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CONTENTS

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DISCRETIONARY POWERS OF THE ATTORNEY-GENERAL : IS THE ATTORNEY-GENERAL ANSWERABLE TO THE PUBLIC?

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ABSTRACT

This article examines the nature and extent of discretionary powers of the Attorney-General. Through legal doctrinal methodology, the article explores the question of whether the execution of such powers can be subject to public scrutiny. With reference to provisions of the Federal Constitution and several decided cases, the article finds that the Attorney-General's discretion cannot be completely unrestrained and can be called to question by the courts when such discretion is employed improperly. Additionally, it is recommended that the Attorney-General must be accountable to Parliament and not the Executive.

Keywords: Attorney-General, discretionary powers, accountability

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INTRODUCTION

Years have passed and the issue remains unsolved, causing public uproar. The question of whether the Attorney-General ('AG') is answerable to the public has already been brought up before when the AG issued a directive to the MACC to close investigations on the 1MDB affair back in 2016.[1] The public at large had demanded reasons and accountability for the decision made by the former AG, Tan Sri Abdul Gani Patail who subsequently retired abruptly during mid-investigations. Transparency International Malaysia has called for greater independence of the judiciary in Malaysia by separating the power of the Attorney General and the Public Prosecutor.[2] Today the same person holds both posts and is accountable mainly to the prime minister. This is why there have not been serious investigations into the corruption allegations surrounding the former Prime Minister. Transparency International Malaysia's (TI-M) understanding of the appointment of the Attorney General is under Article 145 of the Federal Constitution whereby the AG is appointed by the Yang di-Pertuan Agong, on the advice of the Prime Minister.[3]

The question was raised again in the Serba Dinamik Holdings Bhd criminal proceedings in 2022.[4] In December 2021, Tan Sri Idrus Harun, the AG at the time, consented for the Securities Commission Malaysia to prosecute Serba Dinamik and four top executives for allegedly issuing a false statement to Bursa Malaysia, and then

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1 Rozana Latif, 2018, "Exclusive: Evidence that Malaysia's Najib received 1MDB funds was ignored, probe panellists say", Reuters, https://www.reuters.com/article/cnews-us-malaysia-politics-scandal-exclu-idCAKCN1IG0GL-OCATP (20 February 2023).

2 (n.a), 2016, Separate Powers Of Attorney General and Public Prosecutor To Restore Trust In Malaysian Judiciary, Transparency International 2023, https://www.transparency.org/en/press/separate-powers-of-attorney-general-and-public-prosecutor-to-restore-trust (20 February 2023).

3 Dato' Akhbar Satar, Dr. KM Loi, "Ti-M Wants MACC To Be Independent And Have Prosecutorial Powers", Transparency International Malaysia, Press Release, (n.d), https://transparency.org.my/pages/news-and-events/press-releases/ti-m-wants-macc-to-be-independent-and-have-prosecutorial-powers (20 February 2023).

4 Securities Commission Malaysia, (n.d), Updates On Criminal Prosecution In 2022, https://www.sc.com.my/regulation/enforcement/actions/criminal-prosecution/updates-on-criminal-prosecution-in-2022#:~:text=On%2013%20May%202022%2C%20the,in%20the%20KL%20Sessions%20Court.&text=Mohd%20Karim%20was%20charged%20in,to%20Bursa%20Malaysia%20Securities%20Berhad. (20 Februrary 2023).

switched his consent to a compound in March 2022, following a letter of representation from the accused.[5] Although the accused parties paid the compound totalling RM16 million after some delays, they were given a discharge and acquittal. However, even though the AG had written a three-page statement, the statement did not elaborate on the acquittal.[6]

The AG's decision to compound Serba Dinamik in the face of multiple non-compliances has raised more questions than answers and has been a subject of contention by both industry specialists and laypeople. Furthermore, such a decision derogates the spirit of transparency and the integrity of the capital market's governance and regulatory framework.[7] Therefore, this article tries to describe the legal course of action(s) in pursuing remedies available under the law, among others, to call on the AG to provide a thorough justification for his decisions, as well as any other options that may present themselves.

TO WHAT EXTENT IS THE DISCRETION OF THE AG BEYOND QUESTION?

In the early formative years of Malaysia, the position of the AG has been controversial, claimed to be smeared and influenced by politics. In the case of *Lim Kit Siang v U.E.M,*[8] Justice VC George mentioned that the AG is a civil servant appointed by the YDPA on the advice of the Prime Minister. The AG is not answerable to anyone, including the Prime Minister, the Parliament, or the public. He is also not accountable to any Ministers or Ministries. In short, the appointment of the AG has been challenged by the same authority or individual who

5 Izzul Ikram, 2022, "Serba Dinamik: MUDA claims AG's reasons trigger more questions than answers", The Edge Malaysia, https://theedgemalaysia.com/article/serba-dinamik-muda-claims-ags-reasons-trigger-more-questions-answers (20 February 2023).

6 Attorney General, Press Release, 13 May 2022, Attorney General's Chambers, Malaysia (AGC), https://www.agc.gov.my/agcportal/common//uploads/publication/487/2022_05_13_AGC%20PRESS%20RELEASE_13May2022%20BI.pdf (20 February 2023).

7 Mohamad Ezri Abdul Wahab, Press Release, 6 May 2022, "Mere Issuance of Compounds towards Serba Dinamik Sets a Dangerous Precedent", Malaysian Bar, https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-mere-issuance-of-compounds-towards-serba-dinamik-sets-a-dangerous-precedent (20 February 2023).

8 [1988] 2 MLJ 12

appointed him because he is not liable to anyone, thus demonstrating his immunity from the law.

However, in the case of *Long bin Samat & Ors. v. Public Prosecutor,*[9] Tun Mohamed Suffian, former Lord President, interpreted the scope and wide discretionary powers of the AG under Article 145(3) of the Federal Constitution. In brief, the former Supreme Court judge stated that the Courts had no right to intervene in any decision made by the AG to prosecute and vice versa. In the following case of *Repco Holdings Bhd v Public Prosecutor*,[10] the former High Court judge Datuk Seri Gopal Sri Ram, echoed the interpretation in the previous case and added as follows:

> " ..... *The Federal Constitution has committed to the hands of the AG the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings*".

Furthermore, Tun Suffian in the case of *Johnson Tan Han Seng v Public Prosecutor*[11] stated that the provision of Article 145 of the Federal Constitution is not subjected to Article 8 which guarantees equality before the law and freedom from discrimination by any public authority. The former Lord President interpreted the language set out in Article 145 to be very wide. His Lordship defined the word "discretion" as the liberty to decide accordingly by considering that the intention of the makers of the Federal Constitution is for Article 145 to not be read with Article 8.

The question of whether the discretion of an AG is beyond question is simply incorrect. Quoting Raja Azlan Shah in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd* [12],

> *"Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise, there is dictatorship ... In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the court to intervene. The courts are the only defence of the liberty of the subject against departmental aggression."*

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9 (1974) 2 MLJ 152
10 (1997) 3 MLJ 681
11 [1977] 2 MLJ 66
12 [1979] 1 MLJ 135, FC at 148,

Although His Lordship referred to the powers of the State Authority in land decision making in that case, it is made applicable to the discretion exercised by the high constitutional office such as the AG himself where Raja Azlan Shah emphasised the nonsensical term of absolute discretion; more popularly known as a dictatorship. The power given to the AG by the Federal Constitution to institute any proceedings for an offence is "exercisable at his discretion". This power is not absolute. The trust given by the people must be exercised in good faith, in a neutral, detached manner, following the existing law and with the public interest in mind. Words such as "absolute" and "unfettered" to describe the power of a constitutional agency are old-fashioned and must be discouraged.[13]

The judgement by Raja Azlan Shah became a precedent in developing the courage to question the power of the AG and was further echoed in the case of *Dato' Pahlawan Ramli bin Yusuff v. Tan Sri Abdul Gani bin Patail & Ors.*[14] In this case, the judgement by Judicial Commissioner Vazeer Alam Mydin, as he then was, emphasised that absolute immunity for the Public Prosecutor who is a public officer, has no place in a progressive democratic society and is contrary to the rule of law. He further added that the law is central to the legal system, hence no one is above the law.

Tun Salleh Abas in *Public Prosecutor v Zainuddin & Anor.*[15] stated that the Constitution gave the AG "an exclusive power respecting direction and control over criminal matters" and "his decision is not open to any judicial review". The AG's powers over prosecution are prescribed under section 376 of the Criminal Procedure Code and the Article 145 of the Federal Constitution:

Public Prosecutor

13 Summary judgement of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lembah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135 by Suffian LP, Raja Azlan Shah AG CJ (Malaya), Chang Min Tat FJ, Federal Court, Kuala Lumpur, 12 September and 21 October 1978, "His Royal Highness: A Tribute, Judgement of Sultan Azlan Shah", https://www.sultanazlanshah.com/pdf/Judments%20PDF/Pengarah-Tanah-Galian.pdf (21 February 2023).

14 [2015] 7 MLJ 763

15 [1986] 2 MLJ 100

> *376. (1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.*
>
> *145. Attorney General*
>
> *(3) the Attorney-General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.*

On 31st December 2019, former director of the Asian International Arbitration Centre (AIAC), Datuk Prof Dr N. Sundra Rajoo ("Sundra Rajoo") succeeded in his judicial review[16] application against the decision of the Attorney General's Chambers ("AGC") to charge him with three counts of criminal breach of trust involving over RM1 million belonging to AIAC. Previously, the High Court dismissed the leave application on finding that the Appellant had not raised a prima facie arguable case for judicial review and that the leave application was frivolous and vexatious mainly because it sought to review the AG's 'unfettered' prosecutorial discretion under Article 145(3) of the Federal Constitution. The High Court ruled that there was no material to show the AG had abused his prosecutorial power or that the decision to charge the Appellant contravened any constitutional protection or rights. Yang Arif Dato' Seri Mariana Yahya held that the AG's discretionary power under Article 145 (3) of the Federal Constitution to institute, conduct or discontinue any proceedings for a criminal offence is subject to judicial review. It is trite that the Attorney General's discretion under Article 145(3) of the Federal Constitution, to "institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial," is unfettered and is thereby not amenable to judicial review.[17]

WHAT DOES THE ATTORNEY GENERAL ENTAIL?

Despite all the discretion that an AG holds, it is to be noted that in addition to his constitutionally mandated duties, the AG is the defender

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16 [2020] 3 MLJ 788

17 Joshua Wu Kai-Ming, "Commentary on Sundra Rajoo's Judicial Review Application", 1 January 2020, https://joshuawu.my/commentary-on-sundra-rajoos-judicial-review-application/ (9 December 2023)

of the public interest, a right granted to him by common law and made applicable by Article 160 of the constitution. Written law, common law, and custom or usage with the force of law in the force federation are all included by Article 160[18] insofar as they are in the operation of the federation or any portion thereof. This idea makes a distinction between issues that may have legal repercussions and those that do not. In other words, the AG's discretion cannot be completely unrestrained by the law; if it is improperly employed, the courts must intervene.[19]

Article 2.1 of the International Association of Prosecutor's "Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors" reads:

> "*The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference*". [20]

Article 3(b) states that:

> "*Prosecutors shall perform their duties without fear, favour, or prejudice. In particular, they shall remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest*".[21]

Considering Article 145(3) of the Federal Constitution, the AG is deemed to have wide and unfettered discretion and powers in both civil and criminal proceedings. In the case of ***Nadarajah v PP [2000],***[22] the Court held that the power to institute proceedings extends to a choice of forum. The AG has the discretion to institute proceedings in any court that has jurisdiction to hear it, be it a higher or a lower court. This decision further advocates the discretionary power of the AG.

