Cooperative Opportunities for the United States' in David Fouse (ed), *Issues for Engagement: Asian Perspective on the Transnational Security Challenges* (Honolulu: APCSS 2010) 145.

⁹² UN, *Human Trafficking: An Overview* (Vienna: UNODC 2008) v.

⁹³ US DoS, *TIP Report 2016: Malaysia* (Washington DC: US DoS 2016) 255.

<www.state.gov/documents/organization/258876.pdf> accessed 29 September 2016.

⁹⁴ The New Straits Times, 'I want army to man borders: Zahid,' *The New Straits Times* (Putrajaya: 3 June 2015)

<www.nst.com.my/news/2015/09/%E2%80%98i-want-army-man-borders%E2%80%99-zahid> accessed 26 September 2016.

⁹⁵ Farrah N Karim, 'Exclusive: 80pc of Enforcers Manning Borders on the Take,' *The New Straits Times* (Kuala Lumpur 3 June 2015)

<www.nst.com.my/news/2015/09/exclusive-80pc-enforcers-manning-borders-take> accessed 26 September 2016.

suspected to be burying place of human trafficking victims. Following the discovery, the Malaysian authorities detained scores of police officers suspected to be colluding with the trafficking syndicates.⁹⁶

Bearing in mind these underlying characteristics, the discussions that will take place in the subsequent sections will undertake deeper analysis of the issue of anti-human trafficking policy and law implementation in Malaysia.

6.3. Anti-human Trafficking Policy Implementation and Law Enforcement in Malaysia

Policy implementation is closely related to bureaucracy, because bureaucrats are the main actors in the public policy implementation.⁹⁷ Therefore, for the implementation of human trafficking policy in Malaysia, the task is vested in the public service, with the MAPO at the Ministry of Home Affairs serving as the coordinating body for anti-human trafficking efforts. This body will be considered next.

6.3.1. Anti-human Trafficking Policy Implementation Bodies

The coordinating role for the implementation of anti-human trafficking policy and the enforcement of the ATIPSOM 2007 in Malaysia is mainly vested in MAPO, and is centralised at MAPO's National Strategic Office at the Ministry of Home Affairs.⁹⁸ However, the actual implementation of anti-human trafficking policy and law is executed by the specific government agencies having jurisdiction in specific areas. It is manifested by the fact that the MAPO is assisted by five committees, which carry out the tasks that have been assigned to them

⁹⁶ Ben Lin Yi, 'Malaysian Police Arrest Own Officers Over Involvement in Migrant Death Camps' *the Guardian* (Wang Kelian 28 May 2015)

<www.theguardian.com/world/2015/may/28/malaysian-police-arrest-own-officers-over-involvement-in-migrant-death-camps> accessed 26 September 2016.

⁹⁷ Randall B Ripley and Grace A. Franklin, *Policy Implementation and Bureaucracy* (2nd edn, California: Brooks 1986) 3.

⁹⁸ Ministry of Home Affairs, 'NSO MAPO and International Relations' <www.moha.gov.my/index.php/ms/ab-pengenalan> accessed 19 September 2016.

according to their respective jurisdictions,⁹⁹ including: the Legislation Committee headed by the Attorney-General's Chambers; the Enforcement Committee headed by the Royal Malaysian Police; the Victim Protection and Rehabilitation Committee headed by the Ministry of Women, Family and Community Development; the Media and Publicity Committee headed by the Ministry of Information, Communications and Culture; and the Special Committee to Study the Issues of Labour Trafficking headed by the Ministry of Human Resources.

The discussion of this section is divided into two. First, it will consider the role of MAPO as the specialist body handling human trafficking in Malaysia. Secondly, it will review the other agencies handling human trafficking issues in Malaysia, but where that task is not their main job. However, such agencies have specialist units with a specific interest in human trafficking. This section will discuss their respective roles and functions, with the assessment pertaining to the questions of effectiveness and fairness in policy implementation to be discussed in section 6.4.

6.3.1.1. MAPO as the Main Specialised Implementing Body

The ATIPSOM 2007 mandated that the MAPO becomes the main body to implement human trafficking policy in Malaysia. The composition of MAPO comprises senior officials from a number of government agencies with its secretariat being housed in the Ministry of Home Affairs.¹⁰⁰

According to ATIPSOM 2007, section 7, MAPO has a range of functions related to preventing and combating trafficking in persons and smuggling of migrants, including: coordinating the implementation of the Act; formulating policies and programs, including protective programs for trafficked persons; increasing public awareness; monitoring immigration and emigration patterns; advising the

⁹⁹ Ministry of Home Affairs, 'Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants: Background' <www.moha.gov.my/index.php/en/majlis-antipemerdagangan-orang/latar-belakang> accessed 16 October 2016.

¹⁰⁰ Interview with Policy 1.

government on the issues, including developments at the international level; coordinating the formulation of policies and monitoring their implementation with relevant agencies and nongovernmental organizations; cooperating and coordinating with governments and international organizations; collecting and collating data and information; and authorizing research.

The establishment of MAPO is in line with the UN's urge for member states to establish their national anti-trafficking coordinating bodies or task forces, composed of officials from relevant government agencies and non-governmental agencies.¹⁰¹ This is because the UN was of the view that such establishment would develop comprehensive and coordinated policies on trafficking, promote better cooperation, monitor the implementation of national referral mechanisms, and promote research on trafficking in persons.

Notwithstanding this wide remit, MAPO does not play the role of implementing the anti-human trafficking policy, but coordinates it.¹⁰² For example, MAPO has been 'conducting various training programmes with the relevant agencies in order to educate them of the severity and the issue of human trafficking. The Chair of each Committee in MAPO will host programmes related to their activities such as workshops on prosecution, enforcement and others such as the Workshops to discuss the related Standard Operating Procedure (SOP) on human trafficking related to the relevant 3P paradigm of anti-human trafficking efforts.'¹⁰³

MAPO also provides dialogue, NGO programmes and the 'Training for Trainers' and engages with the public who are interested in the issue.¹⁰⁴ According to one interviewee, the most tangible result of such engagement with the stakeholders was the 'roll out session' with the relevant agencies, NGOs and Civil Society

¹⁰¹ UN, 'Background Paper for the Secretary General, Improving the Coordination of Efforts against Trafficking in Persons, 12-13
<www.ungift.org/doc/knowledgehub/resource-centre/ICAT/SG_back_groundpaper.pdf>
accessed on 19 September 2016.

¹⁰² Interview with Policy 2.

¹⁰³ Interview with Policy 1.

¹⁰⁴ Interview with Policy 2.

groups for the proposal to amend the ATIPSOM 2007 in 2015 in order for MAPO to gather responses and feedback from the stakeholders.¹⁰⁵

MAPO's willingness to engage with the stakeholders, especially the NGOs, is recognised but is still unsatisfactory and their participation ought to be wider.¹⁰⁶ It was only after some pressures from many quarters that the NGOs and Civil Society groups were invited to share their views.¹⁰⁷ According to an interviewee, the stumbling block between MAPO and the NGOs is that the former perceived the latter as trouble-makers.¹⁰⁸ One interviewee claimed that there is a gap between the government and the NGOs. He said that 'our views have always been contrary to the Government, hence there is no opportunity for us to get involved with the policy-making and policy review so to speak.'¹⁰⁹ Another interviewee stated that his office was not happy with the NGOs' involvement with the victims because 'there is a tendency that the victims are more comfortable to deal direct with NGOs and the latter will only report the cases to us, but the evidence might have vanished for us to catch the perpetrators.'¹¹⁰ Again, an NGO representative claimed that there was no priority given to the victims, and that the victims are more trusting with the NGOs than the authorities. He claimed that the rescued victims were not being well taken care at the government shelter. According to him:

'...after seven months, I was called as a witness in their case and was shocked to see the victims because they looked grim as compared to their conditions when they were in our shelter. In our shelter, we gave them proper clothes, make up their hair and gave other care but when I saw them in the Court, they only wore flip flops, with track bottoms and with the dress similar to those who were locked in the lock ups.'¹¹¹

¹⁰⁵ Interview with Policy 1.

¹⁰⁶ UNGA, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro: Mission to Malaysia' (1 June 2015) para 48. UN Doc: A/HRC/29/38/Add.1.

¹⁰⁷ Interview with NGO 5.

¹⁰⁸ Interviews with NGO 7 and 8.

¹⁰⁹ Interview with NGO 8.

¹¹⁰ Interview with Enforcement 3.

¹¹¹ Interview with NGO 5.

Looking at the relationship from the other side, some suspicion of NGOs by the Government is unsurprising because the government has always tended to be suspicious of social movement groups that advocate human rights or challenge the way official administration is practiced,¹¹² and especially those which seem to be aligned with the opposition political parties. The government and the government-controlled media often demonise NGOs receiving foreign funds as being ‘foreign agents.’¹¹³

However, on the issue of human trafficking in Malaysia, the situation is different. The government is generally more receptive to the participation of the NGOs. One NGO representative stated that ‘we are happy because we have our voice heard.’¹¹⁴ Another NGO representative stated:

‘...we will continue to speak the truth, highlight the cases to the people higher up. Generally we work well with the authorities. We are quiet, we do not seek publicity but we are serious with what we stand for. This is because we do not want the government to see us as threat. Most importantly we keep the trust of the government. We are consistent with what we say.’¹¹⁵

Despite some difficulties, the current Government-NGO/Civil Society relations have been applauded by the UN Special Rapporteur on Trafficking in Persons. She agreed that the collaboration between the government and the NGOs and Civil Society groups is improving, especially because such collaboration is highlighted in the Anti Trafficking in Persons’ National Action Plan.¹¹⁶ But overall, the engagement and collaboration remains insufficiently developed.¹¹⁷

¹¹² Graham K Brown, Siti H Ali and Wan MW Muda, ‘Policy Levers in Malaysia’ *CRISE Policy Context Paper 4, May 2004* (Oxford: Centre for Research on Inequality, Human Security and Ethnicity 2004) 12.

<assets.publishing.service.gov.uk/media/57a08ccde5274a27b2001431/policycontext4.pdf> accessed 19 September 2016).

¹¹³ The International Center for Not-for-Profit Law, ‘NGO Law Monitor: Malaysia’ <www.icnl.org/research/monitor/malaysia.html> accessed 17 September 2016.

¹¹⁴ Interview with NGO 5.

¹¹⁵ Interview with NGO 8.

¹¹⁶ UNGA, *Special Rapporteur Report: Mission to Malaysia* (n 106) para 85.

¹¹⁷ Interview with NGO 1.

Therefore, it seems that the Government and the NGOs must continue to engage better with each other.

Likewise, the UN Special Rapporteur observed that coordination of work between government bodies remains a challenge partly due to their varying level of commitment to the issue of trafficking, their understanding of trafficking and its impact or relevance to their work.¹¹⁸ This is alluded to by one interviewee when he stated:

‘...we have a good law (ATIPSOM 2007) but it lacks implementation and enforcement. This is because there is no single body that is empowered to handle human trafficking issue. Aside from MAPO, which is only acting on the advisory role, there is no real agency that puts most efforts to combat human trafficking. They are busy with their bread and butter job and will not prioritise human trafficking.’¹¹⁹

One problem with the implementation agencies is ‘departmentalisation’ and ‘silo mentality’ whereby the exchange of information is scarce.¹²⁰ Most agencies are seem to be reluctant to share full information, and the MAPO meetings ended ‘not focusing on the issue to shape the policy and strategies,’¹²¹ but only discussed ‘trivial issues like the relevant agencies presenting the number of cases investigated, victims saved or prosecution being initiated or completed.’¹²²

Another issue is that MAPO has not been effective enough because lack of active participation by its senior members and its reluctance to discuss substantive, policy matters. It seems that MAPO meetings have been left as a venue for its members to present the report of activities.¹²³ One interviewee stated that although MAPO’s membership comprise the heads of ministries and

¹¹⁸ UNGA, Special Rapporteur Report: Mission to Malaysia (n 106) para 48.

¹¹⁹ Interview with Policy 3.

¹²⁰ Interview with Enforcement 7.

¹²¹ Interview with NGO 2.

¹²² *ibid.*

¹²³ Interview with NGO 3.

government agencies, their attendance at the MAPO meetings will usually be represented by a relatively junior officers from such ministries or agencies who were not mandated to make a strategic decision on behalf of their organisation, but merely ‘the one who only present the respective agencies’ report, and took notes for their bosses’ and so ‘we have to wait for their response during the subsequent meetings’.¹²⁴

Therefore, to empower MAPO as a single, one-stop centre for human trafficking in Malaysia, greater political will is imperative.¹²⁵ One interviewee even suggested that:

‘...we have to be realistic in handling human trafficking issues. There must be a single body that is given full authority to handle human trafficking issue. Although we have MAPO, it seems that MAPO only acts as advisory body to the government but lacks authority. Advisory role will not have real authority because it is up to the agencies to accept the advice or not.’¹²⁶

Although MAPO is a body established by the legislation, it is not a single, authoritative government agency, and has no budgetary provision on its own.¹²⁷ It only receives a yearly budget of RM3.85 million, allocated via the Ministry of Home Affairs, which had to be distributed among the implementing agencies.¹²⁸ Such financial allocation seems to be insufficient to run the overall anti-human trafficking programs because it only able to cover repatriation costs, publicity campaigns, catering services and other expenses.¹²⁹ This is further confirmed by an interviewee who stated:

¹²⁴ Interview with NGO 5.

¹²⁵ Interview with Policy 7.

¹²⁶ Interview with Policy 3.

¹²⁷ Interview with Policy 2.

¹²⁸ *ibid.*

¹²⁹ Kavithah Rakwan, ‘RM4 Million to Combat Human Trafficking is Insufficient’ *The Malaysian Reserve* (Kuala Lumpur 11 August 2014)

<www.pressreader.com/malaysia/the-malaysian-reserve/20140811/281642483324383>
accessed 18 October 2016.

'...I don't think [resources] are adequate yet. There are two types of resources. First, the money. There is a budgetary allocation to the Ministry (of Home Affairs) but is scattered among its agencies and there is no specific towards anti human trafficking efforts only. Secondly, the human resources. We do not have enough experts in this area. I can quote the UK's National Crime Agency and National Referral Mechanism where they have people who can decide about the course of action. We should have this but we cannot due to shortage of manpower and expertise.¹³⁰

Another interviewee stated that the resources will never be enough,¹³¹ and that there is a 'budget constraint but MAPO had to do its work within its means.'¹³² This is exemplified by an interviewee who claimed that his organisation had not received enough financial allocations in performing its job, but has to use the department's existing limited budget, which is not specifically meant for anti-human trafficking.¹³³ Therefore, the allocation for the human trafficking policy implementation is not tenable.

Based on the aforementioned issues, there is a need for MAPO to be upgraded as a new fully fledged government agency with its own jurisdiction and financial allocation, so that it can function to fully ensure that the policy and coordination works of the policy implementation is properly undertaken.¹³⁴ The reasonable budget for anti-human trafficking efforts should be around RM15 to RM20 million per year.¹³⁵ However, upon consultation with the Public Service Department, which determines the size and structures well as the development of human resource in Malaysia,¹³⁶ it is argued that such a proposal is untenable because, should MAPO is upgraded into a fully-fledged, newly created agency, it will need

¹³⁰ Interview with Policy 2.

¹³¹ Interview with Policy 3.

¹³² Interview with Policy 1.

¹³³ Interview with Policy 6.

¹³⁴ Interview with Policy 2.

¹³⁵ Rakwan (n 129).