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18 Article 160 Federal Constitution of Malaysia 1957

19 Prof. Dr. Shad Saleem Faruqi, 2005, "Constitutional Interpretation In A Globalised World", Malaysian Bar, https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/constitutional-interpretation-in-a-globalised-world (22 February 2023).

20 Lim Wei Jiet, (n.d), "Australasia / AG: Independent Guardian of Public Interest, Not Government Puppet", Commonwealth Lawyers Association, https://www.commonwealthlawyers.com/australasia/ag-independent-guardian-of-public-interest-not-government-puppet/#:~:text=It%20is%20an%20established%20constitutional,particular%20facts%20of%20a%20case (21 February 2023).

21 Ibid

22 4 MLJ 373

In *Chin Chee Kow v Peguam Negara Malaysia,*[23] the court is compelled not to muddle the AG'S decision, but the Court's role is very much supervisory and should be decided based on whether there has been a lawful exercise of the power provided to the AG under the statute. If appropriate considerations have been taken in arriving at a decision made by the AG, then the Court should refrain from interfering with the discretion exercised. It is undeniable that both the Serba Dinamik and 1MDB cases involved the exercise of power by a minister in the exercise of administrative functions rather than his constitutional powers.

Given that various definitions support the Public Prosecutor is also the AG under section 3 of the Interpretations Act 1948 and 1967 and section 376(1) of the Criminal Procedure Code, therefore, following the decision by the Court in 2015,[24] the Federal Constitution's (FC) grant of total immunity and discretionary powers to the AG is not applicable. Further, In the Raja Azlan Shah ruling, His Lordship provides that any legal power must have legal boundaries and that it can be construed by court intervention despite the lack of express mention of the limitation of the AG's power in the Federal Constitution. However, it is crucial to note that the particular line of action to choose in contesting the authority of the AG has not been explicitly indicated in these case laws.

Following the 2015 decision, in general, it provides the locus for the parties who are affected by the decision of the Attorney General to seek legal remedy by challenging the decision in court commonly being done by way of Judicial Review at the High Court under Order 53 of the Rules of Court 2012.

SUGGESTIONS

To put it simply, the Attorney General's discretion is not limited. It cannot be exercised for an improper purpose and unreasonably or based on an irrelevant or wrong consideration. If it is so exercised, then it could be subject to challenge through the courts. Chief Justice Tengku Maimun Tuan Mat, who presided over a seven-member Federal Court

23 [2019] MLJU 1453

24 *Dato' Pahlawan Ramli bin Yusuff v. Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763

bench noted that in the right situations, the Attorney General's prosecutorial authority might be subject to judicial review.[25] Following that, in 2016, the former AG, Tan Sri Abdul Gani Patail challenged anyone unhappy with his decision to the limits of his powers to pursue the matter for the Federal Court to determine. However, for this to work, he must give his decision for the court to evaluate the legal propriety of his decision properly. Thus, there is no such thing as his power is not up for questioning, especially after causing a public outcry. It is imminent for the AG to explain his decision or else it could be assumed that there was no good reason. If all prima facie reasons point towards one course of action and the minister takes another without giving a reason, the court may infer he has no good reason for the decision and is using his discretion for an improper purpose.

A suggestion that was given by local media shows great potential where the government should adopt an agreement with all government officials including the high constitutional offices to be extended to matters that would likely cause public outcry.[26] It requires each party to adopt or maintain "measures to promote transparency in the behaviour of public officials in the exercise of public functions" as one implemented in the Trans-Pacific Partnership (TPP) agreement concerning international trade and investment matters. Why not start a similar agreement to promote government accountability and transparency?

CONCLUSION

In conclusion, the AG should be made accountable to Parliament rather than the Executive branch of government. Since the AG is a public

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25 (n.a), 2021, "AG's powers not absolute, can be judicially reviewed, says Federal Court", FMT Media Sdn. Bhd.,https://www.freemalaysiatoday.com/category/nation/2021/04/30/ags-powers-not-absolute-can-be-judicially-reviewed-says-federal-court/ (22 February 2023).

26 Official Portal Ministry of Economy, (n.d), Mid-Term Review of the Eleventh Malaysia Plan, Chapter 10: "Reforming Governance towards Greater Transparency and Enhancing Efficiency of Public Service", p19, https://www.epu.gov.my/sites/default/files/2020-08/14.%20Chapter%2010%20Reforming%20Governance%20towards%20Greater%20Transparency%20and%20Enhancing%20Efficiency%20of%20Public%20Service.pdf (23 February 2023).

servant, any decision he makes must be seen to be independent, transparent, impartial, and fair. His role should be apolitical, and no one should be able to question his decisions when they are made in the best interests of the nation provided that a reasonable explanation is given. To be fair, with many political affairs going on, public trust in government officials is slowly fading. Thus, transparency coming from one person holding such power in an office would have restored the public's confidence and faith in the government. Regardless of who's sitting on that chair, power should never be accumulated by a single person or body of government as this has always been the greatest threat to liberty and the life of a nation for a very long time.

SWOT ANALYSIS ON CHILD SEXUAL ABUSE FRAMEWORK UNDER MALAYSIA'S SEXUAL OFFENCES AGAINST CHILDREN ACT 2007

Mahmud Abdul Jumaat*

ABSTRACT

The Malaysian Sexual Offences Against Children Act 2017 provides an opportunity to strengthen the protection of children from sexual abuse and ensure that perpetrators are held accountable for their actions. The Act establishes a legal framework for addressing sexual offences against children and provides for the prosecution of offenders, as well as the protection and support of child victims. Despite the legislative novelty, this paper identifies significant weaknesses in the Act that need to be addressed to ensure that it is effective in protecting children and ensuring perpetrators' accountability. Using a SWOT analysis technique, this paper provides insight into the strengths and weaknesses of Act 792. The result is expected to benefit lawyers, academia, legislature, and civil society on differential perspectives in interaction with the Act.

Keywords: child sexual abuse, SWOT Analysis, Malaysia

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INTRODUCTION

After several clamours for specialised law to further protect children in Malaysia, the Sexual Offences against Children Act 2017 (Act 792) came into force on July 10, 2017. As with any legislation, it is subject to open criticism pertaining to its structural framework and effectiveness in achieving its purpose. This criticism is very much expected given the fact that Act 792 is quite recent among other child-related legislation in Malaysia. There are efforts to amend the law which has led to several forums to discuss the areas which require improvement.[27] This paper is significant due to the fact that the Act i.e. SOACA 2017 has not gone through any amendment since coming into force. Some of the proposed amendments include procedure for child witness, "badgering" children in court and payment of compensation to the victim. The amendments is also to cover new offences such as livestreaming of sex and online sextortion.[28]

The criticisms of SOACA 2017 are credence to the significance of the legislation in its protection of children against sexual crimes. This also gives room for further development in the ecosystem and allows Act 792 to sufficiently progress into a fully developed legislation. Hence, the intention of this paper is to provide an overview and close insight into what Act 792 is all about by dissecting its provisions using a SWOT technique.

METHODOLOGY

This article adopts the SWOT analysis technique. The acronym SWOT stands for Strengths, Weaknesses, Opportunities, and Threats. Although primarily a business analysis tool which has been applied in research to identify the strengths, weaknesses, opportunities and threats of proposed business solutions, it has been applied to evaluate legal

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27 Cooray, Manique, Siti Zaharah Jamaluddin, and Zulazhar Tahir. "Violence and Sexual Offences against Children in Malaysia: Searching for the Right Approach." *International Journal of Business and Society* 21, no. S1 (2020): 152-164.

28 Shivani, Supramani. "Govt To Propose Legislative Reforms On Sexual Offences Against Children And Child Witnesses." The Rakyat Post, 2023. https://www.therakyatpost.com/news/2023/03/24/govt-to-propose-legislative-reforms-on-sexual-offences-against-children-and-child-witnesses/. (Date accessed: 2023-03-26)

issues, the impact of legislation and legal arguments.[29] As a strategic planning tool, SWOT is used in the context of this article to make projections for potential amendments to SOACA 2017 based on the current practicalities and challenges in child sexual abuse legislation.

This methodology involves identifying internal factors (Strengths and Weaknesses) that are within the control of the organization or individual, as well as external factors (Opportunities and Threats) that are outside of their control. The purpose of conducting a SWOT analysis is to gain a comprehensive understanding of the current situation as well as to identify areas of improvement and potential risks. This information can then be used to develop legislative agenda and strategies for civil society towards making informed decisions.[30]

To conduct this SWOT analysis, we initiated a brainstorming session and list out the relevant internal and external factors affecting the legal and procedural framework for child sexual abuse in Malaysia. Then, we categorized the factors into the appropriate SWOT category and evaluate their importance and impact. Finally, the analysis is used to create a plan of action to address any identified weaknesses and threats while taking advantage of its opportunities and strengths.[31]

The significance of this method is the potential of providing law researchers and legal professionals with a better understanding of the internal and external factors that may affect SOACA 2017. Members of parliament can also be informed on the development of legal strategies and the identification of potential areas of improvement to the Act.

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29 Damanik, Eunike Sabrina. "Pelaksanaan Penyuluhan Dalam Mencegah Tindak Pidana Kekerasan Seksual Terhadap Anak." *Indonesian Journal of Police Studies* 4, no. 4 (2020).

30 Rachid, G., and M. El Fadel. "Comparative SWOT analysis of strategic environmental assessment systems in the Middle East and North Africa region." *Journal of environmental management* 125 (2013): 85-93.

31 Pennings, Guido. "A SWOT analysis of unregulated sperm donation." *Reproductive BioMedicine Online* 46, no. 1 (2023): 203-209.

INTERNAL FACTORS	
STRENGTHS • Applicability • Special legislation • New offences including child pornography, sexual grooming, and sexual assault • Child witness and corroboration rule	WEAKNESSES • Limited scope of application • Ambiguity in penetrative assault • Position of sweetheart defence • Financial remedies • Limited implementation resources • Low public awareness and education • Rules on implementation of SOACA
EXTERNAL FACTORS	
OPPORTUNITIES • Can provide legal protection for children • Stakeholders cooperation • Increased public awareness • Enhance support service for victim	THREATS • Limited supportive resources • Lack of public awareness • Cultural and social norms • Evolving technology

Table I: SWOT Analysis of SOACA 2017

STRENGTHS OF SOACA 2017

Applicability

To deter any potential offender and prevent a confirmed offender, the Legislature empowers Act 792 in relation to the extension of its applicability by virtue of Section 3. The provision allows the Act to prevent any offender from evading the claws of our law by playing around with the issue of technicality to escape prosecution on the reason that the offence was committed outside the territorial boundary of Malaysia and therefore Act 792 is toothless against the offender. Introducing the extra-territorial application feature enables Act 792 to start strong and truly reflect the comprehensive nature of Act 792.