¹³⁶ Public Service Department, 'Profile'

<www.jpa.gov.my/index.php?option=com_content&view=article&id=246&Itemid=580&lang=en> accessed 20 October 2016.

to pull experienced staff from other agencies.¹³⁷ While these two issues remain pertinent for the MAPO, the disparity in the component of the ethnicity representation among the policy implementers could also impinge upon the effectiveness and fairness of the MAPO. In this regard, the recruitment of officers from different ethnic groups is imperative to ensure MAPO and its activities are well implemented. The issue has been discussed in 6.2.2.

As well as MAPO, upon the amendment of the ATIPSOM 2007 in 2015, the High Level Committee (HLC) led by the Minister of Home Affairs was established. Nevertheless, this body is seen to involve a duplication of the work of MAPO, with the exception that the level of representative in the HLC is much higher because it involves Ministers. However, since the establishment of the HLC is seen as a higher authority to 'deliberate on and decide the recommendations by the MAPO,'¹³⁸ it seems that MAPO remains the main coordinating body for the implementation of the human trafficking policy in Malaysia. The HLC is also a manifestation of a greater weight of the 'political will' on the part of the Malaysian government in addressing human trafficking in Malaysia, and to put pressure on the more effective and fair human trafficking implementation among the bureaucrats.¹³⁹ Some evidence of the outcomes of the HLC's establishment appears in 6.4.1.

6.3.1.2. General Implementation Bodies

As stated above, although the MAPO has been named as the lead agency in the implementation of anti-human trafficking policy in Malaysia, it has no capacity to specifically implement the policy and enforce the law. The following discussion will elaborate upon those agencies with a specific and focused role in implementing human trafficking policy in Malaysia.

¹³⁷ Interview with Policy 2.

¹³⁸ ATIPSOM 2007, s 5C.

¹³⁹ Interview with Policy 2.

6.3.1.2(a) Prevention

Chapter Five has discussed the prevalence of ‘prevention’ of human trafficking. The purpose of the Trafficking Protocol 2000 is to ‘to prevent and combat trafficking in persons, paying particular attention to women and children,’¹⁴⁰ so does the ATIPSOM as it aims to ‘...prevent and combat trafficking in persons...’.¹⁴¹ Based on section 7, the word ‘prevent’ has been highlighted numerous times as the functions and powers of the MAPO.

As stated in Chapter Four, prevention strategy is well interlinked with other strategies, and this measure must be undertaken in a concerted, holistic due to the complexity of nature of human trafficking by source, destination and transit countries, as well as intergovernmental organisations at a particular country. The term ‘prevention’ is also reflected in a huge range of anti-trafficking interventions and has accounted for a large proportion of the investment in anti-trafficking.¹⁴² With regards to Malaysia, while MAPO functions at the main policy level, the implementation of the prevention paradigm, focused on reducing vulnerability and migration of the possible and potential trafficked victims, is undertaken by numerous government agencies and NGOs.

There are three main actors involved in the prevention activities. First, pertaining to the awareness programmes, the role is led by the Ministry of Communication and Multimedia. Secondly prevention via strengthened border controls, restrictions on movement, particularly of young women and girls, and those for potentially vulnerable migrants in border areas, boat and bus terminals as well as the airports is implemented by the newly created Border Security Agency.¹⁴³ Thirdly, international cooperation is under the purview of the Ministry of Foreign Affairs.

¹⁴⁰ Trafficking Protocol 2000, art. 2.

¹⁴¹ ATIPSOM 2007, long title.

¹⁴² Phil Marshall, *Rethinking Trafficking Prevention: A Guide to Applying Behavioural Theory* (Bangkok: UNIAP 2011) 5.

<un-act.org/wp-content/uploads/2015/07/Re-Thinking_Trafficking_Prevention.pdf> accessed on 17 October 2016.

¹⁴³ Azura Abbas and Fairuz M Shahr, ‘Border Security Agency to Take Effect Today’ *The New Straits Times* (Putrajaya 2 November 2015).

6.3.1.2(b) Law Enforcement

The ATIPSOM 2007, section 27(1), does not confer enforcement jurisdiction on MAPO but identified the role for enforcement officers from five government agencies including the Royal Malaysian Police, the Labour Department,¹⁴⁴ the Immigration Department, the Royal Malaysian Customs Department and the Malaysian Maritime Enforcement Agency. These Departments' core functions, albeit not confined to human trafficking cases only, are required by the ATIPSOM 2007 for the enforcement officers to include the duty to 'investigate into the circumstances of the person's case for the purpose of determining whether the person is a trafficked person.'¹⁴⁵ Apart from human trafficking cases, these agencies conduct general enforcement activities according to their individual legislative frameworks.

These agencies 'have a primary responsibility for identifying trafficking in collaboration with each other.'¹⁴⁶ They are all represented in the MAPO's enforcement committee, and their main functions are to 'rescue victims of trafficking and detain perpetrators, investigate cases, prevent trafficking, raise awareness and build capacity of its members.'¹⁴⁷ They also have the power to 'arrest, conduct search and seizure, and examine persons.' Aside from the ATIPSOM 2007, they are guided by the SOP that 'guides the methods of accomplishing tasks and establishes general performance standards, including in the area of investigation, raid, arrest, rescue and networking or coordination among enforcement agencies.'¹⁴⁸

Notwithstanding to the general enforcement role of these agencies, the Royal Malaysian Police and the Immigration Department operate specialised anti-human trafficking units.¹⁴⁹ The Labour Department was designated as an enforcement agency in 2010 upon the amendment of the ATIPSOM 2007, and

¹⁴⁴ The Malaysian Labour Department is part of the Ministry of Human Resources but divided into two equivalent departments in Peninsular, as well as Sabah and Sarawak.

¹⁴⁵ ATIPSOM 2007 s 51(1)(1)(a).

¹⁴⁶ UNGA, *Special Rapporteur Report: Mission to Malaysia* (n 106) para 12.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid* para 31.

¹⁴⁹ Interviews with Enforcement 7 and 3.

also has a Special Enforcement Task Force on labour exploitation.¹⁵⁰ In respect of human trafficking cases, the Labour Department is vested with powers 'to identify and investigate cases of trafficking, as well as rescue victims.'¹⁵¹ They also apprehend suspects and testify in court.¹⁵²

6.3.1.2(c) Victim Protection

Once victims are rescued, it is the duty of the enforcement officers to hand the rescued victims to the protection officers whose responsibilities are related to the care and protection of trafficked persons at places of refuge.¹⁵³ The latter are also given the power 'to supervise the trafficked person upon order by the Magistrate or direction by the Minister.'¹⁵⁴

The initial part of the Protection Officers' duty is to inquire into the backgrounds of the alleged trafficked victims¹⁵⁵ and to prepare a report for the consideration of the Magistrate's Court, which is produced jointly with an enforcement officer.¹⁵⁶ Based on this report, if the Magistrate is satisfied that a person is a trafficked person in need of care and protection, a Protection Order (PO) will be issued to the trafficked victims requiring the person to be placed in a 'place of refuge' for a period of time.¹⁵⁷ The ATIPSOM 2007, section 25, provides for the non-criminalisation of trafficked persons for offences related to their irregular entry and unlawful residence in Malaysia, as well as the procuring and possession of fraudulent travel documents for the purpose of entering the country, hence a guarantee that they will not be prosecuted for any offence arising from their exploitation.

¹⁵⁰ Interview with Enforcement 6.

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ ATIPSOM 2007, s 43(2)(a).

¹⁵⁴ *ibid* s 43(2)(c).

¹⁵⁵ *ibid* s 51(1)(a).

¹⁵⁶ *ibid* s 51(2).

¹⁵⁷ *ibid* s 51(3)(a).

6.3.1.2.(d). Prosecution

Under the ATIPSOM 2007, section 41, prosecutions for human trafficking offenses can only be instituted with the written consent of the Public Prosecutor. Where criminal proceedings are instituted, the Public Prosecutor may apply for a trafficked person to appear before a Sessions Court for the purpose of recording his or her evidence under oath.¹⁵⁸ There is no special court yet established in Malaysia. But in October 2014, the Minister of Home Affairs has stated in the Parliament that that dedicated courts would be established to hear and expedite cases under the ATIPSOM 2007.¹⁵⁹ However, there is no further information pertaining to the implementation of that proposal.

6.4. Assessment of the Malaysia's Anti-Human Trafficking Policy Implementation

The evaluation of the Malaysian anti human trafficking policy implementation will be made based on the three broad aspects. The first pertains to the legality of policy implementation process and its implementers. While the legality of these activities was discussed in the previous section, especially in the anti-human trafficking policy implementation, the two other aspects of policy implementation will be discussed in this section. Such discussions will focus on the effectiveness and fairness of the anti-human trafficking policy and legal implementation. The assessments will be addressed by reference to enforcement and prosecution.

6.4.1. Prevention

The government has modestly increased efforts to prevent trafficking. The MAPO had monthly meetings, and the Malaysian cabinet convened one meeting specifically to discuss human trafficking issues during the reporting period and separately approved the implementing regulations for the anti-trafficking law, while the HLC held two meetings respectively in 2015 and

¹⁵⁸ ATIPSOM 2007, s 52(1).

¹⁵⁹ Parliament of Malaysia, *Hansard*, DR.8.10.2014, 12.

2016.¹⁶⁰ The government has launched its Anti-human Trafficking National Action Plan spanning 2016-2020 and superseding its 2010-2015 plan. The establishment of the HLC augments further the anti-human trafficking activities in Malaysia. Comparing the previous set up, when only officer-representatives of the various ministries attended the MAPO meetings, the HLC is represented by at the ministerial level and chaired by the Minister of Home Affairs, who is also concurrently the Deputy Prime Minister.¹⁶¹ Such a high level forum enables the speedy decision-making process to the proposals by the MAPO. One example of such decisions is the formation of the Anti-human trafficking Task Force in January 2017¹⁶² comprising five enforcement agencies stated in ATIPSOM 2007,¹⁶³ the Attorney General Chambers (AGC) and the National Security Council and based at the Ministry of Home Affairs.¹⁶⁴ Further, the number of convictions for human-trafficking related cases has significantly increased in 2016 with a total of 97, comprising 76 convictions for human trafficking, 9 convictions for migrant smuggling, and 12 convictions for cases similar to human trafficking under the Immigration Act 1959/63, the Penal Code and other statutes.¹⁶⁵ This is an increase from only seven convictions in 2015.

6.4.1.1. Enforcement

Based on interviews¹⁶⁶ with the respondents from the enforcement field, the Royal Malaysian Police has a specialised anti-trafficking unit with 101 officers being approved and hired. The Immigration Department has 30 officers in its Anti Trafficking Unit. The Labour Department also has a Special Enforcement Task Force 'empowered to identify and investigate cases of trafficking, as well as rescue victims. However, the Malaysian Maritime Enforcement Agency and the Customs Department do not have their specialised officers for human

¹⁶⁰ Follow-up interview with Policy 1 via email dated 20 January 2017.

¹⁶¹ Interview with Policy 2.

¹⁶² Ministry of Home Affairs, Statement by the Deputy Prime Minister on the Second High Level Committee Meeting, MAPO, 20 December 2016.

<www.moha.gov.my/index.php/en/kenyataan-media-kdn/3035> accessed 10 February 2017.

¹⁶³ See 6.3.2.2(b).

¹⁶⁴ *ibid* Ministry of Home Affairs, 'Statement by the Deputy Prime Minister on the Second High Level Committee Meeting' (162).

¹⁶⁵ *ibid*.

¹⁶⁶ Interviews with Enforcement 3, 6 and 7.

trafficking, but their officers were trained by MAPO and also included a module on human trafficking in the curriculum for new cadets.¹⁶⁷ Apart from enforcement duties, such as rescuing victims and detaining suspects, these officers also testify in courts.¹⁶⁸

It is an established fact that law enforcement agencies in many countries lack highly trained personnel and funding, while local police departments tend to take a narrow perspective in jurisdiction.¹⁶⁹

This problem occurs due to the lack of training and resources. These constraints can significantly limit their involvement in local cooperation and subsequently international cooperation.¹⁷⁰ This statement bears resemblance to the problem in Malaysia. The problem with the enforcement personnel is that low rank officers are conducting most of the enforcement activities. They have limited understanding about human trafficking especially about the nature of victims, thus they tend to conflate human trafficking and migrant smuggling. For instance, a senior officer in an enforcement agency was still hoping to attend additional training courses for him to have an in-depth knowledge on human trafficking. He stated:

‘...such training ranges from victim identification and methods to deal with them. This is because as enforcement officers, our nature of main job is to deter crime. However, we lack the interpersonal aspects in dealing with victims...’¹⁷¹

One interviewee admitted that he only learnt about human trafficking throughout his service, and not being a law-trained graduate, though he believed that ‘the law graduates should be the best at this job because they will be able to articulate the laws and regulations better.’¹⁷² One interviewee further mentioned

¹⁶⁷ Interview with Enforcement 2.

¹⁶⁸ Interview with Enforcement 3.

¹⁶⁹ UN Institute for Training and Research (UNITAR), *Human Trafficking and the Role of Local Governments: Good Practices, Challenges and Ways Forward* (New York: UNITAR 2015) 39.

¹⁷⁰ *ibid.*

¹⁷¹ Interview with Enforcement 3.

¹⁷² Interview with Policy 1.

that, despite attending courses on human trafficking thus sharpening his knowledge in the subject from 'documentation based' to 'crime solving', he was of the view that the most important course that he requires is pertaining to the 'upper level management of anti-trafficking issue,'¹⁷³ which could help him to keep abreast with the wider spectrum of the nature of human trafficking.¹⁷⁴

This problem was highlighted by the UN Special Rapporteur Giammarinaro when she undertook a visit to Malaysia in 2015. In her report,¹⁷⁵ she pointed that the Malaysian authorities lack a clear understanding on the issues of human trafficking,¹⁷⁶ and human trafficking problem in Malaysia is viewed primarily as a problem concerning women and children trafficked for sexual exploitation.¹⁷⁷ One interviewee stated that even since the implementation of the ATIPSOM since 2008, there are not many people who understand about human trafficking except by association with sex trafficking, or at worse, just prostitution.¹⁷⁸ To illustrate this, the same interviewee further stated:

'...people do not understand the definition of debt bondage. I give you an example. The Bangladeshi workers who had to be indebted to the syndicate who brought them in the country and had to serve until the debt is fully paid can be said as debt bondage and should be protected under the human trafficking law. (The problem) has been happening for a very long time ago even during the 'kangani' system-debt bondage.

To support the above argument, the Table 6 illustrates the emphasis on the human trafficking in the form of sexual exploitation. While there are reports about the practices amounting to human trafficking occurring in Malaysia, the statistics shows that the sex trafficking cases top the list.

¹⁷³ Interview with Enforcement 7.

¹⁷⁴ *ibid.*

¹⁷⁵ UNGA, *Special Rapporteur Report: Mission to Malaysia* (n 106).

¹⁷⁶ *ibid* para 54.

¹⁷⁷ *ibid* para 50.

¹⁷⁸ Interview with NGO 5.

**Table 6 : Types of Exploitation Under the Definition of Section 2
ATIPSOM 2007.¹⁷⁹**

TYPES OF EXPLOITATION UNDER THE DEFINITION OF SECTION 2
ANTI-TRAFFICKING IN PERSONS AND ANTI-SMUGGLING OF MIGRANTS ACT 2007
FROM 28.02.2008 TO 30.06.2016

NO	ITEM	YEAR									GRAND TOTAL
		2008	2009	2010	2011	2012	2013	2014	2015	2016	
1	SEXUAL EXPLOITATION	17	108	67	52	102	58	105	73	150	732
2	FORCED LABOUR	0	25	34	46	66	40	80	55	48	394
3	SLAVERY	0	0	0	0	0	0	0	0	0	0
4	SERVITUDE	0	0	0	0	0	0	0	0	0	0
5	HUMAN ORGAN REMOVAL	0	0	0	0	0	0	0	0	0	0
	TOTAL CASES	17	151	132	117	195	100	186	158	203	1151

¹⁷⁹ MAPO, Statistics on Types of Exploitation under ATIPSOM 2007 s 2 from 2008-2016 (unpublished).

To illustrate the issue of conflation between human trafficking and migrant smuggling, a revelation by another interviewee is interesting to note. He stated that there was a case where an investigation officer, who was also the enforcement officer, was granted the Protection Order (PO) by the Magistrate convinced that the rescued person was a trafficked 'victim' and she was placed in the shelter instead. However, upon further investigation, the protection officer found out that the so-called 'victim' was not a trafficked victim after all, but a smuggled migrant instead. On inquiry, the 'investigation officer admitted that they were 'not sure' of the characteristics of persons being trafficked victims.'¹⁸⁰

Another problem is that the specialised anti-human trafficking unit of the respective agencies is usually located in their headquarters, so that the specialised officers are not well spread out across the states. At times, due to urgency of cases, officers not necessarily from the anti-human trafficking specialised unit will conduct enforcement.¹⁸¹ They are not well trained to identify victims or the act of human trafficking because most law enforcement officers still do not know how to deal with human trafficking as a crime because their basic training has not included the subject, and many of them have not received additional training.¹⁸² There is no doubt that some officers have attended training related to human trafficking, but the knowledge and expertise are not well cascaded to others, especially those at the lower level.¹⁸³

The officers also complained about the lack of proper and modern enforcement equipment.¹⁸⁴ They have to make do with their 'almost dilapidated' boats that at certain incidents are unable to chase the more sophisticated and modern ones being used by the suspect perpetrators. Another government agency complained about the limited logistical capacity and lack of staff.¹⁸⁵ At the same

¹⁸⁰ Interview with Policy 2.

¹⁸¹ Interview with Enforcement 5.

¹⁸² Willem Pretorius, 'Law Enforcement Responses to the Trafficking in Persons in South East Asia,'

<www.aaptip.org/2006/artip-project/documents/Paper_LE-Responses%20to%20TIP_22Oct08_fnl.pdf> accessed 20 October 2016.

¹⁸³ Interview with NGO 7.

¹⁸⁴ Interview with Enforcement 2, 6, 7, and 8.

¹⁸⁵ Interview with Enforcement 1.

time, an interviewee stated the suspects do not feel the impact of the enforcement because the 'officers are not known as the "real" enforcement officers like the Police of Immigration Departments.'¹⁸⁶ Further, apart from the Police, other enforcement agencies do not have an intelligence unit, and so must rely on the information from the Police. At times, they are not able to conduct their own enforcement pending the supply of information by the Police, thus enabling the perpetrators to vanish and/or destroy the related evidence.¹⁸⁷

Notwithstanding these problems, the recently established Task Force has brought about change in the anti-human trafficking enforcement activities. This is because the Task Force is comprised of officers specifically trained in human trafficking and has its office in the Ministry of Home Affairs.¹⁸⁸ This improvement is evidenced by the arrest of a company director under the ATIPSOM 2007 for an alleged case of workers exploitation on 29 March 2017.¹⁸⁹ A total of 172 foreign and local workers were rescued during the operation.

Another issue is the problem of dealing with the victims, particularly the foreign ones. This is due to the language and cultural barriers,¹⁹⁰ while the secondary problem is the lack of knowledge about the nature of human trafficking practices on the part of enforcement officers. These problems are acute in Malaysia's situation. One interviewee stated that he had problems trying to communicate with the victims because the enforcement activities were not made with the help of interpreters.¹⁹¹ In addition, the AGC have raised an issue that many police officers do not have sufficient understanding about nature of human trafficking;¹⁹² and there is a need for the awareness programme and proper training to be conducted for the enforcement officers¹⁹³ to deal with vulnerable

¹⁸⁶ Interview with Enforcement 6.

¹⁸⁷ *ibid.*

¹⁸⁸ Follow-up interview with Policy 2 via email.

¹⁸⁹ BERNAMA, 'Director, HR manager of bird nest company remanded over worker exploitation' *The Malay Mail* (Klang, 29 March 2017)

<www.themalaymailonline.com/malaysia/article/director-hr-manager-of-bird-nest-company-remanded-over-worker-exploitation#sthash.3SMhpmeP.dpuf> accessed 30 March 2017.

¹⁹⁰ Interview with Enforcement 7.

¹⁹¹ Interview with Enforcement 6.

¹⁹² Interview with Prosecution 2.

¹⁹³ Interviews with Enforcement 5, 6 and 7; Interview with Prosecution 2.

victims. This is because human trafficking bears special characteristics as compared to most other crimes.¹⁹⁴ However, despite the availability of training courses, they are limited to the attendance of senior officials only, thus inhibiting the knowledge to cascade down to the junior officers, who are the actual actors in the policy implementation.¹⁹⁵

Moreover, the local law enforcement agencies in Malaysia may not have prioritised human trafficking compared to other crimes, as they are often tied to short-term results rather than long-term strategic impact.¹⁹⁶ In the case of human trafficking, lengthy and complex investigations and significant resources are needed while the results are uncertain and do not yield short-term benefits.¹⁹⁷

Finally, reflecting structural problems mentioned earlier in the chapter, human trafficking cases often involve foreign victims, and priority may not be given to them as opposed to local crime victims.¹⁹⁸

Based on the statistics provided by MAPO, as illustrated in Table 7, the number of human trafficking cases seems to be increasing from 158 in 2015 to 203 in 2016. Similarly, the number of arrests show an increase of 354 in 2016 compared to 247 in 2015, but lower than average of 140 cases between 2008 and 2015. While the number of Interim Protection Order (IPO) has shown some decrease, the PO has increased as of June 2016 to 324, slightly higher than an average of 292. Notwithstanding to the above, there is a constant increase of enforcement efforts in all areas since the inception of the ATIPSOM 2007 and the date of enforcement took effect on 28 February 2008,¹⁹⁹ with exception of the years 2011 and 2013.

¹⁹⁴ UNITAR (n 169) 39.

¹⁹⁵ Interview with NGO 7.

¹⁹⁶ Interview with NGO 6.

¹⁹⁷ UNITAR (n 169) 40.

¹⁹⁸ Interview with NGO 1 and 5.

¹⁹⁹ ATIPSOM 2007, Federal Government Gazette, P.U. (B) 86/2008, 28 February 2008.

Table 7 : Enforcement of ATIPSOM 2007²⁰⁰

ENFORCEMENT AGENCIES
FROM 28.02.2008 TO 30.06.2016

No	ITEM	YEAR											Grand Total	Average
		2008	2009	2010	2011	2012	2013	2014	2015	2016				
1	Total Case	17	151	132	117	195	100	186	158	203	1259	140		
2	Total Arrests	20	217	195	159	244	154	249	247	354	1839	204		
3	Total Suspected Human Trafficking Victims/Interim Protection Order (IPO)	85	956	870	447	1212	725	1684	1386	1169	8534	948		
4	Total Victims/Protection Order (PO)	29	206	471	220	445	323	303	305	324	2626	292		

²⁰⁰ MAPO, Enforcement Statistics 2008-2016 (unpublished).

The numbers show that the enforcement effort is being made and is increasing, though how it compares to the amount of human trafficking is not revealed since no estimates are available of crime rates. This is because the data on the crime rate in Malaysia is only based on the official crime statistics, not often made public, and based on the aggregate records of offender and offences processed by the police, courts and prison agencies.²⁰¹ This may not represent the true number of human trafficking cases. Further, human trafficking cases are not considered as an index crime²⁰² in Malaysia. This fact is further exacerbated by the fact that human trafficking is a 'dark crime' due to various reasons, which have been discussed in Chapter Three, and often is committed by clandestine groups. Therefore it is difficult to gauge the actual number of human trafficking activities and the victims, except those who have been included in the statistics in Tables 6 and 7.

In this regard, the Malaysian authorities may consider adopting the approach in the UK with the creation of a crime survey, similar to the Crime Survey for England and Wales (CSEW). The CSEW is viewed as the 'gold-standard survey of its kind',²⁰³ and has expanded from an apparatus for counting crime to providing the detailed knowledge on victims/targets as well as the non-victim characteristics, as well as laying a foundation for theory development, particularly the topics of victimisation; fear of crime; and the legitimacy of the trust in the UK criminal justice system.²⁰⁴ The creation of a similar survey in Malaysia could be expected to enable the authorities to gauge whether there is a success of crime reducing activities or otherwise. The survey could include the topic of human trafficking.

²⁰¹ Amin Khan, 'Throwing Lights on Crime Statistics', *The Star* (Kuala Lumpur 19 April 2015) <www.thestar.com.my/news/nation/2015/04/19/throwing-light-on-crime-statistics-it-is-not-just-about-the-numbers-but-what-we-do-about-them-that-m/> accessed on 7 November 2016.

²⁰² The definition of 'Index Crime' in Malaysia is as follows: Crimes that are reported with sufficient regularity and with sufficient significance to be meaningful as an index to the crime situation. See Amar Singh Sindu, 'The Rise of Crime in Malaysia: An Academic and Statistical Analysis' (2005) 4 *Journal of the Kuala Lumpur Royal Malaysia Police College* 1 <rmpckl.rmp.gov.my/Journal/BI/riseofcrime.pdf> accessed on 7 November 2016.

²⁰³ John Flatley, 'British Crime Survey' in Gerben Bruinsma and David Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice* (New York: Springer-Verlag 2014) 199.

²⁰⁴ Nick Tilley and Andromachi Tseloni, 'Choosing and Using Statistical Source in Criminology: What Can the Crime Survey for England and Wales Tell Us?' (2016) 16 *Legal Information Management* 78.

6.4.1.2. Awareness Programme

The tasks pertaining to the awareness programme is vested at the Ministry of Communication and Multimedia, which heads the media and publicity committee in the MAPO. Obviously, an effective awareness programme is an imperative element of policy to address human trafficking. This is due to the fact that as the public becomes more educated, policy makers and enforcers can seek information from them to inform their actions, and employers and so on can be aware of pitfalls and sanctions.²⁰⁵ However, often the proposed anti-trafficking interventions stop at awareness building without proposing any lasting solution. At the same time, funds can be quickly exhausted as the costs for the awareness programmes are high.²⁰⁶ To illustrate this, an interviewee confided that it is too expensive for a government agency to buy television airtime during primetime.²⁰⁷ So, the anti-trafficking awareness messages were only able to be aired at 0300hrs, which was ineffective for the mass viewing.²⁰⁸

Usually, the government's anti-trafficking awareness campaigns continued to highlight the severity of human trafficking, particularly those forms associated with commercial sexual exploitation. According to the 2016 US TIP Report, the Malaysian government produced and aired a total of 6,447 public service radio broadcasts and 1,347 television segments during the reporting period in 2015. The number shows an increase from 3,947 and 1,179 broadcasts respectively recorded in 2014.²⁰⁹ The Government also disseminated 50,000 informational booklets on human trafficking via 139 information centres throughout the country,²¹⁰ as well erected billboards in various strategic parts in the country particularly in larger cities.²¹¹

²⁰⁵ Randy Newcomb, 'Debate: Lessons Learnt from 10 Years and 50 Million Dollars of Grant Making to End Human Trafficking' (2014) 3 *Anti Trafficking Review* 152.

²⁰⁶ Interview with Policy 6.

²⁰⁷ According to Nielsen, global information and data measurement company, the primetime in Malaysia, i.e. part of daily broadcast time during which the number of listeners of viewers is at the peak, is between 2200hrs to 2259hrs.

²⁰⁸ Ibid Policy 6.

²⁰⁹ US DoS, TIP Report 2016: Malaysia (n 96) 257

<www.state.gov/documents/organization/258876.pdf> accessed 18 October 2016.

²¹⁰ Ibid.

²¹¹ Interview with Policy 8.

At the same time, the NGOs also helped by producing their own informational content which was disseminated through their own networks, as well as information produced through social media networks such as Facebook on the severity of human trafficking at the international and domestic levels.²¹² The government has also required public statements to be made on commercial aircrafts arriving at Malaysian airports to warn of the severe punishments under the anti-trafficking law,²¹³ in addition to the existing warning about the trafficking of drugs into Malaysia. The campaign against human trafficking is also made from the perspective of religion. The Department of Information is cooperating with the Department of Islamic Development for materials pertaining to human trafficking to be included in the sermon during the Friday prayers in every mosque in Malaysia.²¹⁴

The anti-human trafficking policy in Malaysia, however, does not yet require the active participation by the private sector. In comparison to the UK, its Modern Slavery Act (MSA) 2015 introduced broad new requirements for the businesses in the UK to observe supply chain transparency. The law requires all businesses operating in the UK with annual revenue exceeding £36 million to publish an annual slavery and human trafficking statement that details what efforts, if any, the company has made during the previous fiscal year to ensure its operations and supply chain are free from human trafficking.²¹⁵ Such a provision, if any, in the Malaysian legislation would help to ensure transparency on the part of the business entities to ensure that they do not become involved with human trafficking.

The Malaysian local media frequently cover trafficking-related news. However it appears that some of them often conflate human trafficking with migrant smuggling. This media coverage pertaining to human trafficking reached its peak during the incident of the mass grave discovery and the Rohingya Burmese boats in Andaman Sea,²¹⁶ incidents which were reported widely by

²¹² Interviews with NGO 1 and 5.

²¹³ Interview with Policy 5.

²¹⁴ Interview with Policy 6.

²¹⁵ US DoS, *TIP Report 2016: United Kingdom* (Washington DC: US DoS 2016) 387.

²¹⁶ Interview with Policy 6.

the local and foreign mainstream media. For example, the STAR a Malaysian English newspaper published a report of a message by the Deputy Home Minister for Myanmar to stop abusing the Rohingya people.²¹⁷ That news was quickly picked up by the foreign news agencies and newspapers, such the AFP, the Reuters, the Guardian, the British Broadcasting Corporation (BBC) and others depicting the gravity of the case.²¹⁸ Perhaps, due to this wider reporting, the local newspapers began to publish special columns discussing about human trafficking.²¹⁹ At the same time, coordination meeting were frequently held between the Ministry of Communication and Multimedia with the heads of media, and interviewees confirmed that they partook in anti-human trafficking campaigns.²²⁰

The Ministry of Home Affairs also continued outreach with Malaysian employers on trafficking issues. The recent one was held during the Malaysian Employer's Federation Academy Symposium in October 2015. It targeted more than 100 companies in the electronics industry throughout the country to sensitize strategic public fora on forced labour indicators, such as passport retention. The government also co-organized with international anti-trafficking organisations a regional workshop in Kuala Lumpur in December 2015, wherein participants from various countries and civil society groups worked together to develop common indicators for practitioners to more effectively identify trafficking victims.²²¹ The Government also co-chaired a consultation session with civil society stakeholders to develop implementing regulations for the 2015

²¹⁷ The STAR, 'Wan Junaidi to Myanmar: Stop Oppressing Rohingya' *The STAR online* (Kuala Lumpur 14 May 2015) <www.thestar.com.my/news/nation/2015/05/14/wan-junaidi-treat-rohingyas-like-humans/> accessed 8 November 2016.

²¹⁸ BBC, 'Why are so many Rohingyas Stranded at Sea' *BBC News* (London 18 May 2015) <www.bbc.co.uk/news/world-asia-32740637> accessed 8 November 2016.