The extradition and extraterritoriality principles are interconnected. It might be argued that the inclusion of this specific section was done so that persons who committed the specified offences outside of Malaysia could be extradited and tried by Malaysian courts. However, under the context of public international law, the application of the extra-territorial application section is always constrained by the double criminality concept. This aspect is a strong one for Act 792 since it clearly shows that the Parliament did not want any criminal to be able to use legal technicalities to evade the law. Section 3 of Act 792 sends a clear and strong message that reads prosecution will come to those who commit any offence stipulated under Act 792 or any offence listed in the Schedule of Act 792 wherever it is committed, whether intra-territorial or extra-territorial.

Special legislation

Before 2017, the principal criminal law that governs the majority of the crimes in Malaysia is the Penal Code. The Penal Code governs various types of crimes including sexual crimes against children. In addition to Act 574, the protection of children against sexual crimes is also afforded under the Child Act 2001 ("Act 611") and the Domestic Violence Act 1994 ("Act 521"). Nevertheless, prior to Act 792, these aforementioned statutes are either unique in their applications as the respective name of the legislation suggests or the legislation is quite general and viewed as insufficient when it comes to dealing with sexual crimes against children. Noticing that there was a gaping lacuna concerning laws for the protection of children against sexual crime, the Parliament made a very commendable move by expediting all the necessary legislative processes from the tabling of the Act 792 bill in the Parliament until its passing and coming into force, where all these processes had been accomplished within the same year of 2017. [32] This action signifies that sexual crimes against children had been caught under the radar of the Legislature and it needs to be combated expeditiously, hence the swift action.

The nature of Act 792 is the same as Act 611 and Act 521 in the sense that these are special legislations enacted to govern and deal with a specific area of law. Nevertheless, when it comes to the area of law

[32] Norazla Abdul Wahab, Mohd Farok Mat Nor: Sexual Offences Against Children Act 2017: An Improvement of the Legislation on Sexual Offences Against Children in Malaysia. Journal of Muwafaqaat. Vol. 1, No. 1, 2018, pp.37-55. Faculty of Syariah and Law, Kolej Universiti Islam Antarabangsa Selangor.

concerning sexual offences against children, Act 792 takes precedence and priority as the principal legislation to be referred to by all parties. This special nature of Act 792 also had been affirmed by Judicial Commissioner in *Chan Kok Poh v Public Prosecutor* [33] based on the maxim of *generalia specialibus non derogant.*

New offences

Prior to the enactment of Act 792, many acts were not clearly governed and criminalized under the Malaysian criminal justice system and thus creating a gap in the old laws. Nevertheless, the gaps had been rectified by the enactment of Act 792. Act 792 had taken into account the dynamic nature of our current technological advances that will benefit child sexual offenders by employing new technology into their *modus operandi* and to combat it, Act 792 introduces new types of sexual offences namely offences relating to child pornography, offences relating to sexual grooming of a child and sexual assault against children.

Child Pornography

There are specific clauses under Act 792 that penalizes each act that makes up the child pornography offence. The anti-child pornography provisions are stipulated under Part II of Act 792 and further divided into a total of seven aspects, each of which deals with a different aspect of child pornography. The fact that Part II is comprehensive in nature is one of the Act's merits. It was structured this way to guarantee that any *modus operandi* used by the offender in committing the offence shall be caught within the ambit of the definition given in Part II and to halt any attempt by the offender to escape prosecution by manoeuvring the issue of technicalities. The seven provisions of Act 792 offer extensive and comprehensive protection to children as Part II criminalizes all aspects including the economics that makes up the child pornography system from the production aspects to the distribution end of the system. This encompassing nature of Part II leaves fewer loopholes for the offenders to manipulate the law. The word structure used in Part II makes it easier for the court to interpret the law. Overall, the way provisions under Part II of Act 792 are structured is flexible to truly appreciate and reflect the dynamic

33 [2022] 9 MLJ 755.

challenges of the current era where sexual crimes have become more sophisticated.[34]

Sexual Grooming

Furthermore, what makes Act 792 a very effective legislation is apart from child pornography offences, Act 792 introduced another new line of offences which are the offences relating to sexual grooming. This inclusion of new offences indicates that the Malaysian Legislature truly keeps up with the current development of crimes in Malaysia as these sexual grooming offences provide avenues for the prosecution to prosecute the offenders. In this respect, Act 792 sufficiently closes the gap in law because previously there was no clear provision defined concerning sexual grooming under the Penal Code and only section 377E may be used for prosecution. Unlike Act 792, for sexual grooming, the Act provides a total of three sections under Part III which are sections 11, 12, and 13 that cover each aspect of child sexual grooming.

The offence of child grooming under Act 792 is divided into three stages according to each provision. Section 11 provides the general definition of what constitutes child grooming. By virtue of section 11, any communication made in a sexual manner done by a person or that person encourages a child to communicate sexually shall be caught within the ambit of the section. The punishment in the form of three years imprisonment carried by section 11 is the lightest compared to the other two sections as section 11 involves only sexual communication without any action made beyond communication itself. The way "communication" is structured in this section truly reflects the necessity of a comprehensive interpretation of what kind of communication amounts to the sexual grooming of a child. This element of flexibility attached to the definition of "communication" allows law enforcement and prosecution to keep up with the ever-changing nature of current communication technologies.

The next stage of child grooming is governed under section 12 of Act 792. This particular section also deals with communication. Nevertheless, in order for a communication to be caught under section 12, the said communication must be done with the intention to commit

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[34] Abu Bakar Munir, Siti Hajar Mohd Yasin, Siti Sarah Abu Bakar, Firdaus Muhammad-Sukki. The Sexual Offences Against Children Act 2017: Flaws In The Law [2018] 5 MLJ cxx. Malayan Law Journal Articles.

any offence under section 5, 6, 7, 8, 14 or 15 of Act 792. Additionally, the intention to commit the specific offences is not limited to the aforementioned sections, but it extends to the offences contained in the Schedule of Act 792. This section also applies to a person who communicates but not the person who committed the offence, that person can still be charged under section 12 on the reason that the person facilitates the commission of the offence. The punishment provided by section 12 is five years imprisonment maximum together with mandatory whipping. Section 12 also has a special standing in Act 792 where mere sexual communication done to a child is sufficient even without any offences stipulated under Section 12 of the Schedule having been committed or otherwise. This scenario is clearly explained in Illustration (a) of Section 12. Furthermore, by making Section 12 detached from any commission of the listed offences also equips the prosecution with a swift legal tool to prosecute an offender even though the actual offence as intended is not materialised. Likewise, the same attribute can be found in section 13 where there is no pre-condition that the offences listed thereunder or in the Schedule be committed beforehand. To invoke section 13, it is sufficient for the prosecution to prove that the offender has in fact travelled to meet or meets the child victim with the intention to commit the offences stipulated thereunder. The offence of meeting following child grooming attracts the highest punishment of imprisonment among all provisions under Part III of Act 792 which is ten years maximum.

Undoubtedly, by virtue of these provisions on sexual grooming, Act 792 has gone the extra mile by extending its protection to children by stopping the crime since its infancy and not letting it develop further. Act 792 truly reflects the spirit of "prevention is better than cure".

Sexual Assaults

As a special law that complements the Penal Code, Act 792 contains offences of sexual assault committed against children. These provisions were stipulated under Part IV of Act 792 and further divided into two categories namely sections 14 and 15 that deal with both physical and non-physical sexual assault respectively. Prior to the enactment of Act 792, offences that constitute sexual assault are also provided under Child Act 2001,[35] and Domestic Violence Act 1994.

[35] Section 31 of Child Act 2001.

Nevertheless, what set Act 792 apart from all three legislations is that both sections 14 and 15 are comprehensive and unconditional upon specific circumstances stipulated under the Child Act and the Domestic Violence Act. To clarify further, it is better to briefly compare all three laws in this respect. For an offender to be caught under the Child Act, the child victim must be under the care of the offender. Further, for the sexual assault to be qualified under the Domestic Violence Act, the child victim must be caught within the definition of a "child" under that Act which is limited to a child who is below the age of eighteen years living as a member of the offender's family or the family of the offender's spouse or former spouse. [36] Nonetheless, in the event that the child victim neither fulfills the condition set under the Child Act nor the Domestic Violence Act, that is when sections 14 and 15 come in as it is generic in nature and encompasses all scenarios concerning the child victim in the scope of sexual assault.

It is intriguing to examine the structure of section 14 as it includes conducts where a person who somehow for sexual purposes makes a child touch the child's own body without any contact on the body of that person and that acts amount to physical sexual assault as well. Further, section 15 laid down a total of eight very comprehensive acts that constitute a non-physical sexual assault on a child. Of all the offences stipulated thereunder, it is to be noted that even a person repeatedly or constantly follows or watches, or contacts a child by any means if done so for sexual purposes shall amount to non-physical sexual assault as well. Currently, these types of activities might be known as "stalking" and this provision opens avenues for the prosecution to prosecute the stalker. Be that as it may, it is clearly stated under section 14 that Act 792 does not cover the offence of rape as it is still under the Penal Code.

The nature of the relationship

Furthermore, it is noteworthy to discuss that Act 792 treats a person who commits any offence under the Act differently should that person is in a relationship of trust with the child victim as provided under section 16(2). If that person is proven to fall in any category under section 16(2), Act 792 shall add extra punishments in addition to the punishment to which he is liable for. The additional punishments are imprisonment for a term not exceeding five years and mandatory

[36] Section 2 of Domestic Violence Act 1994.

whipping of not less than two strokes. The insertion of this unique provision signifies that the Malaysian justice system abhors sexual offences especially committed by a person who has the care, supervision, or authority over the child victim, and that person instead of upholding the trust of people have misused it to take advantage on the child that he/she is supposed to look after.

The position of a child witness and corroboration rule

A child is presumed to be a competent witness for any offence under Act 792 or any offence stated in the Schedule to Act 792, according to Section 17 of Act 792. The application of this provision is specifically for a child who is a victim of the offences listed under Act 792; it is not intended to bolster the position of every child witness. Nonetheless, the court must be convinced of the child witness' competency throughout the trial in order for this presumption to be valid. Until Act 792 was passed, the evidence regime principally depended on the Evidence Act ("EA"), particularly sections 118 and 133A in the case of a minor witness. However, currently, on top of the EA and Act 792, there is another applicable law on child evidence which is the Evidence of Child Witness Act 2007 ("EOCWA") which governs the procedural aspect of child witnesses rather than dealing with the substantive aspect of it. The objective of the EOCWA is to make court proceeding less intimidating to the child witness. [37] Under section 17, the only way for an accused to remove the child witness from the prosecution's witness list is to prove to the satisfaction of the court that the child witness is not a credible witness by displaying to the court that the child victim is giving a wavering testimony. Nevertheless, ultimately it is up to the trial court to accept the testimony and if the accused is unsuccessful, the presumption persists and the court shall continue to allow the child victim's evidence admissible.[38]

When discussing about evidence even from the perspective of Act 792, one cannot tread far without touching the issue of corroboration. Under Act 792, section 18 states that the court may

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37 Asmida Ahmad, Mohd. Nasran Mohamad, Mohd. Al Adib Samuri. *"Syariah and Civil Legislation in Malaysia on Child Testimony in Sexual Offences"*. Asian Journal of Law and Governance. e-ISSN: 2710-5849 | Vol. 3, No. 1, 65-75, 2021; Aminuddin Mustaffa & Kamaliah Salleh. *"Child Evidence In Criminal Proceedings In Malaysian Courts: A Study On Post Ratification Of The Convention On The Rights Of The Child"*. [2010] 6 CLJ(A) i.

38 Razali bin Silah v Public Prosecutor [2019] 12 MLJ 205.

accept the evidence of a child witness even if it is uncorroborated. This section might cause some debate at some time, but in actuality, it might be viewed as strengthening the credibility of a young witness. This nature of the evidence is greatly beneficial to the prosecution especially when the offences were committed without any other eyewitness other than the child victim and the accused.[39] Section 18 has been contested in court on a variety of grounds, for instance in the case of *Chan Kok Poh v Public Prosecutor* [40] where section 18 was argued to be in *ultra vires* of the Federal Constitution ("FC") and clashes with section 133A of the EA. In summary, the High Court decided that the principle of "*generalia specialibus non derogant*" applies and in consequence, section 18 of Act 792, a special law prevails over general legislation namely the EA. In addition, section 18 of Act 792 can be viewed as a cure to the rules set under section 133A of the EA on the ground of discrimination towards child witness as they have been underplayed under section 133A of the EA where in contrast, the capability of a child to become a witness is being supported by many scientific studies.[41]

WEAKNESSES

There are several weaknesses of SOACA 2017 which have become a challenge for the operationalisation of the law. Among the weaknesses identified include ambiguities regarding penetrative sexual assault, aggravated assault, "sweetheart" defence from the accused, financial remedies and victim compensation, the limited scope of the Act, and limited operational resources.

Ambiguity regarding penetrative sexual assault

Under Act 792, the provision regarding physical sexual assault does not clearly state anywhere under section 14(a) until (d) that it includes any act that involves the introduction of any object into the vagina or anus of the child like it is stipulated under section 377CA of the Malaysian Penal Code. Though the wording of section 14(d) includes

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39 Mageswary Siva Subramaniam & Hashvini Rekha Pachappan. *Corroboration Rules In Malaysia: A Brief Review On The Impact Of The Sexual Offences Against Children Act.* [2019] 1 LNS(A) cxviii.

40 [2022] 9 MLJ 755.

41 Abu Bakar Munir, Siti Hajar Mohd Yasin, Siti Hajar Mohd Yasin, Khairul Anwar Hairudin and Saifullah Qamar. *Child Evidence in the Sexual Offences Against Children Act 2017: So Close, Yet So Far*. Malayan Law Journal Articles [2018] 6 MLJ xxxii.

any other acts that involve physical contact excluding sexual intercourse seems comprehensive but it may lead to complexity in the interpretation of the provision. It is submitted that the Legislature must reconsider the inclusion of acts similar to section 377CA of the Malaysian Penal Code but modified to suit the context of the offence against a child victim since section 377CA is a generic provision irrespective of the age of the victim with more stringent minimum punishments.

The position of 'sweetheart' defence

A 'sweetheart defence' is a type of defence used by an accused in circumstances where the sexual activity is purely consensual. Nevertheless, there is no defence given to the accused on the ground that the sexual act committed against a child is consensual under Act 792. This current standing of Act 792 on this matter is branded as unfair according to some rights groups in Malaysia on the reason that both the offender and the child engaged in the sexual activity willingly and with consent but were still caught under Act 792.[42] It is argued that the lack of means for the accused to defend himself on the basis of consent may be seen as contributing to the lack of sexual health awareness among young people as they may be afraid of facing legal repercussions if they consult a doctor, which may increase the risk of the spread of STDs, unintended pregnancies, and unsafe abortions. Since Malaysia is predominantly Muslim population, this kind of defence needs to be further researched for its applicability and suitability in the Malaysian context.

Financial Remedies

Act 792 does not provide financial remedies to the child victims or their families directly because there is no specific provision thereunder to empower the court to give the order. In order for the child victim (the one that suffers the most both physically and mentally) to benefit from the criminal justice system, it is strongly argued that the inclusion of financial remedies provisions in Act 792 is essential as one should view

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42 https://www.malaymail.com/news/malaysia/2017/03/30/child-advocates-want-sweetheart-defence-in-new-sexual-protection-law/1345877; https://www.malaymail.com/news/malaysia/2017/09/12/doctor-calls-for-sweetheart-defence-clause-in-child-sex-law/1463075; https://www.thestar.com.my/news/nation/2017/03/30/ngos-want-sweetheart-defence-included-in-bill & https://www.malaysiakini.com/letters/549854.

the child victim as a beneficiary in the criminal justice system, particularly in the context of Act 792. It is generally noted as well that the recovery process of a child victim is cost-incurring.

Other weaknesses that have been identified are;

Limited scope and resources within of the Act

The Act only covers sexual offences against children and does not address other forms of violence and abuse, such as physical abuse, emotional abuse, and neglect. This limits the effectiveness of the Act in protecting children from all forms of harm. The implementation of the Act requires a range of resources that involves various authorities, including trained personnel, forensic facilities, and support services for victims. However, there are concerns that these resources are limited and may not be sufficient to effectively implement the Act.[43]

Lack of roles for stakeholders

The Act has not provided roles for stakeholders besides the prosecution and judiciary. Other important stakeholders such as parents, school managers, and caregivers among others are supposed to be part of the implementation, prevention and protection of children from sexual abuse and crimes.[44] As a result, there is a lack of awareness and education among the general public. The law focuses more on the role of law enforcement officials, about the Act and the issues related to sexual offences against children. This can lead to a lack of reporting and prosecution of cases, as well as a lack of support for child victims.[45]

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43 Child Rights Coalition Malaysia (CRCM). (2020). Assessing the Implementation of the Sexual Offences Against Children Act 2017. Retrieved from https://www.unicef.org/malaysia/media/221/file/Assessing%20the%20Implementation%20of%20the%20Sexual%20Offences%20Against%20Children%20Act%202017.pdf

44 Adonteng-Kissi, Obed. "Cultural Responsiveness in Child Protection: Stakeholders and Parental Perceptions of Working Children and Culture-appropriate Assessment in Ghana." *The British Journal of Social Work* 53, no. 1 (2023): 118-138.

45 UNICEF Malaysia. (2019). Sexual Violence Against Children in Malaysia: Understanding the Issues and Ways Forward. Retrieved from https://www.unicef.org/malaysia/media/161/file/Sexual%20Violence%20Against%20Children%20in%20Malaysia%20-%20Understanding%20the%20Issues%20and%20Ways%20Forward.pdf

A cursory look at literature and legislation in other jurisdictions such as Australia and India shows that the public has a vital role to play in the protection of children against sexual abuse.[46]

Power to make rules

Legislation of a nature such as the SOACA 2017 often requires guidelines for ease of operations by stakeholders. In ensuring smooth implementation of any legislation, it is common for the Legislature to incorporate supplementary rules of regulations to the main statute. However, the Act has not provided any rules or regulations that further elaborate the provisions of Act 792. This matter is originated in the absence of any provision that empowers the Minister in charge of Act 792 to make rules or regulations attached to the Act itself. Nevertheless, despite no statutory regulations, the implementation mechanism of Act 792 are further elaborated by the Special Guideline in the Handling of Sexual Offences Against Children in Malaysia formulated by the Office of the Chief Registrar of the Federal Court of Malaysia. The scope of the guideline is reactionary to child protection as it focuses on handling cases i.e; prosecution and other law enforcement matters.

Overall, while Act 792 represents an important step towards protecting children from sexual abuse, there are significant weaknesses in the Act that needs to be addressed to ensure that it is effective in protecting children and holding perpetrators accountable.

OPPORTUNITIES

In a SWOT analysis, opportunities refer to external factors that have the potential to positively impact the organization or individual being analysed. SOACA 2017 provides an opportunity to protect children from sexual abuse and ensure that perpetrators are held accountable. The Act establishes a specialised legal framework for addressing sexual offences against children and provides for the prosecution of offenders, as well as the protection and support of child victims. These

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46 McCartan, K. F., Hazel Kemshall, and Joan Tabachnick. "The construction of community understandings of sexual violence: Rethinking public, practitioner and policy discourses." *Journal of Sexual Aggression* 21, no. 1 (2015): 100-116; Das, Aditi. "Institutional care and response to victims of child sexual abuse in India: The role of non-governmental organizations & public hospitals." *International Journal of Social Work and Human Services Practice* 5, no. 4 (2017): 181-196.

opportunities are external factors which can help to achieve the purpose presented by the Act including:

Strengthening legal protection for children

The law provides extensive legal protection for children from sexual abuse from pre-commission as well as post-commission of the offence and ensures that perpetrators can be held accountable for their actions. This can act as a deterrent to potential offenders and help to protect children from harm. There is an opportunity to extend these gains by amending the Act to cover new offences and improve the procedural processes for child witnesses

Enhancing support services for victims

The Act provide an opportunity to legislate on support services for child victims. At the moment, this is not provided anywhere in the Act. Several ranges of support services for child victims, including counselling, medical treatment, and rehabilitation are required at different stages of child sexual abuse incidents and prosecution. The amendment of legislation to incorporate these services can help to address the trauma and emotional impact of sexual abuse and support the recovery of child victims.

Establish a role for school managers and caregivers

Beyond section 16 which provides punishment for a person in a relationship of trust, there is no clear provision on what the person in trust should do to protect the child including but not limited to reporting. This is unfortunate despite the low reportage among school managers and high incidence involving persons in a trust relationship.[47] The amendment of the Act can be an opportunity to establish a clear role in the operation of the Act and increase public awareness on issues relating to sexual offences against children, including the importance of reporting such crimes and the legal framework in place to address them. This can help to create a culture of accountability and responsibility for protecting children from harm.

Encouraging cooperation among stakeholders

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47 Weatherley, Richard, AB Siti Hajar, O. Noralina, Mettilda John, Nooreen Preusser, and Madeleine Yong. "Evaluation of a school-based sexual abuse prevention curriculum in Malaysia." *Children and Youth Services Review* 34, no. 1 (2012): 119-125.

The Act needs to create a framework for cooperation among a range of stakeholders, including law enforcement officials, healthcare providers, and social workers, to ensure that child victims receive the support and protection they need. The Suspected Child Abuse and Neglect (SCAN) team for instance lack the prerequisite legal framework for handling sexual abuse cases.[48] This can help to improve the effectiveness of their response to sexual offences against children.

Overall, Act 792 provides an opportunity to strengthen the protection of children from sexual abuse and ensure that perpetrators are held accountable for their actions. However, effective implementation of the Act is essential to ensure that these opportunities are realized and that child victim receive the support and protection they need.

THREAT

In a SWOT analysis, threats refer to external factors that have the potential to negatively impact the organization or individual being analysed. Therefore, we analyse the "threat" element and external factors that may hinder the effectiveness of the act in achieving its objectives. Some possible examples of threats could include limited resources and awareness, legal loopholes, evolving technology, as well as cultural and social norms.

Lack of public awareness and limited resources

Due to the absence of a clear role for the stakeholders in the public, there is lack of public awareness. This is a threat to understanding the importance and implications of the Act. There is high focus on prosecutorial and law enforcement rather than prevention of child sexual abuse. This may result in low public support and limited engagement in reporting and preventing sexual offences against children.

Cultural and social norms

Deep-seated cultural and social norms may create barriers to the implementation of the act, such as the belief that sexual offences against children are a private matter or that victims should remain silent

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48 Ghani, Rimah Melati Ab, Azriman Rosman, and Nor Asiah Muhamad. "The Suspected Child Abuse and Neglect (SCAN) Programme in Malaysia: From Inception to Present." *Global Journal of Health Science* 11, no. 7 (2019): 148-148.

and thus complicating the efforts done by the authority to uproot this crime. Moreover, should the Legislature consider the inclusion of the "sweetheart defence" into Act 792, the sensitivity attached to this type of defence must be addressed very carefully as Malaysia is a multi-faith country and predominantly Muslim.