²¹⁹ For example, see Salleh Buang, 'Tackling the Scourge of Human Trafficking Rings' *The New Straits Times* (Kuala Lumpur 26 November 2015)

<www.nst.com.my/news/2015/11/113864/tackling-scourge-human-trafficking-rings?d=1>

M. Saravanabavan, 'Positive Steps to End Human Trafficking' *The New Straits Times* (Kuala Lumpur 26 August 2016)

<www.nst.com.my/news/2016/08/168427/positive-steps-end-human-trafficking> both accessed on 23 November 2016.

²²⁰ Interview with Policy 7.

²²¹ Interview with Policy 2; Interview with Enforcement 5.

ATIPSOM amendments, focusing on legal changes allowing trafficking victims to live and work outside of government facilities.²²²

Notwithstanding the efforts by the government, there are still shortfalls in the awareness programme in which four main issues are identified. First, there is a need to address the problem of employment of unskilled workers by errands employers who end up exploiting them. Secondly, the policy implementers are still lacking knowledge on the legal and technical know-how on the part of the on the nature of human trafficking, its causes and how to deal with the trafficked victims. Third, there is an insufficient budget for the anti-human trafficking awareness programme. Forth, there is insufficient contents for the awareness campaign.

In comparison, the UK law requires the companies to publish the annual slavery and human trafficking statement which contains what steps have been taken to ensure their business are slave-free.²²³ Based on the Annual Report by the UK Independent Anti-Slavery Commissioner, the UK government has taken various steps to engage with the industry to ensure all efforts are taken to ensure issues of human trafficking are put in place in their agenda,²²⁴ including to highlight the forced labour issue in the agenda of the G20.²²⁵ In this regard, Malaysia authorities should increase engagement with the key private sectors such as construction, plantation and entertainment industries for them to be made more aware of the severity of human trafficking.

²²² US DoS, TIP Report 2016: Malaysia (n 96) 255.

²²³ MSA 2015 s 54.

²²⁴ Independent Anti-Slavery Commissioner, 'Annual Report for the Period 1 August 2015 to 30 September 2016' (London: Independent Anti-Slavery Commissioner October 2016) 31.

²²⁵ *ibid* 32. The G20 is the central forum for international cooperation on financial and economic issues. The G20 countries account for more than four-fifths of gross world product and three-quarters of global trade, and are home to almost two-thirds of the world's population. See <www.g20.org/Webs/G20/EN/G20/Agenda/agenda_node.html;jsessionid=B3F3DE4FB69652D4D878D2A8BC7E90BA.s3t2> accessed 18 March 2017.

6.4.1.3. International Cooperation

The Malaysian government has negotiated and signed 'Memoranda of Understanding on the Recruitment of Workers' with some source countries²²⁶ such as with the Philippines (on domestic workers in 1996), Sri Lanka in 2003; Thailand in 2003; Viet Nam 2003; China in 2003; Bangladesh in 2004; Pakistan in 2005; Indonesia in 2006; and India in 2009. With Viet Nam, Malaysia signed another MOU on enhanced rights of the workers in 2015. These MOUs were signed in order to improve the regulation of foreign workers' contracts and rights.²²⁷ In December 2015, the government signed two memoranda of understanding to govern the employment of Cambodian domestic workers in Malaysia, which prompted the Cambodian government to rescind its 2011 ban on its nationals traveling to Malaysia to work as household maids; however, some women remained subject to domestic servitude.²²⁸

Malaysia has also been involved in the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP) in Kuala Lumpur in November 2015²²⁹ establishing a legal framework for the region 'in a holistic manner and the deepening of cross-sectoral cooperation in addressing human trafficking'.²³⁰ The ASEAN countries also agreed to the creation of the ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children which aims:

'...to provide specific action plans within ASEAN Member States' domestic laws and policies, as well as relevant international obligations, to effectively address regional challenges common to all

²²⁶ The list of MOUs can be retrieved from the website of the Ministry of Foreign Affairs, Malaysia. See Ministry of Foreign Affairs, 'Bilateral Diplomacy: Bilateral Treaties' <www.kln.gov.my/web/guest/bd-bilateral_treaties> accessed 22 November 2016.

²²⁷ Interview with Policy 3.

²²⁸ *ibid.*

²²⁹ The Association of the Southeast Asia Nations, 'ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP)' <www.asean.org/storage/2015/12/ACTIP.pdf> accessed 22 November 2016.

²³⁰ ASEAN, 'Chairman's Statement of the 27th ASEAN Summit' (Kuala Lumpur 21 November 2015) <www.asean.org/wp-content/uploads/2015/12/Final-Chairmans-Statement-of-27th-ASEAN-Summit-25-November-2015.pdf> accessed 23 November 2016.

ASEAN Member States in the identified major concerns, to wit: (1) Prevention of trafficking in persons; (2) Protection of victims; (3) Law enforcement and prosecution of crimes of trafficking in persons; and (4) Regional and International cooperation and coordination.²³¹

Malaysia is also a member of the regional arrangement of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, forum for policy dialogue, information sharing and practical cooperation to help the region address these challenges.²³² Malaysia recognised that the forum has effectively raised regional awareness of the consequences of people smuggling, trafficking in persons and related transnational crime.²³³ It has resulted in various issue-oriented workshops, such as identity fraud, child sex tourism, protection of victims, and the development of model legislation.²³⁴

At the working level, Malaysia has also cooperated with the US DoS especially by despatching officers for training such as in the International Visitors Programme on human trafficking,²³⁵ as well as with the Japan International Cooperation Agency,²³⁶ and with Australia through its Australia-Asia Programme to Combat Trafficking in Persons (AAPTIP).²³⁷ Malaysian officers have also gained knowledge and experience from the international organisations such as the International Labour Organisation (ILO), the United Nations Office of Drugs and Crimes (UNODC), the International Organisation for Migration (IOM) and other UN bodies. Activities have included 'the

²³¹ ASEAN, 'ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children: Introduction' 1

<www.asean.org/wp-content/uploads/2015/12/APA-FINAL.pdf> accessed 1 October 2016.

²³² The Bali Process, 'About the Bali Process'

<www.baliprocess.net/> accessed 19 October 2016.

²³³ BERNAMA, 'Zahid Hamidi in Bali for Bali Process Conference' *The Malay Mail* (Bali 22 March 2016)

<www.themalaymailonline.com/malaysia/article/zahid-hamidi-in-bali-for-bali-process-conference> accessed on 10 October 2016.

²³⁴ Ralf Emmers, Beth Greener-Barcham & Nicholas Thomas, 'Institutional Arrangements to Counter Human Trafficking in the Asia Pacific' (2006) 28:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 490.

²³⁵ Interviews with Policy 1 and 2.

²³⁶ Interview with Protection 1.

²³⁷ *ibid.*

exchanges of ideas how to combat human trafficking and capacity building.²³⁸ This is manifested by the drafting of the related Regulations such as in the victim protection, where officers from the United States Embassy shared their expertise in perusing the draft and further recommendation.²³⁹ On occasions, representatives from the foreign diplomatic corps in Malaysia were also invited to MAPO's meetings to raise concerns and share ideas.²⁴⁰

The aforementioned preventive efforts represent a manifestation that Malaysia seeks not to isolate itself in addressing and combating its human trafficking problems. This is because cases of human trafficking in Malaysia involve mostly foreign victims because Malaysia is mostly a destination country for migrant workers,²⁴¹ or is a transit country. These victims are vulnerable to promises of better job and life conditions opportunity in Malaysia.²⁴² They are susceptible to becoming victims of sexual and labour trafficking.²⁴³ In this regard, it is imperative for Malaysia to maintain its cooperation at the highest level with its partners and keep itself open to inputs in ensuring the effectiveness of its anti-human policy, law and strategy.

Such international cooperation shows that Malaysia does not want to isolate itself from other countries. However, despite plenty of evidence of cooperation, limited impacts are recorded in the US TIP Reports. Three improvements may be considered. First, the authorities should address corruption issue, at the entry point such as the border area and both departure and arrival airports. Secondly, cooperation can be enhanced through more training of officers such as in language proficiency particularly of the major source countries. Third, the authorities should also install the understanding of the notion of cosmopolitanism, which is to accept different ethnicity and diversity.

²³⁸ Interview with Policy 1.

²³⁹ Interview with Policy 1.

²⁴⁰ Permanent Mission of Malaysia to UN, Statement by Senator Lihan Jok, Member of Parliament of Malaysia During the 67th UNGA, New York, 10 October 2012 <www.un.int/malaysia/sites/www.un.int/files/Malaysia/67th_session/2012-10-10_crime_drugs.pdf> accessed 18 October 2016.

²⁴¹ US DoS, *TIP Report 2016: Malaysia* (n 96) 255.

²⁴² Interview with Enforcement 6.

²⁴³ Human Rights Commission Malaysia, *Human Trafficking* <www.suhakam.org.my/human-trafficking/> accessed 16 October 2016.

6.4.2. Protection

As mentioned earlier, most of human trafficking victims in Malaysia are foreign nationals who were promised better economic opportunities in Malaysia before being tricked into exploitation, hence Malaysia is the destination country.²⁴⁴ Based on the interviews, most respondents were of the view that these victims would want to return to their origin countries. For example, one interviewee stated that they just want to ensure that ‘they get their overdue pay owed by the employers before they go home.’²⁴⁵ But the ATIPSOM 2007 requires them to be returned to their home country after they have recorded their evidence,²⁴⁶ which will take place upon expiry of the three months PO.²⁴⁷ However, subject to an order of extension by a Magistrate, the victims will remain in the shelter home if the evidence recording cannot be completed within such a period. Notwithstanding, the overall view of the ATIPSOM 2007 is that it aims to ensure the victims to eventually leave the country, with less emphasis on overall protection as victims or as employees.

In this regard, the ATIPSOM 2007 is akin to Immigration law. Only after the ATIPSOM 2007’s amendments in 2015 were some provisions, in particular section 51A, added for the victims of trafficking who do not wish to return to their countries owing to fear of retribution, hardship or re-trafficking. These amendments allow viable alternatives to remain and work legally in Malaysia, including through granting special work permits and employment visas. But in pursuing the policy objectives of crime reduction and human rights, these goals may conflict. This is because granting amnesty and assistance to the human trafficking victims may induce further human trafficking flows into the country, attract more illegal immigration, and increase the pool of potential human trafficking victims.²⁴⁸ As a consequence, countries that prioritise reductions in human trafficking may pursue such a policy goal at the expense of victims

²⁴⁴ TK Logan, Robert Walker and Gretchen Hunt, ‘Understanding Human Trafficking in United States’ (2009) 10:1 *Trauma, Violent and Abuse* 3.

²⁴⁵ Interview with Enforcement 3.

²⁴⁶ ATIPSOM 2007 s 54.

²⁴⁷ ATIPSOM 2007 s 51(3)(a)(ii).

²⁴⁸ Seo-Young Cho, Axel Dreher and Eric Neumayer, ‘The Determinants of Anti-Trafficking Policies – Evidence from New Index’ (2014) 116 (2) *Scandinavian Journal of Economics* 429.

protection and their human rights by exercising restrictive immigration policies including deportation of potential victims and neglecting assistance of victims.²⁴⁹ The implementation of this new policy has not resulted in tangible results in Malaysia as yet.

The similarity to immigration law is manifested in the conditions of the shelter homes. Most victims are housed at one of the seven Government-run shelter homes in several places in the country, including one each in Kuala Lumpur, Selangor, Johor and Sabah, which accommodate female victims only. While the shelter home in Johor is for underage boys, the one in Malacca is for the male victims and in Negeri Sembilan is for the underage girls.²⁵⁰ These shelters are operated by the Ministry of Women Affairs and Community Development, which received a total of RM4.6 million for its daily operation.²⁵¹ However, the general regime involves closed and guarded shelters, raising the feelings that victims are deprived of freedoms.²⁵² They may also be punished for escaping.²⁵³ Hence, the perception is that these shelters, which are supposed to be places of refuge, are akin to detention centres where the trafficked victims are treated like criminals.²⁵⁴

In addition, the services offered by the shelters appear insufficient to address the needs of the trafficked victims. Although the victims are given medical and health check-ups by the medical personnel upon arrival, there is no other psychological and counselling services being provided except those provided by the NGOs.²⁵⁵ But the participation of the NGOs is not forthcoming due to level of official bureaucracy as well as lack of manpower on their side.²⁵⁶

²⁴⁹ Seo-Young Cho, 'Evaluating Policies Against Human Trafficking Worldwide: An Overview and Review of the 3P Index' (2015) 1:1 *Journal of Human Trafficking* 86.

²⁵⁰ Interview with Protection 1.

²⁵¹ *ibid.*

²⁵² UNGA, *Special Rapporteur Report: Mission to Malaysia* (n 106) para 61.

²⁵³ *ibid.*

²⁵⁴ Interviews with NGO 1 and 3.

²⁵⁵ Interview with Protection 1.

²⁵⁶ Interview with NGO 7.

Generally, the NGOs think that the officials are not accommodating enough.²⁵⁷ There is also an issue of distrust between the government officials and the NGOs, where the former are perceived as suspicious that NGOs are trying to meddle in the government officials' jobs.²⁵⁸ Problems are also attributed to funding. Due to the limited budgetary provision, none of the NGO received any form of compensation for the work they have provided.²⁵⁹ The NGOs assistance was made voluntarily and was rendered because they want 'to ensure that the victims are well taken care especially with the psychological aspects.'²⁶⁰

Arising from the interviews, the NGOs also complained that they could not sustain the level of assistance if there is no monetary compensation paid to them because 'we also need to pay for rental, operating costs and compensate our members who had to use up their own personal expenses'.²⁶¹ They also lamented that that there is no similar enthusiasm among the government officials who work in the centres. According to one interviewee:

'...the general feeling is that they got transferred there to do the job they are not willing to do. And if there is a lack of commitment on the part of the staff you can see the level of care given will be poor. Therefore, the victims will not feel that they are really being protected. Based on our observations, the staff are not committed because the victims are mostly foreign workers therefore they would think why should they be helped.'²⁶²

The insufficient number of shelter homes worsens these problems. According to an interviewee, each shelter can accommodate between 40 to 60 victims,²⁶³ so they have to live and sleep in cramped spaces with double bunker beds.²⁶⁴

²⁵⁷ Interview with NGO 3.

²⁵⁸ Interview with NGO1.

²⁵⁹ Interview with NGO 8.

²⁶⁰ Interview with NGO 7.

²⁶¹ Interview with NGO 3.

²⁶² *ibid.*

²⁶³ Interview with Protection 1.

²⁶⁴ Interview with NGO 2.

There is no separation between the new and old residents.²⁶⁵ Based on the statistics, on average there are around 300 victims with POs being protected each year, with more than 1,000 others being protected under the IPOs.²⁶⁶ This concern was raised by one NGO worker. According to him, the insufficiency of shelter home causes setbacks to the protection effort. Many victims are traumatised, and there is a need for the authorities to ensure they are being given proper assistance.²⁶⁷ Some victims were physically affected, such as those who have been contracted with sexual transmitted diseases (STDs) such as herpes, syphilis, HIV and AIDS, especially those who were exploited in the sex trafficking.²⁶⁸ It seems that the conditions of the shelter homes are inadequate to protect the human trafficking victims.

Based on the financial provision, the shelters are able to provide basic necessities and cater food for the victims.²⁶⁹ But this is seemed to be at the bare minimum.

Another critical issue faced by the shelter officials is the communication with the victims.²⁷⁰ This is because although the victims are from different nationalities and spoke different dialects, there are no interpreters available to assist them on daily basis.²⁷¹ This has created some difficulties in dealing with them, particularly in preparing victims to attend court cases as 'star' witnesses.²⁷² One of the ways to address this issue is a proposal to engage the service of the independent interpreters, but there is a lack of expertise and finance. Without such assistance, it seems that dealings with victims have been difficult for the shelter workers.