Evolving technology

The rapid evolution of technology and the internet may pose new and complex challenges for the act in terms of identifying, investigating and prosecuting offenders who use technology to commit sexual offences against children.

Inadequate coordination and cooperation among relevant agencies and stakeholders may result in gaps in the implementation and enforcement of the act, making it less effective in protecting children from sexual offences and ultimately may hamper the objective of Act 792.

CONCLUSION

From the foregoing, this article had identified several strengths and weaknesses of the SOACA 2017. Although it is a child focused legislation which seeks to protect children against sexual offences, the weaknesses identified show that the law placed more emphasis on law enforcement more than the prevention of the crimes. This is evident in the absence of roles for stakeholders such as parents, school managers and *madrasa* teachers. Other major weakness is the lack of regulations or rules on the operationalisation of SOACA 2017. Such rule creates some lacunae in the law-making powers of the parliament with respect to the operation of the Act. The guidelines formulated by the Federal Court is restricted to the member of the prosecution and judiciary who may be involved with child sexual abuse cases. Based on these and other challenges, we identified certain threats and opportunities which can be a guide for the amendment of the Act. This paper would be significant for parliamentarians, civil societies and legal practitioners who are involved with child rights and sexual offenses.

WHERE MALAYSIA STANDS IN THE HUMAN TRAFFICKING AND MIGRANT SMUGGLING ORDEAL

Arziah binti Mohamed Apandi*

ABSTRACT

The country's single piece of legislation to combat the heinous practise of trafficking in people and smuggling of migrants, namely, the Anti-trafficking in Persons and Smuggling of Migrants 2007 ("the Act"), is not completely tailored to prevent the demoralising misconduct. Although after its inception, the Act was amended in 2010, 2015 and 2022, Malaysia remains in the lower position as one of the countries with poor progress in obstructing the people trafficking and migrant smuggling conducts. The Top Glove case exposed the company's deplorable working conditions and poor hygiene living accommodation of its factory workers whilst the Sime Darby case brought embarrassment with below-par living conditions of its plantation workers all of whom are predominantly migrants. While these companies were internationally castigated, the local laws remain unsettled in many aspects, particularly on the definition of forced labour and whether there is trafficking in those case scenarios. Under the Act, forced labour is undefined making prosecution a difficult task. Many issues have arisen recently like the Indonesian maid issue and foreign worker inflow where Malaysia is keenly observed by the global economic players on whether we can tackle this problem of trafficking and smuggling of migrants. The US Government maintained Malaysia in its Tier 3 classification from 2018 until 2022 but has now classified Malaysia in the Tier 2 Watch List category in 2023. Considering the impact of COVID-19 pandemic, Malaysia was considered to have made some significant progress in its anti-trafficking policy. But, Malaysia still has not resolved its old problems especially in failing to sufficiently prosecute labour traffickers and failing to achieve a systematic implementation of standard procedures across the region to proactively identify victims during law enforcement raids. Fresh efforts by the new government saw that in early 2023, immigration officers were charged in court for alleged smuggling of migrant syndicates. But, is that enough? Surely if Malaysia fails to tackle this problem, foreign investors will shy away from this country thus worsening the economic condition that needs urgent revival after the COVID-19 pandemic. Malaysia must put a fast but hard push in its enforcement and preventative measures to

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stop the crimes of trafficking in people and smuggling of migrants. The beautiful façade of Malaysia must be reinstated so that people across the globe are attracted to us once again and not be put off by our lackadaisical attitude to eradicate these inhumane practices.

Keywords: Human Trafficking, Migrant Smuggling, Malaysia

INTRODUCTION

The United States (US) Government's special office to monitor and combat trafficking in persons published in 2022 a detailed report on Malaysia's efforts to stop trafficking in persons. The US Government's rating of Malaysia as a Tier-3 country reflects the country's lesser efforts in combatting human trafficking. The said report concluded that the Government of Malaysia did not meet (yet again) the standard requirements to satisfy the minimum standards in eliminating trafficking. Malaysia is observed not to perform well in putting obvious efforts despite the consideration of the impact of the COVID-19 pandemic. Despite its effort to implement the five-year National Action Plan in 2019 to eliminate forced labour by 2030, amending its Anti-trafficking in Persons and Smuggling of Migrants 2007 ("the Act") with the Employment Act 1955 to cover a broader scope of forced labour, convicting more traffickers, issuing more passes with increased mobility to victims rescued and put at the government centres, adding more translators and protection officers to assist victims in the arduous judicial process, all these government's actions do not yield satisfactory results to improve its Tier 3 status. It is now realised that by maintaining to consolidate both human trafficking offences with migrant smuggling crimes has resulted in disruption in its law enforcement and efforts to properly identify the real victims of trafficking or migrant smuggling and arrest the actual perpetrators of the two crimes. The knock-on effects of this conflation include the anti-trafficking investigations being greatly reduced. The investigation into the complaints against government officers as suspects of complicity in the trafficking crimes is almost non-existent. Whilst further action upon strong allegations of trafficking crimes is minimal no proper action is taken upon being informed of such trafficking complaints. The trafficking crimes that exist in the country's rubber, manufacturing and palm oil industries' labour forces are reported internationally but not in the local news. Malaysia's failure to solve these problems has led immoral employers to have the 'freedom' to sometimes act with impunity. With fewer victims identified, the government is unable to systematically implement holistic standard operating procedures (SOPs) across the nation to proactively identify victims during law enforcement raids or checks amongst vulnerable groups. Due to inconsistent identification efforts, the authorities continue to inappropriately penalize trafficking victims for immigration and "prostitution" violations. Poor inter-agency coordination and

insufficient victim protection service have discouraged foreign victims to remain in Malaysia to be involved in criminal proceedings as prosecution witnesses, thus continuing to erode Malaysia's efforts to succeed in its effort to curb trafficking in persons in the country.

DEFINITION OF TERMS

What is human trafficking?

The UN definition of human trafficking is given a wide meaning that blankets the acts of exploitation in the sex, entertainment and hospitality industries, and those as domestic workers and even those in forced marriages. Human trafficking broadly covers the practice where the victims are forced to work, usually in large plantations or manufacturing plants and big construction sites, with no or inadequate salaries where they live fearful of violence inflictions and they also often stay in inhumane conditions. Some victims are cheated, manipulated or coerced into having their body organs removed where they would end up dying. Child victims are often trafficked as forced labourers, child soldiers or young criminal offenders who commit crimes upon instructions from their criminal "employers".

References like forced labour, modern slavery, human trafficking or debt bondage are given where these references affect women, men and children all around the globe, be it far away in other parts of the world or within the four corners of our locality. These acts of human trafficking are often unseen through the naked eye because it is camouflaged, because we choose to be ignorant about them, or maybe simply because we do not recognize it. But, most of the time, it is because the victims themselves, out of fear of reprisal or of losing the little they have left to cling on, prefer to remain invisible from the public eye. These victims of trafficking do not know who to trust anymore. What is worse is that they do not even know their rights. Being unseen creates indifference and indifference creates the unseen. For us to come out of this tenacious vicious cycle, we have to face the reality. How can we make the victims visible to step afront to defend their rights?

What is trafficking in persons?

It refers to the recruitment, transportation, transfer, harbouring or receipt of persons which is done by force, coercion, fraud or some other form of deception for the purpose of exploitation [United Nations

Human Rights Office of the High Commissioner, OHCHR and trafficking in persons, 2023].

It is possible to identify a case or incident of human trafficking by establishing whether the three (3) key elements of the definition in Article 3 of the Trafficking Protocol (and from the national legal framework) are present. The three (3) elements in Article 3 of the Trafficking Protocol cover firstly "the action" of what is done with the victims. The actions would vary from the recruitment, harbouring, transfer, transportation, and receipt of the persons trafficked. The second element is the "means" or "methods" of the trafficking inflicted on the victims. The "means" cover threat or use of force, fraud, abuse of the position of vulnerability, deception, coercion, and the giving or receiving of payments or benefits to secure the consent of the person controlling the victim. The third element is the "purpose" or "reason" for the trafficking which covers from labour to sexual exploitation, slavery and organ removal.

Malaysia has now adopted a similar definition of trafficking in persons as Article 3 of the Trafficking Protocol in the Act vide its 2022 amendment (Act A1644). Section 2 of the Act defines "trafficking in persons" to be:

> "all actions of recruiting, conveying 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 exploitation, by the following means of threat or 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".

On the broader spectrum, the international human rights law acknowledges the acts of "trafficking in persons" to include debt bondage, slavery, servitude, child sexual exploitation, forced marriage and forced prostitution. This definition of "trafficking in persons" is based on the Protocol to Prevent, Suppress and Punish the Trafficking in Persons, especially women and children, supplementing the United

Nations (UN) Convention against Transnational Organized Crime ratified in the year 2000.

Modern slavery

The current definition of modern slavery means, for global estimation, to consist of two major components namely forced labour and forced marriage. The definition is derived from the International Labour Organization (ILO) Report on Global Estimates of Modern Slavery: Forced Labour and Forced Marriage in 2021.

These two (2) major components refer to exploitation circumstances where the person cannot refuse or cannot leave because of facing threats, violence, deception, and abuse of power or other forms of coercion made on the said person. The ILO Report found that 49.6 million people are involved in modern slavery daily where they are either forced to work unwillingly or forced into a marriage involuntarily. From this modern slavery component, forced labour accounts for 27.6 million and forced marriage accounts for 22 million.

The ILO Report released shocking data that showed a large number of people are in fact involved in modern slavery. The ILO Report discovered that in the year 2021:

- 49.6 million people were in modern slavery lives where 27.6 million were in forced labour and 22 million were in forced marriage.
- Out of the 27.6 million population of people in forced labour, 17.3 million are victims in the private sector; whilst 6.3 million are in the forced commercial sexual sector, and 3.9 million are in state's forced labour.
- Out of the 6.3 million in the forced commercial for sexual sector, women and girls account for more than 70% (4.9 million).
- 12% of all those in forced labour are children where a staggering over 50% of them are in the commercial sexual exploitation.
- The Asia and the Pacific region has the highest people in forced labour (15.1 million) with the Arab States tops the highest prevalence (5.3 per thousand people).

Forced labour

The ILO Forced Labour Convention, 1930 (No. 29), refers "forced labour" as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

The ILO Report on Global Estimates of Modern Slavery: Forced Labour and Forced Marriage in 2021 acknowledges that child labour, forced labour and human trafficking in global supply chains originated in the interplay of the three (3) critical circumstances which are (1) lacunae in statutory legislation, enforcement and access to justice that create opportunities for disobedience; (2) socio-economic pressures inflicted on individuals and workers; and (3) business conduct and overall business conditions. The ILO and Human Resources Without Borders report had released the information that in 2021, there were 25 million children and adults in forced labour globally.