In response to the above, the amendment of the ATIPSOM 2007 seeks to solve some of the issues pertaining to victim protection. Following the amendments,

²⁶⁵ Interview with Protection 2.

²⁶⁶ See 7.

²⁶⁷ Interview with NGO 3.

²⁶⁸ Interview with Protection 1.

²⁶⁹ Interview with Protection 2.

²⁷⁰ *ibid.*

²⁷¹ UNGA, *Special Rapporteur Report: Mission to Malaysia* (n 106) para 59.

²⁷² Interviews with Protection 2 and NGO 3.

victims are to be allowed to move freely and work under a regulation which was made after consultation by the relevant authorities,²⁷³ and came into force on 4 May 2016²⁷⁴ in accordance with the ATIPSOM 2007, section 66. The said statutory provision empowers the Minister to issue a regulation prescribing the qualification, conditions and procedures relating to the freedom of movement and work.²⁷⁵ The Sessions Court could also issue an order on payment of compensation or arrears in salary to the victims. The law also empowers the MAPO to pay allowance to the trafficked victims while they are being protected in the shelter homes, an amount which is determined in the specific regulations.²⁷⁶ At the same time, the law also allows for the NGO to operate a shelter homes because the Minister may declare a specific area as a 'place of refugee',²⁷⁷ whether a government building or not, and 'appoint any person who he thinks fit to exercise the powers and perform the duties of a Protection Officer'²⁷⁸ under the ATIPSOM 2007.²⁷⁹ The appointment of a person as the 'Protection Officer' is a new measure in the post-2015 amendment of the ATIPSOM 2007. Prior to that, only social welfare officers from the Ministry of Women, Family and Community Development could be appointed as protection officer.²⁸⁰ The related amendments to the ATIPSOM 2007 and the new regulations were applauded by the US DoS' as they 'reflected some international best practices and NGO input'.²⁸¹

²⁷³ BERNAMA, 'DPM: Malaysia Remains on Tier 2 Watch List of 2016 Human Trafficking Report,' The Star (Putrajaya 1 July 2016)

<www.thestar.com.my/news/nation/2016/07/01/dpm-malaysia-remains-on-tier-2-watchlist-of-2016-human-trafficking-report/> accessed 6 October 2016.

²⁷⁴ Anti-trafficking in Persons and Anti-smuggling of Migrants (Permission to Move Freely and Work) (Foreign Nationals) Regulations 2016, Federal Government Gazette P.U. (A) 119, 4 May 2016.

²⁷⁵ ATIPSOM 2007 s 66 2(aa).

²⁷⁶ ATIPSOM 2007 s 7 (1) (ja). Also Anti-trafficking in Persons and Anti-smuggling of Migrants (Payment of Allowance to the Trafficked Persons) Regulations 2017 Federal Government Gazette P.U. (A) 60, 1 March 2017.

²⁷⁷ ATIPSOM 2007, s 2.

²⁷⁸ *ibid* s 3 (IA).

²⁷⁹ *ibid* s 43 (1A).

²⁸⁰ *ibid* s 43 (1)

²⁸¹ US DoS, TIP Report 2016: Malaysia (n 93) 257.

6.4.3. Prosecution

The number of human trafficking prosecutions is often a common metric by which a government's anti-trafficking response is judged.²⁸² Prosecution is assumed to be the barometer for the effectiveness of the policy implementation, as well as indispensable element for government programmes to fight human trafficking.²⁸³

The prosecution of human trafficking cases in Malaysia is initiated and handled by the Deputy Public Prosecutors (DPP) who work either from the Attorney General Chambers (AGC) headquarters or in each state. This is because prosecutions for human trafficking cannot be instituted without the written consent of the Public Prosecutor,²⁸⁴ who is the Attorney General himself.²⁸⁵ Beside the officers in the AGC headquarters, there are at least two specialist prosecutors in every state²⁸⁶ who are specially trained to handle human trafficking cases,²⁸⁷ particularly by the Judicial and Legal Training Institute.²⁸⁸ Their training covers the prosecution skills and techniques, procedural matters, and admission of evidence.²⁸⁹ They also are trained in investigation techniques and evidence gathering, apart from interview skills with trafficked victims.²⁹⁰ Therefore, there is no doubt that the prosecution officers are well versed in human trafficking law.²⁹¹ There are 42 specialist prosecutors as of 2015, an increase of 13 from the previous year.²⁹²

²⁸² Amy Farrell and others, 'The Prosecution of State-Level Human Trafficking Cases in the United States' (2016) 6 *Anti-Trafficking Review* 48.

²⁸³ US DoS' Office to Monitor and Combat Trafficking in Persons, 'The 3Ps: Prevention, Protection and Prosecution' <www.state.gov/documents/organization/167334.pdf> accessed on 18 October 2016.

²⁸⁴ ATIPSOM section 41.

²⁸⁵ Federal Constitution art. 145(3).

²⁸⁶ Suhana Ahmad and Ali Salman, 'Government Policy and the Challenge of Eradicating Human Trafficking in Malaysia' (2014) 10:6 *Malaysian Journal of Society and Space* 66.

²⁸⁷ Interview with Prosecution 2.

²⁸⁸ Interview with Prosecution 1.

²⁸⁹ *ibid.*

²⁹⁰ *ibid.*

²⁹¹ Interviews with Prosecution 1 and Policy 2.

²⁹² US DoS, *TIP Report 2016: Malaysia* (n 93) 256.

Table 8 provides the statistics on prosecution of human trafficking cases in Malaysia in accordance to the ATIPSOM 2007. Based on the total number of prosecution cases in Table 8, the number of specialist DPPs is sufficient given that the total human trafficking cases in Malaysia stands at 138 in 2016.²⁹³ Therefore, human trafficking cases are now assigned to these specialist prosecutors who are well trained and well versed in these specific criminal cases.²⁹⁴ Under normal circumstances, the prosecution of such cases will be handled by the state DPPs, however, in case of cases involving enormous public interest, they will be handled by the more senior DPPs from the AGC headquarters.²⁹⁵

²⁹³ Interview with Prosecution 1.

²⁹⁴ Interview with Prosecution 1.

²⁹⁵ *ibid.*

Table 8 : Prosecution of Human Trafficking Cases in Malaysia²⁹⁶

ATTORNEY GENERAL CHAMBERS
FROM 28.02.2008 TO 30.09.2016

NO	ITEM	YEAR									GRAND TOTAL
		2008	2009	2010	2011	2012	2013	2014	2015	2016	
1	TOTAL PROSECUTION CASE	8	142	193	22	70	129	62	26	131	783
2	TRIAL STAGES	0	27	105	1	10	112	38	17	138	448
3	DISCHARGED/ACQUITTAL CASES	2	50	40	13	23	7	12	1	2	150
4	DISCHARGED NOT AMOUNTING TO ACQUITTAL	3	18	4	4	14	4	2	2	3	54
5	CONVICTION	3	47	44	4	24	6	1	6	18	153

²⁹⁶ Statistics from the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Council of Malaysia for the year 2008-2016

Based on the statistics,²⁹⁷ from 2008 to September 2016, a total of 783 prosecution cases were instituted, with a total of 153 convictions. This might be considered a small total compared to total cases of 1259 and 1839 arrests, and a total of 2626 victims issued with the PO. The statistics demonstrate that the ratio between the total human trafficking cases and those brought to prosecution is 62%, while the ratio between prosecution and conviction is only 19.5%. It shows that the success rate is still relatively low because 'the prosecution will only pursue the case when there is a strong evidence to prosecute the perpetrators'.²⁹⁸ Among the common problems faced the prosecution are that it is hard to procure evidence from the victims either because of their short memory problems due to their exploitation or because of their lack of education that inhibits them to give clear explanations about the nature of their exploitation, thus rendering them as incredible witnesses.²⁹⁹ Some victims were also not motivated to provide evidence as they only aim to return home or are afraid that their family back home will be intimidated by the perpetrators and their agents.³⁰⁰ Most of them just want to return home and start a new life.³⁰¹

As stated, a striking problem inhibiting the victims as 'star witnesses' in human trafficking cases arises from the nature of victims. In some instances, particularly with sexually exploited victims, there is a possibility that at the outset, they are consensual but end up as victims, and at times they assume the role as complainant-witness and required to provide accounts of their experience to investigation officers, prosecutors and judges. It could be a straight forward witness account, but as a victim, they may experience post-traumatic stress disorder (PSTD) that could produce fragmented memories, lacking in specific details and difficulties in explaining within a linear narrative, which is in opposition to common notions of what constitutes a 'good' victim account.³⁰² Even without the effects of trauma, autobiographical memories are liable to alter on retelling, with lost details and fading memories. The adversarial

²⁹⁷ See Table 8.

²⁹⁸ Interview with Prosecutor 2.

²⁹⁹ *ibid.*

³⁰⁰ Interview with NGO 5.

³⁰¹ *ibid.*

³⁰² Chris R Brewin, 'Autobiographical Memory for Trauma: Update on Four Controversies' (2007) 15 *Memory* 227.

system in the court may exacerbate rather than ameliorate trauma amongst the victims, thus making efforts to rely on their accounts difficult.³⁰³

Further, the view of the NGOs is that the attitude among the prosecutors is unsatisfactory. One interviewee lamented that the prosecutors would choose to prosecute cases that are easier to prove. For example, the charges under the ATIPSOM 2007 are viewed as harder to prove because of their complexity compared to the Penal Code, such as cases pursuant to section(s) 359 to 374 pertaining to slavery, forced labour, forced marriage and prostitution.³⁰⁴ Therefore, prosecutors resort to use the latter. This is because the aim is for the 'successful prosecution because the US Embassy will consider a conviction, even if it is an alternative charges, they will considered as fulfilling the Prosecution aspect of the human trafficking policy.'³⁰⁵ Another issue is that the prosecution will opt for different legislation such as the Passport Act 1966 section 12 (1)(f) (having possession of the passport not issued for such a person), or the Immigration Act 1959/63 section 55B (employing a person without a valid employment pass).³⁰⁶ This is due to the fact that apart from the quality of the investigation papers, the prosecutors find the cooperation on the part of the victims as their biggest problem and so choose offences which can be proven by documents.³⁰⁷ However, the setback for the application of such alternative laws is that it renders the victims unrecognised as trafficked victims, therefore they will not be protected under the ATIPSOM 2007.

Another issue is the insufficient understanding of human trafficking on the part of the judges. One of the biggest problems is pertaining to the standard of 'exploitation' or 'coercion' on the part of the victims. This is evidenced in the case of *PP v Boon Fui Yan*.³⁰⁸ According to the case, the fact that the alleged victims were free to move and possess mobile phones on their own does not impose restraint on movements or communications by the victims. The learned

³⁰³ Louise Ellison and Vanessa E Munro, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2016) *International Journal of Evidence and Proof* 1.

³⁰⁴ Interview with Defence 1.

³⁰⁵ Interview with Prosecution 2.

³⁰⁶ Interviews with Prosecution 2 and 3.

³⁰⁷ Interview with Prosecution 2.

³⁰⁸ [2015] MLJU 999.

judge also found that the retention of the alleged trafficked victims' passport would not have real effect on the workers should they want to escape from the employer. Therefore there was no element of coercion duly established. The judge's analysis for the Malaysian case is in contradiction with the UK case of *R v Lorenc Roci and Vullnet Ismailaj*³⁰⁹ where the Court was more sympathetic towards the victims' conditions, whereby the confiscation of their passports manifested the element of coercion. Both cases were discussed in Chapter Five of this thesis.

6.5. Conclusion: Strengths and Shortfalls in Policy Implementation

Malaysian implementation is in accordance with the rule of law, and the policy and the law, such as the ATIPSOM are in accordance with the international legal instruments such as the Trafficking Protocol. The strategy to combat human trafficking that focus on the 3P paradigm - to prevent, protect and prosecute - is reflected in the establishment of the specialised body to address human trafficking in the form of MAPO. The creation of the HLC which is attended by senior ministers to 'deliberate and decide on the recommendation' by MAPO has also shown a greater political will on the part of the government to address human trafficking. Further, the establishment of regulations as well as the SOP of the anti-human trafficking implementers, as well as the establishment of specialised anti trafficking units and the level of training imparted to the relevant implementers of the anti-trafficking sector comprise a potentially sufficient bureaucracy. Overall on paper, the anti-human trafficking policy and law are good enough to address human trafficking in Malaysia.

While the policy and the law in Malaysia seem to be compatible with the requirements of the United Nations, these measures have not been implemented with overall effectiveness. As a consequence, the ineffective policy implementation will render them unfair to the victims. Based on the assessment in this chapter, multiple problems inhibit the effectiveness and

³⁰⁹ [2005] EWCA Crim 3404.

fairness of human trafficking policy and law, as summarised in the following ways.

6.5.1. Lack of Sensitivity

There is a lack of sensitivity on the part of the relevant policy implementers. This is evident from the statement of the interviewees gained from the data collection. For example, the conditions of the shelter homes, as well as the victims themselves, have been noted as well as the difficulties in producing them as potential 'star witnesses' in human trafficking cases.

The lack of sensitivity also appears on the part of the enforcement officers who at times could not understand the plight and need of the traumatised victims when they were rescued, or they had the pre-conceived perception against sexually exploited victims who are stigmatised as volunteer sex workers. This problem is further aggravated by the lack of cosmopolitanism among the Malaysian people. This is due to the fact that most victims are foreign workers, who are perceived not to have equal standing to locals. The local media plays no positive part. More often, the victims are demonised by the Malaysian media,³¹⁰ with media focus on the sexuality of foreign workers, and with reports of Malaysian women also perceiving maids to be house-wreckers preying on the 'innocent' Malaysian husband.³¹¹

Further, during raids, the enforcement officers were not accompanied by interpreters who could converse in the language understandable by the victims. The language barrier is also a problem faced by the shelters and prosecutors who could not interact well with the victims.

³¹⁰ Vicky D Crinis, 'The Devil You Know: Malaysian Perceptions of Foreign Workers' (2005) 39: *2 Review of Indonesia-Malaysia Affairs* 91.

³¹¹ Muhammad Nadratuzzaman and Aswatini Raharto, 'Indonesian Domestic Workers Overseas' in Dick Hoerder and Amarjit Kaur (eds), *Proletarian and Gendered Mass Migrations: A Global Perspective on Continuities and Discontinuities from the 19th to the 21st Centuries* (Leiden: Brill 2013) 396

6.5.2. Lack of Funding

There is a dire problem of lack of funding for the human trafficking policy implementation in Malaysia. The current financial budget of RM4 million is insufficient to address human trafficking in Malaysia, and falls short of the required amount of RM15 to RM20 million a year. The issue of funding is emphasised by the interviewees, as it inhibits the effective implementation of human trafficking efforts. The existence of seven shelter homes for victims of human trafficking seems to be inadequate too as they tend to be operating beyond their capacity due to the large number of victims. The proposal to designate shelter homes operated by the NGOs would be futile without any financial assistance by the government. This is because while the NGOs have been asking for budget allocation by the government to run their current activities in the existing shelters, therefore it would be untenable for them to run their own shelter homes without such assistance.³¹² This is contrary to the position in the UK where the government maintained a sum of £6 million for an NGO to coordinate the provision of care for adult victims in England and Wales under the National Referral Mechanism (NRM)³¹³ The NRM is a framework for identifying victim of human trafficking in the UK, to meet the requirement of the Council of Europe Convention on Action against Trafficking in Human Being (COE Convention) 2005³¹⁴ Under the NRM, the 'Competent Authority'³¹⁵ or trained decision makers must consider whether a person is a human trafficking victim or otherwise during the 45-day recovery and reflection period. If the competent authority reaches a 'conclusive decision' that a person is a trafficked persons, then the appropriate assistance and protection must be accorded to the victim.³¹⁶

³¹² Interview with NGO 3.