The figure that 25 million people are in forced labour worldwide is mind-boggling and makes us wonder if we are oblivious to the obvious forced labour or if we are accustomed to the practices of forced labour that we ratify it. Maybe the time is ripe to be reminded to ensure that we are still able to identify the existence of forced labour within our circle of life. While we may be grossly occupied with our lives, let it be remembered that the lives of the oppressed others need our attention and dutiful assistance. These oppressed victims of forced labour also are entitled to a right of reasonable and acceptable livelihood. Here are some guides based on the ILO Indicators of Forced Labour to ascertain if the person may be trapped in forced labour situations:

INDICATOR	
Deception	Person is directed to perform other different job(s) that they were promised before or do work for reduced pay
Complex dependency on employer	Person depends on employer for job, place to stay and food
Seclusion	Person is prevented to communicate with family
Restriction of movement	Person is locked up in workplace or is able to leave workplace but with supervision
Violence	Person is forced to physical, sexual or psychological violence
Bullying and threats	Person is threatened of retaliations against family or report to police for illegal entry into the country
Abuse of predisposition	Person is forced to sign a contract in incomprehensible language or is blackmailed to pay recruitment fees to get the job
Abusive working and living conditions	Person works and lives in appalling and without dignity conditions
Retention of identity documents	Person is denied possession of passport back from their employer who retained it
Withholding of salary	Person is not paid as agreed for no concrete reason
Debt captivity	Person is unable to repay debt because the amounts were controlled unscrupulously
Excessive work hour	Person works overtime beyond legal limits under compulsion

Table II: Table 1: Indicators of force labour situations
Source: ILO Indicators of Forced Labour

We can also deduce that the people are victims of forced labour when they experience many facets of duress which emanate from abusive employment charges, unwarranted salary deductions, passport withholding, physical infliction, psychological influences or sexual violence. These victims of forced labour are usually confined and obstructed from communicating with their relatives. They also oftentimes live and work in appalling, unhealthy and poor conditions. The ILO's global estimates found that 152 million children are in child labour and 25 million adults and children are in forced labour including those in the global supply chains.

Child labour is any work that deprives children of their childhood, their potential and dignity, and that is harmful to their physical and mental development (ILO Minimum Age Convention, 1973 (No.138), the Worst Forms of Child Labour Convention 1999 (No.182), the United Nations Convention on the Rights of the Child, and the indicator of the 2017 ILO Global Estimates of Child labour). The children are children in child labour when they are aged 5-11, doing the economic activity for a minimum of 1 hour in the reference week (the 7-day period from Sunday through Saturday including the 12th of the month). They are also considered child labour victims if they are aged 12-14, doing the economic activity for a minimum of 14 hours in the reference week. Those aged 15-17, doing economic activity for a minimum of 43 hours in the reference week, and those aged 5-17, doing activity in hazardous occupations and branches of economic activities are also child labour victims.

What is the smuggling of migrants?

The UN Protocol against the Smuggling of Migrants ratified in the year 2000 is the single world legal documentation that can be widely enforced by its 151 UN members to prevent this crime. Article 3(a) of the said UN Protocol defined the "smuggling of migrants" to involve "the facilitation of a person's illegal entry into a State, for a financial or other material benefit". While is it a crime against the State, it also violates the human rights of the smuggled migrants in terms of physical abuse like withholding food and water and mental torture during the smuggling episode.

The Act defines "smuggling of migrants" under Section 2 to mean:

> "(a) arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and
>
> (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a)."

Unfortunately, Malaysia has yet to become a party to the now 151 members of the said UN Protocol. Nonetheless, the Malaysian membership to the UN Convention against Transnational Organized Crime is a catalyst to a more robust enforcement to prevent the smuggling of migrant practices in the country. Hopefully, Malaysia will in the near future, also be a member of the UN Protocol against the Smuggling of Migrants.

As mentioned earlier, Malaysia does not separate the offence of trafficking in persons from the offence of smuggling migrants. Instead, both offences are legislated under 1 single statute which is the Act. Hence, it is pertinent to distinguish between the two offences. To the author's mind, the differentiation by the US Homeland Security Investigations (HSI) aptly describes one from the other.

The US HSI mentioned that the "human trafficking" offence involves the "exploitation of men, women, or children for the common purposes of forced labour or commercial sexual exploitation". On the opposite end, HSI mentioned that "human smuggling" involves the "provision of a service, normally the transportation or fraudulent documents to an individual who willingly seeks to gain entry into a foreign country". Thus, it is normal for human smuggling to transform into human trafficking. But, the two definitions are not interchangeable terms because smuggling is transportation-based whilst trafficking is exploitation-based of people. The US HSI aims at the perpetrators' financial difficulties while committing human trafficking and human smuggling activities where they work to destroy the traffickers' source(s) of finance.

LITERATURE REVIEW
Development of anti-trafficking

The United Nations Office on Drugs and Crime (UNODC) published its 2022 Global Report on Trafficking in Persons Report which comprises the biggest dataset on trafficking in persons with more than 450,000 victims' information and 300,000 suspected traffickers found between 2003 and 2021. The UNODC issued a press statement on 24 January 2023 on this report to declare that the global issue of trafficking in persons now has evolved into territorial crises where trafficking patterns have now changed which has delayed victim identification. The UNODC report said that there were fewer victims of trafficking in persons identified despite the Covid-19 pandemic whilst various pressing crises had increased susceptibilities to exploitation. This UNODC 2022 Report found that the number of victims discovered dropped by 11% in 2020 from 2019, driven by fewer discoveries in low and medium-income countries. The COVID-19 pandemic, apart from reducing chances for traffickers to start, may also have incapacitated to some extent, the law enforcement capacities to discover the victims.

The UNODC report covered 141 countries which gives the global overview of patterns and flows of trafficking in persons while focussing on the regional and national levels based on trafficking cases between the years 2017 and 2021. The UNODC report analysed 800 court case summaries with detailed suggestions to the governments to help formulate effective responses. The UNODC report found fewer cases of trafficking for sexual exploitation during the pandemic as public spaces were closed and restriction of movements may have pushed this form of trafficking into more concealed but dangerous locations, making it harder to identify victims. The number of global convictions for trafficking offences fell to 27% in the year 2020 compared to the year 2019 with a sharper reduction in South Asia (56%), Central America and the Caribbean (54%) and South America (46%). The court case analysis shows that trafficking victims, when identified, escaped from traffickers on their own and are actually 'self-rescued'. There are more cases of victims escaping and reporting to authorities of their own efforts (41%) rather than being saved by law enforcement (28%), or public and civil community (11%). This statistic is alarming considering many trafficked victims may not be able to realize that they themselves are victims or they may be very afraid of their exploiters to enable attempts to escape. The UNODC report also

identifies how war and conflict create situations for exploitation by the traffickers onto the people inflicted by the war and conflict crises. Notably, the Ukraine war is evident with heightened trafficking chances for the displaced population to the advantage of the traffickers.

The UNODC report detailed that most victims originating from countries in conflict are trafficked to African and Middle Eastern countries. The existence of higher levels of impunity in the Sub-Saharan Africa and South Asian regions shows that they convict fewer traffickers due to lower victim detections compared with other countries. The victims from these countries are identified in a wider destination countries compared to victims from other places. The UNODC report also found that court cases show women victims are subjected to three times higher physical or extreme violence by traffickers than men, and children are subjected to almost twice the violence as often as adults. Women who are investigated for trafficking in persons have higher convictions compared to men. This may be due to a biased criminal justice system against women, and/or that the women's involvement in trafficking networks may heighten their probability of conviction.

PROBLEM STATEMENT

Malaysia's position

In the Southeast Asia region, Malaysia champions itself as one of the developing nations that at the same time has to deal with the issue of trafficking in persons.

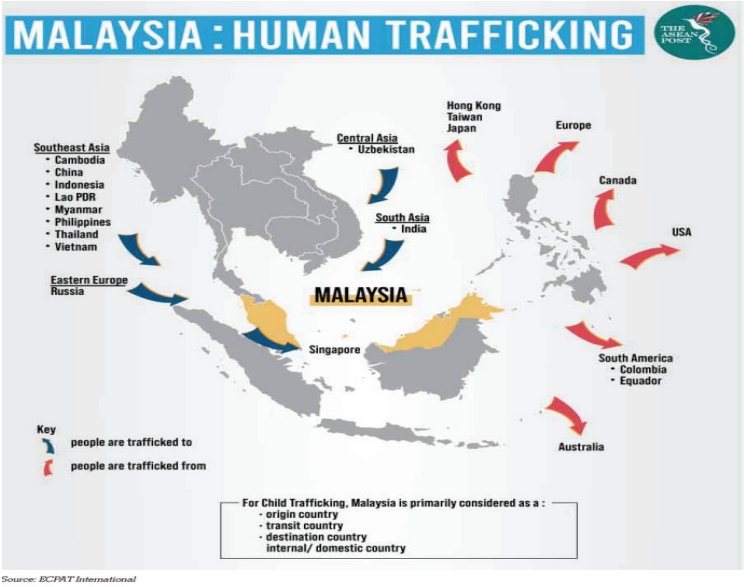

Figure I: Human Trafficking in Malaysia
Source: ECPAT International

Malaysia is considered the destination and transit country for human trafficking. SUHAKAM in 2018 reported that because Malaysia is a popular destination amongst foreign workers with its attractive economy these workers are exposed to become victims of sexual and labour trafficking.

The discovery of human trafficking camps and graves in Wang Kelian in Perlis after a long investigation made by the New Straits team dragged Malaysia down further with the issue. In January 2015 the team found the camps as transit locations for foreign people to enter the country. They also found 197 graves of various sizes believed to contain bodies of hundreds of foreign migrant workers, particularly from Myanmar and Bangladesh (Utusan Online, 26 May 2015).

It is the lure of high demands for labour that results in many foreign migrants coming to Malaysia for the purpose of securing such job opportunities (Kartini, 2015). Nevertheless, the purpose oftentimes resulted in them getting involved in the issue of trafficking in persons which unintentionally made Malaysia in the spotlight as a haven for trafficking in persons

Malaysia has been on the radar of the U. S. Government Office of Inspector General for many years in the Trafficking in Persons reports, from its former position in 2001-2008 in Tier 2, followed by Tier 2 Watch List in 2010 – 2013, slipped to Tier 3 in 2014 but gained to in Tier 2 Watch List in 2015 – 2018. From 2018 – 2022, Malaysia slipped into Tier 3 again, but the latest revision in 2023 pushed up our country into Tier 2 Watch List.

CURRENT ISSUES

We are continuously fed with human trafficking news like the smuggling of illegal immigrants into the country that was exposed in March 2023 with the arrest of 9 individuals of which 5 were enforcement officers. The smuggling syndicate that operated since 2018 would bring in between 5 to 20 illegal immigrants on each flight from Tawau in Sabah to Kuala Lumpur where these smuggled people would pay RM2, 500 each for the trip using other people's identities.

Another news in June 2023 revealed the baby trafficking syndicate involving officers of the National Registration Department (NRD) being arrested on suspicion of corrupt practices in the birth certificate and MyKid syndicate. This expose may be after the success of the busted child trafficking syndicate that obtained children from Sri Lanka to be sent abroad to European countries using Malaysian passports. The suspects have been charged in court in May 2023. The *modus operandi* engages the agent or so-called "transporter" who would bring the Sri Lankan child into Malaysia as tourist and then the agent would get a Malaysian citizen who is willing to use his child's identity documents (MyKid) to obtain the Malaysian passport. At the immigration application for a passport, the Sri Lankan child would be present instead of the actual Malaysian child where the passport would eventually be captured with the Sri Lankan child's photograph but with the identity details of the Malaysian child. Once the passport is secured, the agent is now able to bring the child anywhere in the world where the demand exists for the particular trafficked child. The Sri Lankan child trafficking syndicate is paid between RM145,906 to RM243,177 which is equivalent to €30,000 to €50,000 per child.