³¹³ US DoS, *TIP Report 2016: United Kingdom* (Washington DC: US DoS 2016) 386.

³¹⁴ CETS No. 197. Discussed in Chapter Three.

³¹⁵ The Modern Slavery Human Trafficking unit (MSHTU) and the Home Office Visas and Immigration (UKVI).

³¹⁶ National Crime Agency, 'National referral Mechanism'

<www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism > accessed 7 April 2017.

The lack of funding may also constrain the awareness programme and the training of bureaucrats. This is made evident by most of the bureaucrat-implementers who spoke about their lack of training.

6.5.3. Lack of Knowledge and Expertise.

The issue of lack of knowledge impedes the effective anti-human trafficking implementation efforts. Most of the interviewees recognised that this problem leads to constraints in the implementation process. They also concur that none of their initial training to their profession has any content about human trafficking.

The lack of knowledge about human trafficking is rampant among the enforcement officers. Given that the specialised anti-trafficking units of the relevant agencies are centralised in their headquarters, often the enforcement was executed by the state of district based officers, such as the Police officers attached to the state police contingent or the state immigration offices to save time and costs.³¹⁷ This led to a poor standard of investigation that will eventually affect the investigation papers, and thus will not help the prosecution.³¹⁸

The lack of knowledge also led to the overemphasis of human trafficking as sex-trafficking. Despite that the definition of human trafficking has been given a wide spectrum in the ATIPSOM 2007, the subject of human trafficking has always been associated with prostitution. This is not solely the case in Malaysia. In fact, the definition of trafficking that has been pushed to prominence refers exclusively to sexual exploitation³¹⁹ and often conflates with prostitution.³²⁰

³¹⁷ Interviews with Enforcement 5 and 7.

³¹⁸ Interviews with Prosecution 1 and 2.

³¹⁹ Melissa Gira Grant, 'The Truth About Trafficking: It's Not Just About Sexual Exploitation' *The Guardian* (London 24 October 2012) <www.theguardian.com/commentisfree/2012/oct/24/truth-about-trafficking-sexual-exploitation> accessed 19 October 2016.

³²⁰ *ibid.*

However, the sex trafficking victims in Malaysia are just one component of the large foreign workforce.³²¹

The awareness programme also suffers from the lack of knowledge. An interviewee confided that despite of the fact that he is a media practitioner, his knowledge of human trafficking is still very minimal. This is mainly because the lack of training that renders restricted knowledge of the subject.³²² Therefore, it causes the lack of useful content for the awareness programme through the mass media.³²³

6.5.4. Problems in Addressing Demand

The fourth set of problems address demands. Malaysia is at the crossroads between its economic development that requires foreign workers in the replacement of the locals who seem to be unavailable in sufficient numbers or actually unwilling to work in the labour intensive sectors,³²⁴ and its efforts to address human trafficking. This issue is further exacerbated by the nonchalant attitude of the authorities towards the victims, particularly those of foreign nationalities because they are not seen as suffering much harm and are perceived as being needed by the domestic economy.³²⁵ In this regard, the results of these activities of employing cheap and unskilled migrant labourers may potentially drive human trafficking, as discussed in section 6.2.2.

³²¹ Zarina Othman, 'Human (In)security, Human Security and Human Trafficking in Malaysia' in Karen Beeks and Delilah Amir (eds), *Trafficking and Global Sex Industry* (Lanham MD: Lexington 2006) 47.

³²² Interview with Policy 6.

³²³ *ibid.*

³²⁴ Kamles Kumar, 'Replace Foreign Workers if You Don't Want Them Here, Zahid Tells Malaysian Youths' *The Malay Mail* (Kuala Lumpur 14 February 2014) <www.themalaymailonline.com/malaysia/article/replace-foreign-workers-if-you-dont-want-them-here-zahid-tells-malaysian-yo> accessed 20 October 2016.

³²⁵ Yoichiro Sato, 'Perceptions of Transnational Security Threats in Malaysia and Singapore: Windows of Cooperative Opportunities for the United States' in David Fouse (ed), *Issues for Engagement: Asian Perspective on the Transnational Security Challenges* (Honolulu: APCSS 2010) 145.

6.5.5. Corruption

As was discussed above, one of the biggest problems in human trafficking is corruption that affects all aspects of human trafficking including the trafficking chain, the criminal justice chain and the victims support and protection chain.³²⁶ Based on the Corruption Perceptions Index, the corruption perception level in Malaysia is at number 54 out of 167 countries.³²⁷ There is a strong suspicion that many of the local officials who conduct human trafficking policy implementation efforts are in collusion with the traffickers. According to an interviewee, over the years the trafficking perpetrators know that the level of corruption is very high, and the border is so porous and there are low numbers of prosecution and convictions.³²⁸ Another interviewee further complained that corruption occurs at all levels. He stated that if at all such corruption practices are detected, 'no one will come forward to testify because corruption has happened at all levels because everybody is on the take.'³²⁹

6.5.6. Overall

In concluding this chapter, serious efforts must still be undertaken by the Malaysian government to ensure the fairness and effectiveness of all its action plans following the amendment of the ATIPSOM in 2015, especially in strengthening victim protection and the expansion of NGOs' role.³³⁰ Provided the laws and policies were to be well implemented, there is no doubt that Malaysia is able to combat and address human trafficking problems effectively and fairly.

Human trafficking remains an ongoing, endemic problem. Different forms of trafficking emerge because of new emerging markets for labourers or because of new vulnerabilities, for example the ethnic problems in Myanmar that affected

³²⁶ UNODC, *The Role of Corruption in Trafficking in Persons* (Vienna: UNODC 2011) 7.

³²⁷ Transparency International, 'Corruption Perceptions Index 2015' <www.transparency.org/cpi2015> accessed 20 October 2016.

³²⁸ Interview with NGO 2.

³²⁹ Interview with NGO 5.

³³⁰ Abas and Aziz (n 66).

the Rohingyas. Therefore there is a need to review the existing mechanisms in Malaysia, such as by appointing a human trafficking czar who will help to ensure the assessment of the policy and law implementation from an independent person or body, modelled from the UK mechanism.³³¹ At the same time, the engagement between the government with the NGOs, the players in various labour intensive industries and the stakeholders must be further intensified. These issues have been discussed in previous chapters.

³³¹ See Chapter Three.

Chapter Seven

Conclusion

7.1. Introduction

This chapter offers an overall analysis and reflections based on the previous chapters of the thesis. This includes the pivotal points which have been discussed throughout the thesis where the summary of the previous findings will be made. This chapter also reflects upon the research methodologies, the research limitations, the possible sites for future research and the recommendations for the way forward in improving the anti-human trafficking agenda and delivery in Malaysia.

It is reiterated that the main purpose of this thesis is to examine the problem of human trafficking with a focus on Malaysia. This thesis sought to explore the Malaysian government's policy responding to the human trafficking problems. This thesis also explored the various anti-human trafficking laws in Malaysia, particularly the ATIPSOM 2007 that outlines matters relating to the prevention, prosecution and victims' protection, which are the prerequisites of the anti-human trafficking paradigms drawn from the Trafficking Protocol 2000.

At various points, this thesis has made reference to the policy and the laws in England and Wales. Further, the researcher has noted ways and in which the issue of human trafficking in Malaysia might be better addressed through policy transfer. This is in line with the aims and objectives of this thesis as stated in its Chapter One.

In achieving these purposes, this chapter will offer six levels of discussion to cover the following. First, it will consider how the thesis hypothesis has been answered. Second, this chapter provides answers to the research objectives,¹ and it will make a summarised assessment to whether such policy law, enforcement and implementation are fair and effective. Third, it will reflect on

¹ Both hypothesis and research objectives were set out in Chapter One.

the research methodologies. Fourth, it offers the reflection on the recommendations made throughout the research. Fifth, it will consider what could be the future research aiming at analysing human trafficking problems in Malaysia. Finally, the statement of originality of the thesis will be considered.

7.2. Answering the Hypothesis

At the outset, this thesis provided a hypothesis as follows:

The anti-human trafficking law in Malaysia is compatible with the UN Trafficking Protocol in providing an anti-trafficking regime aimed at preventing the crime, prosecuting offenders and protecting victims. However, it has yet to address comprehensively the human trafficking phenomenon or to provide effective protection for victims. This is due to failures or shortcomings in strategy, law and enforcement. These shortcomings affect Malaysia's effort to combat human trafficking and to provide a sufficiently victim-centric strategy and law.

In elucidating this hypothesis, the thesis breaks into three discrete but inter-related parts. First, it explored the question of how human trafficking creates problems for the law, involving a further examination of the nature of human trafficking and problems it causes in terms of migration, human rights or crimes. Secondly, this study looked at the strategies, policies and legal regime, as constructed to address the trafficking problems. Thirdly, this research focused on the questions pertaining to the effectiveness and fairness of the human trafficking policy and law implementation.

Based on these analyses, this research provided important and unique findings to support the hypothesis. First, this research finds that that human trafficking remains a problem in Malaysia. Human trafficking is a negative phenomenon and has been plaguing Malaysia due to various factors, namely the economic push and pull factors, the porous border, social and cultural factors, and corruption. Therefore it poses a security threat to Malaysia and creates a multifaceted problem that requires comprehensive policy and law responses. This issue is discussed in Chapter Three. Secondly, this research finds that on

paper, the policy, strategy and laws in Malaysia are sufficient and should be able to effectively and fairly combat human trafficking, with the inclusion of the 3P paradigm. This is implemented by way of the promulgation of the ATIPSOM 2007 that translates the anti-human trafficking policy into legislation, as well as the application of other related and existing laws to counter human trafficking. These issues were respectively elaborated in Chapters Four and Five. Thirdly, despite the existence of the policy and laws on paper, this thesis exposed some issues impeding the effectiveness and fairness of the policy and legal implementation. These findings among others are based on the lack of empathy and expertise on the part of the authorities, lack of resources in the form of staff and funding for the institutions, problems in addressing issues of demand and supply, as well as the corruption. These issues were elucidated in Chapter Six.

7.3. Answering Research Objectives and Research Findings

In summary, this research was undertaken with four main objectives. Firstly, this research elucidates the concept and phenomenon of human trafficking by explaining the concept of human trafficking and defining the elements involved in human trafficking issues. Secondly, this thesis discussed the actions and measures taken to counter the problems of human trafficking in terms of strategy, law and enforcement mechanisms. Third, this research endeavoured to widen the scope of study by taking into account other data uncovered during the fieldwork, and not only depended on the already available documentary sources. Finally, the researcher proposed some policy transfer from the UK law and practices into Malaysia. On the basis of this research, the answer to the research objectives and research findings are as follows.

7.3.1. Human Trafficking a Legal Problem for Malaysia

The concept of human trafficking and its problems were comprehensively discussed in Chapter Three. Human trafficking is not a new phenomenon, albeit it comes in different names, but it is another form of a crime infringing the basic rights of the victims as a result of exploitation by the perpetrators. Based on estimation of victims and profits, human trafficking attracts transboundary

criminal syndicates. This has prompted the international community to recognise it as an issue that requires several solutions. Therefore, several international agreements have been promulgated, and they finally reached their summit when the United Nations agreed on Trafficking Protocol, which formulates definitions of what is meant by human trafficking, as well as outlining the global efforts required to address it.

From the perspective of Malaysia, the economic and social conditions, border security and corruption have made Malaysia vulnerable to human trafficking activities. Based on the findings in Chapter Three, human trafficking is not a new phenomenon in Malaysia. But because of the steadily rising number of victims being rescued, arrests and prosecutions of the perpetrators,² it manifests that human trafficking remains one of the major problems in Malaysia. Not only does it add to the crime statistics but also affects Malaysia's credibility when it is placed in the 'hall of shame' by the international community. This is because Malaysia has been ranked at Tier Three of the Department of State's Trafficking in Persons Report in 2014, and Tier Two Watch List in the consecutive years in 2015 and 2016, thus showing that the efforts to combat human trafficking are less than satisfactory.

7.3.2. The Policy, Strategy and Law are Compatible with the UN Trafficking Protocol

The details of policy and the law were discussed in Chapters Four and Five. The outcomes of this research revealed that the human trafficking policy and laws in Malaysia fulfil the minimum standard and requirements set by the Trafficking Protocol. The same point is also recognised by the US TIP Report. However, the implementation of such policy and law remains a problem and is discussed in Chapter Six.

² The statistics appear in Chapter Six.

7.3.2.1. Policy

The basis of the findings in Chapter Four revealed that the broad international agreement pertaining to the human trafficking international treaties has signalled that the world community has found a common goal to create globally acceptable standards in combating human trafficking. But first they had to find a uniform and acceptable anti-human trafficking policy and strategy. Therefore, the Trafficking Protocol provides guidelines how the member States should implement their domestic laws, policy and strategies to combat human trafficking.

Malaysia has shown its willingness to deal on paper with human trafficking, not only because of its obligations to the international law, but also due to the sense of responsibility to combat the prevalence of human trafficking within its border. The initial step undertaken by the Malaysian authorities was to promulgate the anti-human trafficking policy and strategy, followed by its ratification of the Trafficking Protocol.

The findings in Chapter Four further revealed that the public policy and strategy are well defined and explained in Malaysia. The process of policymaking has undergone a vigorous cycle of problem identification, formulation, adoption, implementation, and evaluation. The same situation applies to the strategy where it is formulated based on the requirements that it must have strategic objective, set out tactics and be operational by way of the support from institutions and resources.

The findings in Chapter Four revealed that Malaysian anti-human trafficking policy is embodied in the ATIPSOM 2007, while the strategy to combat human trafficking is set out in the Five-Year National Action Plans. These anti-human trafficking instruments manifest the required 3P-prevention, protection and prosecution mechanisms reflecting the demands of the Trafficking Protocol to address human trafficking problems.

7.3.3.2. Law

The ATIPSOM 2007 was promulgated to deal with the specialised forms of criminality characterised by human trafficking with the purpose to prevent the problems, punish the perpetrators and protect the victims. The enactment of the law is also an implementation of Malaysia's obligation under the Trafficking Protocol. While the ATIPSOM 2007 is a clear reflection of the requirements underlined by the Trafficking Protocol, the question is whether it is fair and effective to combat human trafficking problem in Malaysia.

Based on the dissection of the ATIPSOM 2007, it appears that the Malaysian law possesses the basic elements of the anti-human trafficking 3P paradigm. However, the ATIPSOM 2007 is prone to the impact of the immigration law, particularly against foreign victims. This is reflected in the provisions pertaining to the protection of the victims, particularly section 54 that requires that eventually victims be returned to their home countries. It manifests in the requirement that the ultimate aim of the ATIPSOM 2007 is to ensure that the victims leave the country once rescued and be at the service of the authorities, in case their service is needed in the investigation and prosecution of human trafficking case. However, there is not much attention given to the comprehensive protection and assistance to victim once they are rescued. This stance arises due to the fact that human trafficking cases in Malaysia only involve foreign nationals.³

The situation in England and Wales, however, is different. The UK has ratified the Council of Europe Convention on Action Against Trafficking in Human Beings that provides for human trafficking victims being granted minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection. The law in England and Wales also provides for those who were granted the leave to remain to be able to work in private households, and they will be able to change employers.⁴ Such a law could boost the comprehensive victims'

³ Interviews with Enforcement 1 and 4.