And in September 2023, a human trafficking syndicate was busted with the arrest of 51 illegal immigrants in Kota Bharu, Kelantan. Those arrested included 43 Indian nationals where 39 were men and 4

women whilst the rest were 2 Pakistani men and 6 Thai nationals of 2 women and 4 boys. They were between 2 to 60 years old, and were caught at a budget hotel used as a transit house that was manned by 5 local men. The Kelantan Immigration Department believed the syndicate had been active since the middle of last year. The syndicate targeted illegal immigrants from India intending to enter Malaysia illegally. The syndicate charged between RM8,000 and RM10,000 per person. The syndicate's modus operandi is to smuggle them through a neighbouring country using illegal border routes on local transporter vehicles to transit locations before they are delivered to specific locations.

Despite the arrests and crackdowns of the syndicates, Malaysia is still weak in its prosecution to secure a conviction in the cases brought to the Courts. The processes from the arrest up to the decision-making day show the challenges the prosecution faces with each trafficking and/or smuggling case in Malaysia.

From complaints by victims to arrest of perpetrators and prosecution in court

Arrests would normally be triggered upon tips given by the victims and rarely whistle-blowers to the enforcement officers. The victims themselves would take time to complain of ill-treatment by their employers since they would be restricted in their freedom of movement and access to the outside community other than their own circle at work. It would be based on these tips that the victims would be rescued by the enforcement agencies or they would themselves escape to anyone they had first contact with upon exiting their workplace.

The victims of trafficking and victims of smuggled migrants would be placed in temporary shelter homes upon their escape and subsequent rescue by third parties such as the government itself or non-governmental organizations (NGOs) like Tenaganita. Most victims are women and children. The Government representative of the Ministry of Women, Family and Community Development aimed to create three women's shelter homes, particularly in Kelantan, Kedah and Sarawak states. The women's shelter in Kelantan was officiated in April 2019 to cater to the needs of women trafficked in the eastern states of the country. The Government also aims to join forces with established NGOs that have the expertise to provide care and management to the women trafficked victims. Victims who are placed at the government

shelter homes are currently provided with services like counselling, language interpreter services like Thai and Vietnam, and also basic medical treatment. Programmes like learning languages for communication namely English and Bahasa Malaysia, and skills training like cooking, sewing, baking and gardening are also provided to the victims at the government shelters. The services are provided to them to maintain their physical and mental health for the victims to be occupied while waiting for their reports and cases to be completed, and before their deportation to their country of origin by the immigration department of Malaysia.

In 2021, the Ministry of Women, Family and Community Development launched five stimuli to safeguard human trafficking victims like training modules for protection officers, creating intervention models in shelters and enhancing communication services for victims and their families. Other stimulus includes the permission for mothers and children victims rescued to be housed together in the same shelter. There is also a stimulus for intervention services and programmes for human trafficking victims ranging from free health and treatment services, counselling services, legal and court matters to work permits for those who fulfil the requirements. At the moment, although the Ministry of Women, Family and Community Development has initiated the 5 stimuli since 2021, the best services based on a victim-centric approach, the needs and well-being of the victims from a trauma-informed approach with consideration of the psychological and emotional condition of the victims is sadly, not evident.

The International Justice Mission (IJM) of the Malaysia office reported in 2022 that the trafficked victims were tormented in the counselling sessions as these traumatized victims were repeatedly asked by various parties about their accounts of being trafficked. They were often neglected on their mental capacity to answer, and whether they were in a state of shock after the rescue was unchecked by the officers at the shelter centres. Coping mechanisms may be scarce to the victims as they are unfamiliar with the surrounding conditions and people who are foreign to them. The IJM found that the trafficked victims are found not to be well treated at the government shelters. Many victims are treated like prisoners with prison uniformed garments and daily chores they are assigned to perform. The victims

feel captivated and isolated and apparently the shelter is no different from their escaped place.

The IJM also analysed the court process the victims had to undergo. As a general rule, upon rescue, the victim's case is reported to the appropriate enforcement authorities like the police. The enforcement authorities will have to get a court order namely the Interim Protection Order (IPO) for time to investigate one victim's case. The IPO is usually granted for 21 days and upon expiry of the IPO, it must be replaced with a proper Protection Order (PO) if investigations are still pending and cannot be completed within 21 days of the IPO. Application to court for the PO is seldom granted by the Courts. This refusal to give PO puts pressure on the enforcement authorities to complete within the given days which is actually a time constraint that tolls on all parties in the rescue and prosecuting missions. The investigations may not be wholesome and for purposes of prosecution, the investigations are done quickly and improperly. More often than not, the charge under the Act cannot be sustained in the courts of law and the accused were subsequently convicted for offences under different Acts like s. 6(1)(c) or s. 56(1)(d) of the Immigration Act, or s. 372(1)(f) or s. 373(1) of the Penal Code.

Reported cases in 2007-2022

From the author's research on the Lexis-Nexis search engine, about 70 cases concerning the charge for trafficking of persons and smuggling of migrants started off from 2008 until September 2022. At the beginning of 2008 – early 2012, most cases were offences of s.12 and s.14 of the Act while from mid-2012, offences of smuggling of migrants kicked off with s.26J of the Act alongside the trafficking of persons charges. Of the smuggling of migrant charges, the most offences were under s.26A which is the general offence of smuggling of migrants with 20 cases. The next highest is the offence under s.26J which is the offence of conveyance of the smuggling of migrants with 7 cases, followed by 4 cases under s.26(H) of concealing or harbouring of smuggled migrants and migrant smugglers. There were 3 cases for offences under s.26E which is the offence of utilising fraudulent travel or identity documents. For the other offences, there was one case of which under s.26B of the aggravated offence of smuggling of migrants, s.26D of profiting from smuggling of migrants, s.26G of providing services for smuggling of migrants, and s.26I of supporting the smuggling of migrants. Of all the cases, 10 were dismissed by the

Courts while the convicted cases found punishment of imprisonment ranging from 15 months calculated from the date of arrest to 10 years calculated from the date of sentence. Some of the convictions were upon reduced charges under the Immigration Act.

Despite bail being refused by the Courts in all the cases, compensation to the victims of trafficked persons or smuggled migrants was also denied except for one case due to lack of evidence to prove such losses.

RECOMMENDATIONS AND CONCLUSION

In the religion of Islam, each human being created by God is dignified. The Quranic verse from Surah Al-Isra': 70 says:

> "And indeed, We have honoured the children of Adam; And We have provided them with transport on land and sea; And We have provided them with good and pure things for livelihood; And given them special favours, over and above a great part of Our Creation."

With such dignity of all humans, no one should be treated differently. The act of trafficking persons is unacceptable in Islam because not only this act violates human rights but also degrades the human being's status who is created by Allah with such dignity (Hamzah, 2019).

Che Mat, 2004 argued that trafficking in persons is seen to be in contradiction with *Maqasid Al-Syariah*, besides potentially affecting the accorded life harmony within the welfare system. It also can lead to dissatisfaction which in turn can destabilize a country.

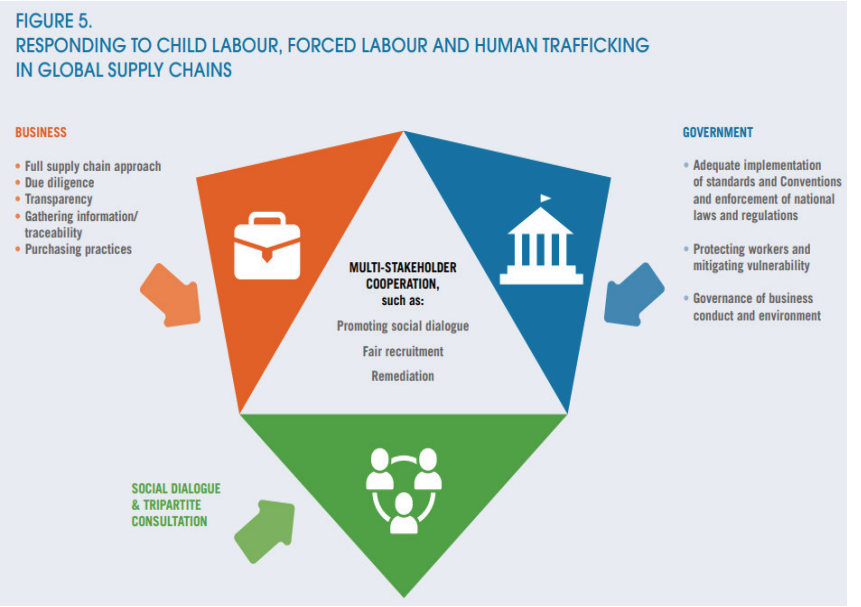

Figure II: Human Trafficking in Malaysia
Source: ECPAT International

It is thus believed that a broader approach is in dire need since the limited focus in eliminating these violations only targets the violations within the production settings that form part of global supply chains without remedying the common set of socio-economic pressures at the root cause. The risks only displace the violations into sectors of the local economy that are disconnected from global supply chains, which in turn result in the ultimate goal to end all forms of child labour, forced labour and human trafficking, regardless of location, would be no closure. The issue of child labour, forced labour and human trafficking in global supply chains thus cannot be dissected from that of child labour, forced labour and human trafficking generally, or from the common set of socio-economic pressures that lead people to become vulnerable to these basic labour violations.

The Sustainable Development Goals (SDGs) of the international community commit to ending child labour by 2025 and forced labour and human trafficking by 2030. To achieve the SDG target 8.7, governments, businesses, social partners, the financial sector and civil society must take strong action to solve the fundamental causes and determinants of these human rights violations. The Global supply

chains have the potential to generate growth, employment, skill development and technological transfer. But decent work shortages like the non-existent sufficient employment opportunities, inadequate social protection, denial of rights at work and shortcomings in social dialogue (definition based on the ILO *"Reducing the Decent Work Deficit: A Global Challenge",* 2001) and human rights violations, including child labour, forced labour and human trafficking, have been linked to global supply chains. All operators in this chain commit to protect the workers' human rights and ensure that the protection is appropriately done.

The US Government in classifying Malaysia in (Tier-3) has recommended Malaysia to improve on the following actions:

1. Train relevant officers like the police, labour, and immigration officers on the necessary SOPs for victim identification and identification for trafficking indicators.
2. Enhance efforts to investigate, prosecute, and convict more traffickers by separating the trafficking cases from migrant smuggling cases but include cases that involve tyrant officers and forced labour crimes.
3. Broaden appropriate labour protections for domestic workers and investigate fully allegations of domestic worker abuse.
4. Minimise prosecution delays by providing improvised guidance to prosecutors to initiate trafficking charges and increase judicial familiarity with the full range of trafficking crimes, particularly forced labour offences.
5. Strengthen efforts to identify trafficking victims among Chinese national workers on the government-linked infrastructure projects.
6. Enhance law enforcement capacity to investigate and prosecute trafficking cases including the improvisation of co-ordination between agencies.
7. Make public the results of investigations involving corrupt officials to increase transparency and as deterrence and also to make officials criminally accountable upon violations of the law by hastening prosecution in court.