⁴ Modern Slavery Act (UK) 2015 s 53(3)

protection and has the potential to alleviate the exploitative conditions that they have endured as well as encourages those who were subject to exploitation to self-identify and to expose abusive employers. However, similar legal provision seems to be absent within Malaysia's legal framework.

In the light of the above shortcomings and potential policy transfer from the UK, the amendments to the ATIPSOM 2007 in 2015 allowing the payment of compensation and wages in arrears to the human trafficking victims is timely. It shows that the ATIPSOM 2007 is moving from purely criminalisation-centric legislation that only focuses on prosecuting offenders.

In this regard, thesis finds that largely (but not as fully as possible) the ATIPSOM 2007 meets the minimum standard and requirement of the Trafficking Protocol as it contains all the appropriate 3P elements of prevention, protection and prosecution in addressing human trafficking. The provisions of the ATIPSOM 2007 should be able to address the requirement of 'minimum standard' by the United States Trafficking Victim Protection Act 2000 if they can be effectively and fairly implemented.

7.3.4. Implementation of Policy and Law

The elaboration of the issue of policy and law implementation took place in Chapter Six. It revealed that the Malaysian implementation is in accordance with the law. In fact the policy and the law, such as the ATIPSOM 2007 are concomitant with the international legal instrument such as the Trafficking Protocol. This further proven by the establishment of the MAPO and the High Level Committee (HLC) manifests government's political will to address human trafficking. The relevant Standard Operating Procedure (SOP) further stands as guidelines to the policy implementer, as well as the establishment of specialised anti trafficking units and the level of training afforded to the relevant implementers in the anti-trafficking sector.

Notwithstanding, MAPO lacks sufficient authoritative power. This is disclosed by research participants through the fieldwork. It is true that MAPO is chaired

by the Secretary General of the Ministry of Home Affairs who commands the role of the administrative head of the Ministry of Home Affairs that spearheads the policy-making function on security affairs and public order.⁵ But the actual enforcement, protection and prosecution activities rest on individual departments with constrained resources confined by their primary roles and functions. Apparently, the budgetary provision for anti-human trafficking activities is far from sufficient. The creation of the HLC is also seen to be an addition of another bureaucratic level. Nonetheless, it shows important signs of political will on the part of the government to address human trafficking.

7.3.4.1. Assessing Fairness and Effectiveness

Notwithstanding the compatibility of the Malaysian anti-human trafficking policy and laws with the Trafficking Protocol, these measures have not been amounted to comprehensive policy implementation, thus rendering them lacking in effectiveness to the implementers, and deficient in fairness for the victims. This is because the findings during the fieldwork revealed that while the policy and law on paper have emphasised victims' protection, Malaysia exhibits an implementation approach, which emphasises the enforcement of the criminal and immigration laws rather than victim protection and rights.

The problems inhibiting the implementation are found in Chapter Six. They include: the lack of sensitivity to the problems of human trafficking and its victims; the lack of funding; the lack of knowledge and expertise amongst the implementers; the problems in addressing economic demands that lure innocent people into becoming victims; and the problem of corruption. Some recommendations are proposed in this Chapter to tackle these issues.

⁵ Ministry of Home Affairs, 'Main Function of the Ministry', <www.moha.gov.my/index.php/en/maklumat-korporat/fungsi-kementerian> accessed 14 December 2016.

7.4. Reflections on Fieldwork Data Collection

Socio-legal research is the overall framework of this thesis. As element of socio-legal research, the doctrinal analysis or the 'black letter' approach was adopted enabling the understanding, systemising, and clarifying of the law on the subject of human trafficking. This is obtained by way of analyses of legal texts of primary and secondary sources contained in the statutes, textbooks, legal journals, and international agreements. Based on this method, it was found that Malaysia has achieved a lot of results in the law and policy, such as the ATIPSOM 2007, as well as the process of amendments that may render the legal doctrine in a good shape for Malaysia to address human trafficking. The main problem identified was the implementation, as evidenced in the fieldwork.

A further method applied for this research was the empirical social science methods. Explained in Chapter Two, this research adopted the use of face-to-face, in-depth and semi-structured interviews based on purposive sampling of thirty-one cross-sector participants drawn from policy makers, enforcement, prosecution and defence, NGOs and Civil Society, and victim protection. Such a strategy provided a helpful perspective about the practical problems of human trafficking, the practical responses by the government to address them and prevailing criticisms about the process of implementation. These represent an important aspect of the original answer to the research problems.

Most of the interviewees gave full and candid responses, apparently enjoying the conversation and sharing their experiences and knowledge, as well as expressing their concerns. The engagement triggered further and additional conversations pertaining to the issue and problems of human trafficking in Malaysia. The outcomes of the fieldwork proved it worthwhile. However, there were several problems, such as institutional gaps, differences of empathy towards people of different ethnicities that render the authorities treating them not as victims but as illegal immigrants. These issues could call for the institutional redesigning and cultural paradigm shift such as how to train the officials to be more empathetic with the victims of different ethnicities, nationalities and background.

No doubt, the research could have been strengthened with interviews with the trafficked victims. This would have enabled the researcher to analyse further data pertaining to the implementation. However, the absence of data from victims was a deliberate feature of the research design. This is because the main focus was law and policy and their influence on the perspective of the relevant officials and their counterparts. Further, the analysis about the victims' perspective on the policy and the law can be adduced from data collected from the NGOs. In addition, time constraints and bureaucratic obstacles would have hindered the availability of victims, plus costs to engage translators for foreign languages such as Chinese, Vietnamese and Burmese. Such a fund was not available to the researcher.

The interview approach generated valuable data that were highly relevant to the research hypothesis and objectives. The data collected were analysed and created value for the thesis. It was found that there have been lack of empathy on the part of the implementers, and more generally lack of victim-centric approach in the implementation of the law and policy, and, to certain extent, the law and policy themselves because ultimately victims will be returned home. The findings show that there is a strong will towards victim protection but there are difficulties in the implementation.

As a third research tactic, references to the policy and laws of England and Wales as well as the prevailing policy in the Europe also helped the researcher to formulate policy transfer into Malaysia's setting. This method has enabled the researcher to gain knowledge about policies, administrative arrangement, institution, and others in one time and/or place is used in the development of policies administrative arrangements and institution in another time and/or place in the UK to be proposed for the transfer into Malaysia's policy and legal framework.

Overall, the researcher's main perspective is on the law and policy and its influence for the perspective of the relevant officials and their counterparts. This was appropriate due to researcher's background as a government officer with relevant experience in the government bureaucracy at the outset of his

research, as well as his continuance there upon the completion of this research. Such a background can form a strength adding the value of originality to this research. This is because the data might only be made available due to the researcher's background as an officer with status and experience and ability to connect with the relevant authorities and sources. This quality may not be available to other researchers in the same area of studies.

7.5. Reflections on the Recommendations and Way Forward

7.5.1. Reform of the Policy and Law

The discussions in Chapter Four and Five addressed the issues of policy and law. While it is recognised that the policy and the law fulfil their international obligations, the inadequacy of the implementation must be addressed. However, for effective and fair implementation, the policy and the law must be reformed, as per the following recommendations.

7.5.1.1. Oversight of the Policy and Law

While the ATIPSOM 2007 is a substantial anti-human trafficking legislation, there is insufficient provision pertaining to the self-assessment mechanisms of its implementation. The successful operation of the domestic anti-human trafficking framework can only be attained if the mechanisms are transparent and accountable. In the case of Malaysia, only an outside party makes the assessment, namely the US TIP Report, whereas the UNODC Trafficking Report is made based on the state's voluntary response. At the same time, the visit by the Human Trafficking Special Rapporteur is only based on invitation, and the latter's report to the UN is not regular. None of these mechanisms form any assessment or retrospection originated from within Malaysia.

As a comparison, the UK Modern Slavery Act 2015 (MSA 2015), section 40, provides for the establishment of an Independent Anti-Slavery Commissioner with independent oversight functions. Therefore, it is recommended that Malaysia should adopt this measure. The appointment of an 'assessor' must be

made among independent individuals or bodies who are able to make assessment, comment and recommend the best practices and working mechanisms towards the effective and fair implementation of the anti-human trafficking policy and law.

7.5.1.2. Tracking the Supply Chain

One important measure to ensure that commercial firms do not become involved in human trafficking activities is greater transparency in supply chains. However, this safeguard is not available to Malaysia. In contrast, the MSA 2015, section 54(4), provides for the requirement for the commercial organisations earning above a specified total turnover to publish prominently on their website or produce following a written request, a 'slavery and human trafficking statement' for each financial year. It is therefore recommended that a similar provision in the ATIPSOM 2007 could be a good move to at least compel employers, especially the big corporations, to consider and adhere to the prohibition against, and prevent human trafficking practices in Malaysia.

7.5.2. Reform the Anti-Trafficking Implementation Regime

The elaborations in Chapters Four and Five revealed that the human trafficking policy and law in Malaysia are leaning toward being more victim-centric following the ATIPSOM 2007's amendment in 2015. However, there is little evidence, as considered in Chapter Six, change in the implementers' perspectives on human trafficking victims in practice. Therefore, the government must be willing to provide adequate resources such as money, people, and upgrading institutions in its effort to implement human trafficking more fairly.

The implementation of human trafficking policy and law also requires enhanced partnership between multiple agencies, cross-sectors and across borders. Based on the interviews, one of the issues raised is the inadequate coordination that inhibits the effective implementation. In this regard, the authorities must play a more active role in promoting a better level of partnership and

cooperation, as well collaborative networks among all different levels of bureaucrats, NGOs, civil societies and private sector in all sectors, both in local and international fora.

7.5.3. Enhancing Institutional Capacity and Capability

Although the establishment of Council for Trafficking in Persons and Smuggling of Migrants (MAPO) is a bold move by the Malaysian government, which intends it to be an authoritative body to address human trafficking problems, in reality, MAPO seems lacking in effectiveness due to several limitations. MAPO is not a distinct government agency, but a part of the Ministry of Home Affairs. This causes resource shortages for MAPO, both in terms of finance and manpower. In this regard, it is recommended that MAPO be upgraded as a distinct body with its own resources.

Alternatively, should the above recommendation seems untenable, the financial provisions for the MAPO should be made in the form of annual budget, and not on an ad-hoc basis so that MAPO should be able to plan ahead its activities and programmes. The reform could include an awareness programme and the enhancement of the officers' capacity building. While training is important, the government should also address the imbalance of the policy implementers among different and diversified ethnicities and backgrounds. This issue is discussed in Chapter Six. This can be addressed by way of the relevant agencies employing a greater diversity of officers so as to enable them to interact better with victims who do not derive from a single ethnicity or community.

7.5.4. Establishment of a Special Court

The proposal by the Malaysian government to establish the human trafficking specialised courts is timely. However, based on the research findings, the proposal has yet to materialise. While the prosecution has human trafficking specialised prosecutors in every state handling human trafficking cases, it is

also important for more to be on-going training for the judges who need good understanding about human trafficking.

The establishment of this special court could change the way that the criminal justice system responds to human trafficking in different ways. It would change the way the legal system looks at the people who have committed crimes as a result of them being victims of human trafficking. For example, the judges who have training in human trafficking may form a different perspective about those who committed immigration offences, such as overstaying or breach of working permit, or those who were arrested for being in prostitution. Such a change of perception may enable them to respond to human trafficking victims in a different way by greater understanding of the severity of human trafficking. Thus the judges would be rendered more empathetic to the trauma that maybe brought the victims to exploitative commercial sex, or forced labour, and to ensure that the criminal justice system understands what human trafficking is and treats the people who have experienced it accordingly.

Such a special court would increase the speed with which human trafficking cases are heard. This could save time and avoid the unnecessary delay for the victims who are being put forward as the 'star witness' so than they can testify in the court. At the same time, the perspective on the perpetrators of human trafficking would also change, and the court would not hesitate to severely punish them.

7.5.5. The Creation of a Crime Survey

The issue of the formation of a crime survey was discussed in Chapter Six. The issue with data pertaining to human trafficking is that it is only based on the cases investigated by the enforcement agencies and those who have undergone prosecution. Yet, such data does not represent the total number of human trafficking cases. Therefore, it is timely for Malaysia to adopt a human trafficking survey once a year to gauge whether the implementation of anti-human trafficking policy is being effectively and fairly undertaken or otherwise. Such a survey will help the authorities to further understand the human

trafficking issues and identify problems and solutions in the efforts to address human trafficking.

7.6. Future Research

Whilst this research has been substantiated and original, nevertheless, there remain possible agendas for future research, as follows.

First, since the perspective of the researcher is on the legal, policy and official, it would also be worth researching other research perspectives such as the victim and feminist. Secondly, the research could also drill down by looking at human trafficking within the labour and sex trafficking sectors. Third, the research may also drill down at the level of institutions and agencies such as the police and other enforcement, prosecution and welfare/victim protection.

Fourth, the research may also drill up by looking at inter-governmental cooperation. This would be is by investigating the government-to-government cooperation in human trafficking in the areas of extradition, mutual legal assistance, police cooperation at the bilateral and multilateral fora, and the ASEAN anti-human trafficking cooperation, to name a few. The area of research may also focus on the how the inter-governmental cooperation can provide greater protection to the victims of different countries who will eventually return to their respective countries such as by obtaining assurance that they are protected from re-victimisation or looking at the areas of extradition or rendition. The question may arise about what guarantees the countries of origin will provide should the suspected person be extradited to their home countries. In this regard, the actions taken by the UK Government in the case of *Othman (Abu Qatada) v United Kingdom*⁶ is worth comparing with the issue pertaining to the issue of repatriation of the human trafficking victims. Compared to the issue of terrorist, human trafficking victims are far easier to deal with because

⁶ [2012] ECHR 56

countries may not be so hesitant to recognize the rights of the victims of human trafficking as opposed to the terrorists.

7.7. Overall Conclusion: Aims Achieved?

Human trafficking is an obdurate problem, plaguing international and national communities. With lucrative profits gained from the exploitation of human beings and low risks, compared to other transboundary crimes, human trafficking has been flourishing globally. Malaysia is no exception. The government recognises that human trafficking is a problem that needs serious attention and concrete action. In this regard, in accordance to the principles arising from the international instruments, Malaysia has taken positive steps in addressing human trafficking problems. The most obvious accomplishment on the part of the Malaysian government, aside from its ratification to the Trafficking Protocol, is the promulgation of a specialised law in the form of the ATIPSOM 2007. However, while the anti-human trafficking policy and the ATIPSOM 2007 address all issues pertaining to human trafficking, including recognising it as a crime, and providing the 3P approaches to address the problem, the implementation remains deficient.

This research has provided important and original findings on the subject of human trafficking in Malaysia. The findings of this research are the first to have successfully explored the issues and problems of human trafficking and the government's responses in Malaysia. It has further scrutinised the fundamental factors that inhibit the effectiveness and fairness of the human trafficking policy implementation, and has provided recommendations for the government to consider, so that the human trafficking problems can be properly tackled and the victims protected.

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List of Abbreviations

ATIP	Anti-Trafficking in Persons (Malaysia) 2007
ATIPSOM	Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (Malaysia) 2007
BERNAMA	<i>Berita Nasional Malaysia</i> (National News Agency of Malaysia)
BSC	British Society of Criminology
ASEAN	Association of Southeast Asian Nations
CATW	Coalition Against Trafficking in Woman International
CLJ	Current Law Journal
COE	Council of Europe
ECHR	European Convention of Human Rights
ECOSOC	United Nations High Commissioner for Human Rights to the Economic and Social Council
ECtHR	European Court of Human Rights
GGATW	Global Alliance Against Trafficking
ILC	International Law Commission
ILO	International Labour Organisation
IHRN	International Human Rights Network
IOM	International Organisation for Migrants
MAPO	Majlis Anti-Pemerdagangan Orang (Council of Anti-Trafficking in Persons)
MLJ	Malayan Law Journal
MOU	Memorandum of Understanding
NAP	National Action Plan
NCA	UK National Crime Agency
NRM	National Referral Mechanism
OIM	International Organisation of Migration
OHCHR	Office of the United Nations High Commissioner for Human Rights
RM	Ringgit Malaysia
SOP	Standard Operating Procedure
Trafficking Protocol 2000	Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000

TVPA	Trafficking Victims Protection Act 2000 (United States)
TVPRA	Trafficking Victims Protection Reauthorisation Act 2008
UKHTC	UK Human Trafficking Centre
UN Convention 2000	United Nations Convention against Transnational Organised Crimes 2000
UN	United Nations
UNDP	UN Development Programme
UNODC	United Nations Office on Drugs and Crime
UNGA	United Nations General Assembly
UN Doc.	United Nations Document
UNHCR	United Nations High Commission for Refugees
US Dos	United States Department of States
US Dos TIP Report	United States Department of State's Trafficking in Persons Report

Appendices

Appendix 1 Interview Schedule and Information Sheet

Information Sheet and Interview Guideline Interview with Policymakers

My name is Mohd Norhisyam Mohd Yusof. I am a PhD student of the School of Law, University of Leeds, UK, under the supervision of Professor Clive Walker and Mr. Stuart Lister. The purpose of my doctoral research is to examine the phenomenon, policy and strategy, law and the effectiveness of the enforcement of the anti-human trafficking efforts in Malaysia. The ultimate aim of my study is to provide for proposals and suggestions towards the enhancement of the strategy, laws and enforcement in the area of trafficking in persons in Malaysian.

As learning from experiences and expertise from various parties is important to this research, I would like to ask you some questions regarding your experience and involvement in the area. For your information, I am interviewing a total of 30 people including officers from various Ministries, government agencies, civil societies and Non-Governmental Organisations. You have been chosen to take part in the research because of your role in the policymaking pertaining to human trafficking.

Please be informed that taking part in the interview is entirely voluntary and you can stop the interview at any time, for any reason, without any negative consequences. You can also withdraw your consent for your interview to be used in the research within two weeks after the interview by contacting me on 016-2767601, or lwmnmy@leeds.ac.uk, and any information collected will be destroyed and will not be used for the purpose of this research.

The interview will take around an hour. I also seek your permission to tape-record the interview so that I can make sure I correctly record your views and experiences. If you prefer otherwise, please tell me and I shall take written notes instead. You may also refuse to answer particular questions. You can also bring up subjects that you think may be useful which I have not asked directly about. You can also ask to take a break at any time during the interview.

The interview will be confidential so that anything you say will only be known by the research team. I will including in my research some general findings from the interviews as well as some selective quotations, but all the interviewee's names and particulars will be made anonymous. They may also be published as academic papers. People who take part in the research will not be named or to be identified in the thesis or in any publications produced. The important exception to this is if you say anything, which, in the opinion of my supervisors or myself, may amount to evidence of a serious crime. If this is the case, the information may be reported to the relevant authorities.

Whilst there are no immediate benefits to you as an interviewee, the research will result in recommendations being made to the Government of Malaysia to

improve the strategy, law and the enforcement of the human trafficking problems in Malaysia. If you require any further information please contact either myself or my supervisors at the School of Law, University of Leeds, LS2 9JT, United Kingdom: Professor Clive Walker (C.P.Walker@leeds.ac.uk) and/or Mr. Stuart Lister (S.C.Lister@leeds.ac.uk).

Thank you for agreeing to be interviewed and taking part in this research project.

Note: The italicised notes will be mentioned to the interviewees, as an introduction to each section and to help the flow of the conversation.

Thank you for your time to participate in this interview. As a start, allow me to ask you some personal question about your background and your training. The purpose of these questions is to enable me to know about your professional background.

Section One: Demographic and Profile

The following questions are related to your duties as anti-human trafficking policymaking officer.

Would you mind responding to the following questions:

1. How long have you been involved in the work of anti-human trafficking?
2. What type of qualifications and trainings do you need to attain/attend to become an officer in this area of work?
3. Did the training prepare you adequately for being an officer for this work?
 - (a) If not, what type of training would you wish to attend in the near future?

The next set of questions will be pertaining to the nature, problem and situation of human trafficking in Malaysia. Allow me to ask you the following questions:

Section Two: Human Trafficking Situation

4. How would you describe the human trafficking situation in Malaysia?
 - (a) Is human trafficking a major, medium or minor problem to Malaysia?
5. Is Malaysia mainly an origin, destination or transit point of human trafficking activities?
6. In your opinion, what kind of problems arise as a result of human trafficking in the country?
7. Why does human trafficking occur in Malaysia?
8. What are the types of human trafficking existing in Malaysia?

To get statistics from the MAPO.
9. Who are mainly perpetrators of human trafficking activities in the country?
10. Who are mainly victims of human trafficking in Malaysia?

Now I would like to request your attention to the matters pertaining to the human trafficking policy.

Section Three: Human Trafficking Policy and Strategy

11. What is the primary role of your organization in addressing human trafficking problem?
12. What is the working definition of human trafficking as interpreted by your organization?
13. Is there any link or confusion between human trafficking and smuggling of migrants?
 - (a) If Yes: How do you address this issue?
14. What is the Malaysian policy and strategy on human trafficking?

15. What are the objectives of Malaysian policy and strategy?
 - (a) Are they clearly stated?
 - (b) Are they well understood?
 - (c) Are they well disseminated/informed?
 - (d) Are they well shared by other organisations/agencies?
 - (e) Are they fair and effective?
 - (f) Does your organization have any plan to amend or improve the current policy?
 - If so, how and why?
16. Are your organisation's objectives on the anti-human trafficking strategy well understood by the other agencies?
 - (a) If not, what are the steps do you think need to be taken?
17. What is the main emphasis of the anti-trafficking strategy in Malaysia?
 - (a) Is there any other additional strategy for Malaysia?
18. What are the factors influencing Malaysia's human trafficking policy and strategy?
19. Do you think Malaysian policy and strategy is in line with the one set by the United Nations?
20. Do you think that the United States TIP Reports have some influence over Malaysian human trafficking policy and strategy?
 - (a) Do you agree with the findings in the latest US TIP Report?
 - If Yes: What have you done or will do to improve the Malaysian current standing?
 - If No: Can you elaborate why you do not agree with the report.
 - (b) Did the US Embassy work together with your organization?
 - If Yes: What type of cooperation that you have provided to them?
 - If No: What kind of cooperation do you expect from them?
 - (c) What you think about the reliability of the US TIP Report?
 - (d) Has it been helpful or not for Malaysia to have TIP Report ratings?
21. Does your organisation have any collaboration or cooperation with any international or regional organization?
 - (a) Have you benefited from such collaboration/cooperation or not?
22. Do you think the current human trafficking policy and strategy are sufficient/adequate to fairly and effectively address human trafficking problems in Malaysia?
 - (a) Any suggestion towards improvement?
 - (b) Any proposal for better policy and strategy?
 - (c)

(Only for Enforcement Officers)

Section Three: Enforcement Practices

23. Is there any manual of procedure or standard operating procedure made and enforceable with regard to your human trafficking enforcement activities?
 - (a) If affirmative, are these rules well disseminated among the officers?
24. What are the usual sources of information (intelligence or evidence) leading to enforcement actions?

- (a) Do you rely on information from border control mechanisms?
 - (b) Do you focus on intelligence sources within Malaysia and how effective is your intelligence mechanism?
 - (c) What about the cooperation from the public – is it forthcoming?
 - (d) How about reports from the victims?
25. What do you normally do upon receiving reports of human trafficking activities?
- (a) How long will it take for you to investigate and resolve the report?
 - (b) At what point do you arrest and in what circumstances? And in what percentage of reports?
26. What sort of evidence is needed to bring a charge against the perpetrators?
27. What are the main problems you normally face in conducting your enforcement work?
28. Do you think that the current laws are sufficient for you to conduct your investigation, enforcement and detention activities?
- (a) Do you think that the law is effective and fair?
 - (b) Do you have any suggestion to improve fairness and effectiveness?
 - (c) Do you have any suggestion in terms of policies, facilities and laws towards helping further your work in this area?

(Only for Prosecutors)

Section Three: Prosecution Practices

7. What types of 'exploitation' are normally involved in human trafficking cases which you deal or dealt with?
8. What sort of evidence is needed to bring the suspects to prosecution?
- (a) Do you find the evidence gathered by the police is initially sufficient to bring the case to prosecution?
 - (b) How do you find the cooperation between the enforcement agencies and prosecution in providing sufficient evidence through the investigation papers?
 - (c) How do you gather evidence during oral-examination of the enforcement/investigation officers?
 - (d) How do you gather evidence from the medical/psychology/protection officers ?
 - How and to what extent do you use their evidence?
 - How important and useful is their evidence?
9. How do you gather evidence from lay witnesses?
- (a) From the victims:
 - How are they being treated to reflect the sensitivity of their evidence?
 - How and to what extent do you use their evidence?
 - How useful is the evidence from the victims?
 - (b) From the accused persons:
 - How and to what extent do you use their evidence?
 - How useful is the evidence from the accused persons?
10. What are the main problems in prosecuting human trafficking cases?

- a. *The co-operation of the victims – victims refusing to co-operate during investigation stage or turns hostile during trials. The language barrier is also another problem.*
 - b. *The enforcement agencies are inexperienced when it comes to raids done and also investigation.*
 - c. *Time frame to investigate and prosecute.*
 - d. *Other than that, getting judges to understand the complexity of a trafficking ring and the mind of trafficked person is also difficult as they see that the offences should be that of an immigration offence, hurt or prostitution.*
11. How do human trafficking cases differ from other criminal cases, particularly during the pre-trial, trial and post-trial?
- a. What is the common outcome in the prosecution of human trafficking cases?
 - What is the percentage of investigated human trafficking cases that go to trial?
 - Of the cases put on trial, what is the percentage of conviction?
 - b. In the event of conviction, do you think that the form and level of sentencing are fair and effective?
 - c. *(If the answer is negative)* - what could be further done to ensure fairness and effectiveness?

Section Four: Implementation of Policy and Strategy

29. What are the specific programmes being conducted to implement the policy and strategy?
- (a) Can you give an example of these programmes?
30. What kinds of mechanisms have been established to implement the policy and strategy?
31. What are the resources being made available to the officers/agencies?
- (a) Are they adequate?
- (b) If not, what type of extra resources is necessary?
- (c) Are they being appropriately shared among the agencies?
32. Are there any joint activities among various agencies (planning, data gathering and evaluation, monitoring, training or supervision) being conducted?
33. Is there any international collaboration in terms of implementation of policy, strategy and law?
- (a) If yes, what type of collaboration and with which party?
- (b) If no, why and which party do you think most appropriate?
34. Can you rate the success of the policy and strategy implementation to address human trafficking problems in Malaysia?
- (a) What are the other areas of improvement to ensure fairness and effectiveness in the implementation?
- (b) If it is unsatisfactory, what do you think the main problems behind the failure?
35. What are the main factors affecting the policy and strategy implementation?
36. How could policy and strategy implementation be improved to ensure fairness and effectiveness?
- The policy and strategy implementation is okay but there is a question to how to cascade down them. In this regard, we need resources and energy.

We have done a lot of programmes such as roll out and we still are doing them to get the information down to the targeted people.

(a) What do you suggest?

Let me ask you a few final questions:

(Only for Victim Protection)

Section Five: Human Trafficking Victims

37. *Can you describe about to what extent your organization involves with the policing and victim protection activities?*
 - (a) *Do you think such activities are fair and effective?*
 - (b) *If not, what can you propose?*
38. *What are the challenges in dealing with victims of human trafficking?*
 - (a) *How do you overcome these challenges?*
39. *What type of services do you offer to the victim of human trafficking?*
40. *What are the needs of these victims? How are the needs currently being met? What are gaps?*
41. *What are your priorities when you deal with them?*
42. *What are the barriers to providing services to the victims and how to overcome them?*
43. *What is your perception on the priorities given in the victims case by the prosecution, enforcement and the deportation agencies?*

Section Five/Six: Conclusion of the Interview

44. *Would you like to share your overall views and perceptions on the human trafficking policy and strategy as well as their implementation in Malaysia?*
45. *Is there anything else you would like to raise pursuant to human trafficking phenomenon, human trafficking policy and strategy as well as their implementation in Malaysia, which we have not discussed.*
46. *Do you have any documents that you can share/provide/show which would help my research?*

Appendix 2 Research Ethics Approval

Performance, Governance and Operations
 Research & Innovation Service
 Charles Thackrah Building
 101 Clarendon Road
 Leeds LS2 9LJ Tel: 0113 343 4873

Email: ResearchEthics@leeds.ac.uk



UNIVERSITY OF LEEDS

Mohd Norhisyam Mohd Yusof
 School of Law
 University of Leeds
 Leeds, LS2 9JT

**ESSL, Environment and LUBS (AREA) Faculty Research Ethics
 Committee
 University of Leeds**

8 June 2017

Dear Norhisyam

Title of study: The Law of Anti-human Trafficking in Malaysia with Reference to the United Kingdom.
Ethics reference: AREA 14-188

I am pleased to inform you that the above research application has been reviewed by the ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee and following receipt of your response to the Committee's initial comments, I can confirm a favourable ethical opinion as of the date of this letter. The following documentation was considered:

Document	Version	Date
AREA 14-188 Ethics Form Amended 030815.docx	1	03/08/15
AREA 14-188 Yusof52-ethics (1).docx	1	10/07/15
AREA 14-188 Info Sheet.docx	1	10/07/15
AREA 14-188 Consent Form.doc	1	10/07/15
AREA 14-188 Low Risk Fieldwork RA form.docx	1	10/07/15

Please notify the committee if you intend to make any amendments to the original research as submitted at date of this approval, including changes to recruitment methodology. All changes must receive ethical approval prior to implementation. The amendment form is available at <http://ris.leeds.ac.uk/EthicsAmendment>.

Please note: You are expected to keep a record of all your approved documentation, as well as documents such as sample consent forms, and other

documents relating to the study. This should be kept in your study file, which should be readily available for audit purposes. You will be given a two week notice period if your project is to be audited. There is a checklist listing examples of documents to be kept which is available at <http://ris.leeds.ac.uk/EthicsAudits>.

We welcome feedback on your experience of the ethical review process and suggestions for improvement. Please email any comments to ResearchEthics@leeds.ac.uk.

Yours sincerely

Jennifer Blaikie
Senior Research Ethics Administrator, Research & Innovation Service
On behalf of Dr Andrew Evans, Chair, [AREA Faculty Research Ethics Committee](#)
CC: Student's supervisor(s)

Appendix 3 Informed Consent

School of Law
Faculty of Education, Social Science and Law



UNIVERSITY OF LEEDS

**Consent to take part in the research entitled
Human Trafficking Law in Malaysia as Reflected in Policies and
Practices**

	Add your initials next to the statements you agree with
I confirm that I have read and understand the information sheet dated 2015 explaining the above research project and I have had the opportunity to ask questions about the project.	
I agree for the data collected from me to be used in relevant future research in an anonymised form.	
I agree to take part in the above research project and will inform the lead researcher should my contact details change.	

Name of participant	
Participant's signature	
Date	
Name of lead researcher	Mohd Norhisyam Mohd Yusof
Signature	
Date*	