8. Effectively enforce laws that prohibit employers from keeping passports without employees' consent, including by increasing resources for labour inspectors and by stating clear terms in the bilateral memorandum of understanding (MOU) and contracts with labour-sourced countries.
9. Improve case management and communication with trafficking victims including by continuous use of interpreters and value-added service programmes. Broaden also efforts to inform and educate migrant workers of their rights and the country's labour laws including rights to have access to their passports at any time and the opportunities for legal remedies in cases of exploitation.
10. Create an access system for timely and accurate interpretation in victims' mother tongue languages that are available to the law enforcement authorities, the court system and victim shelters. Broaden also cooperation with NGOs, including financial or in-kind support to provide victim rehabilitation services.
11. Abolish recruitment or placement fees charged to workers by recruiters and replace with recruitment fees to be paid by employers. Increase the number of trafficking victims who obtain permits for freedom of movement from shelters, widen the freedom of movement to include unaccompanied movement, and increase victims' access to communication with people beyond shelter facilities.

ILO on the other hand, recommended the following tasks to end forced labour:

- Broaden social protection to all workers and their families, to mitigate their socio-economic vulnerability whilst providing workers with basic income security, and also to broaden social protection in the shadow economy.
- Promote fair and ethical recruitment, to shield workers from abusive and fraudulent practices including the over-charging of fees and related costs by unethical employment agents and labour middle persons.
- Strengthen the outreach and capacity of public labour inspectors to detect and act on labour violations in all sectors including the shadow economy before the violations transform into forced labour, to increase awareness of forced labour risks and increase

the employers' compliance obligations, and to quickly detect and refer actual cases to the authorities.

- Make available protection for liberated forced labour people like instant help, rehabilitation and long-term sustainable solutions to prevent re-victimization. Children, migrants and victims trafficked for forced labour are of crucial focus.
- Ensure access to remedy for people liberated from forced labour, to help recompense them for the losses suffered from forced labour and to help them claim compensation for special damages arising like medical costs for injuries sustained, unpaid wages, legal fees, and loss of earnings and/or loss of earning capacity or for other general damages like pain and suffering.
- Ensure sufficient enforcement teams to arrest perpetrators to be charged in court and deter future offenders from contemplating the crime of forced labour.
- Tackle migrants' exposure to forced labour and forced labour trafficking. Despite most migration being consensual, the migrants are inadequately protected by law or are unable to exercise their rights. They are at higher risk of forced labour and human trafficking. National policy and legal frameworks to promote respect and preservation of the migrants' rights at all times ought to be implemented.
- Address properly children trapped in forced labour including those in commercial sexual exploitation and linked to armed conflict.
- Reduce the increased risk of forced labour and forced labour trafficking during crises like natural disasters, wars and disease outbreaks. Countries must align protective and preventative actions across all stages of crisis responses including pre-crisis preparedness to humanitarian action at the crisis outbreak stage to post-crisis reconstruction and recovery stages. Actions to sustain livelihoods during crises are vital to avoid the victimization of workers for forced labour and trafficking.
- Tackle forced labour and forced labour trafficking in business operations and supply chains. Focus attention on knowing, emphasize and act on "hotspots" where the risk of forced labour

and other human rights abuses is highest in severity and scale. The informal enterprises and operations in the black economy at the lower links of supply chains are indeed high-risk sectors.

- Stop government-imposed forced labour which is the direct product of selected laws and practices by the existing government but aim for continuing political commitment and progressive reforms.
- Embark on partnership and international ventures since the challenge of forced labour is gigantic with a myriad of root causes being too complex for national governments or other interested parties to tackle single-handedly.

Table 1 shows examples of impacted actions that governments take to stop forced labour based on the ILO's 2014 Protocol and Recommendation:

Prevention	▪ Organize awareness-raising campaigns for a vulnerable group or the general public ▪ Train labour inspectors and law enforcement officers to detect forced labour situations ▪ Ensure that relevant laws cover all workers and do not exclude anyone (e.g. undocumented migrants) or any sectors (e.g. domestic workers) ▪ Ensure that workers do not have to pay any recruitment fees to get a job ▪ Identify the risks of forced labour in the supply chains of public and private companies and take corrective action as necessary ▪ Raise awareness of public authorities on due diligence with regard to their suppliers' practices ▪ Address the root causes of forced labour (discrimination, poverty, illiteracy, lack of social protection, etc.)
Protection	▪ Formalise a list of indicators to help detect cases of forced labour ▪ Provide safe housing to victims after they are freed ▪ Offer support and training to victims to help them access decent work opportunities ▪ Protect victims against prosecution for acts they were compelled to commit as a result of being in forced labour (e.g. offenses related to immigration status, prostitution or drugs)
Access to justice	▪ Criminalise all forms of forced labour ▪ Allow civil society organizations to press charges on behalf of victims ▪ Ensure that victims have access to justice, in particular access to appropriate and effective remedies and compensation, irrespective of their presence in the county or of their legal status (documented or undocumented) ▪ Provide housing, healthcare, and material, social, financial and legal assistance to victims ▪ Do not make protection measures or access to justice conditional upon victims' collaboration to investigations
Coordination	▪ Adopt a national action plan on forced labour, human trafficking and debt bondage ▪ Involve employers' and workers' organizations and other interested groups in the development of this plan ▪ Adopt a strategy that encompasses specific vulnerabilities, namely those of children and migrant workers, as well as gender issues ▪ Reinforce international cooperation between migrant workers' countries of origin and of destination

Table III: Human Trafficking in Malaysia
Source: ECPAT International

It must be a real concern for all of us that where Malaysia posits and will be in the world audience in the human trafficking and migrant

smuggling ordeal in the future would greatly depend on the government's aggressive actions to prevent this epic ordeal. The aggressive course of action to combat this inhumane misconduct is almost mandatory for us to break apart the lucrative webbing business of trafficking in people that transacts across global jurisdictions. Joint forces and mutual collaborations with international counterparts inclusive of the relevant bodies must be ignited now.

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THE IMPLEMENTATION OF RENEWABLE ENERGY IN MALAYSIA IN THE CONTEXT OF GLOBAL INITIATIVES AND TARGETS

John Vercoe*

ABSTRACT

This article discusses Malaysian initiatives in implementing RE and how far Malaysia has reached in terms of pledges made under the Paris Agreement and recently at COP27. Employing legal doctrinal and comparative methodologies, this article observes that apart from Malaysia's initiatives for the nation's transition to RE, many other global initiatives or assistance are provided by other countries to help offer strategies and financial support for Malaysia to accelerate its transition to RE and achieve its climate targets as outlined in the roadmap designed by Malaysia's Sustainable Energy Development Authority (SEDA). Achieving climate targets, such as net-zero emissions and 70% RE generation by 2050, requires more than just internal implementation alone. It is a nationwide collaborative effort dependent on constant collaboration with other countries and international organisations. Hence, this article discusses how the United Kingdom has played a role in actively encouraging other countries, especially Malaysia's own transition. It concludes by identifying several factors that would enhance the effectiveness of initiatives and programmes to achieve Malaysia's climate targets.

Keywords: renewable energy, global initiatives, climate targets, Malaysia

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INTRODUCTION

With the earth in dire need of help to recuperate from all the damages that were caused by greenhouse gas ("GHG") emissions and fossil fuel consumption, more initiatives must be taken to help reduce and/or prevent climate change. Renewable energy ("RE") is not a new concept; in fact, many countries have been transitioning to or attempting to transition into RE. For there to be RE, there must be various types of natural resources available for harnessing, and some of these types may not necessarily be available in a particular country. If so, what forms of RE are there in Malaysia, and more importantly, how effective is Malaysia in terms of implementing RE? This article will discuss Malaysian initiatives in implementing RE and how far Malaysia has reached in terms of pledges made under the Paris Agreement and recently at COP27. Apart from Malaysia's initiatives for the nation's transition to RE, there are also many other global initiatives or assistance provided by other countries to help offer strategies and financial support for Malaysia to accelerate its transition to RE and achieve its climate targets as outlined in the roadmap designed by Malaysia's Sustainable Energy Development Authority (SEDA). Ultimately, this article is to illustrate that achieving climate targets, such as net-zero emissions and 70% RE generation by 2050, requires more than just internal implementation alone. It is a nationwide collaborative effort dependent on constant collaboration with other countries and international organisations. Hence, this article will also discuss how the United Kingdom has played a role in actively encouraging other countries, especially Malaysia's own transition.

WHAT IS RENEWABLE?

"Renewable" refers to energies that can be regenerated, meaning that it is a type of energy, that is generated from natural sources that can be produced constantly at an effective rate[49]. There is quite a wide range of RE, including solar, wind, geothermal, hydropower, and biomass. The types of RE available depend on the geographical location of the country. In Malaysia, the main types of RE are hydropower and, being close to the equator, solar energy.[50] Contrastingly, non-renewable

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1 United Nations, 'What is Renewable Energy?', (*United Nations*, n.d.), <https://www.un.org/en/climatechange/what-is-renewable-energy> accessed 6 November 2022.

50 Progressture Solar, 'Renewable Energy in Malaysia 2022: Extensions, Expansions & Expectation', (*Progressture Solar*, 9 December 2021),

energy is derived from finite natural resources that form over hundreds of millions of years. [51] Fossil fuels such as coal, oil and gas are non-renewable energy sources, and to produce such energy, a large amount of GHG is emitted.[52] Fossil fuels are burnt to generate electricity, contributing to worldwide emissions of carbon dioxide reaching around 34 billion tonnes of carbon in a year.[53] GHGs are one of the main factors directly influencing climate change. More alarmingly, electricity production once again emerged as the main contributor to the increase in carbon dioxide emissions in 2022, with global energy-related CO2 emissions reaching a new high of over 36.8Gt. [54] This result indicates that energy demand is growing, leading to an increase in the use of fossil fuels.[55] Moreover, it also indicates that RE alone is still not able to reduce GHG emissions, due to various factors, including insufficient implementation of the use of RE or governance in the use of non-RE. Another reasonable cause is the lack of awareness and persuasion in transitioning the use of non-RE to RE.

The use of RE can reduce GHG emissions, as RE systems do not emit GHG since their fuel or energy source is largely carbon-free.[56] No GHG will be produced when generating electricity through wind or sun, as no combustion is involved. Although arguably biomass energy also involves combustion, the gases produced cannot be considered to increase GHG emissions as these gases are known as "carbon dioxide neutral" gas.[57] The International Renewable Energy Agency (IRENA), in its report, has shown that to achieve 90% of energy-related CO2

<https://www.progressturesolar.com/post/renewable-energy-in-malaysia> accessed 6 November 2022.

51 United Nations (n 1).

52 Ibid.

53 World Nuclear Association, 'Carbon Dioxide Emissions from Electricity', (*World Nuclear Association*, October 2022), <https://www.world-nuclear.org/information-library/energy-and-the-environment/carbon-dioxide-emissions-from-electricity.aspx#:~:text=Worldwide%20emissions%20of%20carbon%20dioxide,and%20about%2020%25%20from%20gas.> accessed 7 November 2022.

54 International Energy Agency, "Global Energy Review: CO2 Emissions in 2022 – CO2 Emissions in 2022", (*IEA*, March 2023), < https://www.iea.org/reports/co2-emissions-in-2022> accessed 29 November 2023.

55 Ibid.

56 Tennessee Valley Authority, 'The Role of Renewable Energy in Reducing Greenhouse Gas Buildup', September 2003.

57 Ibid.

reduction, RE should constitute 80% of global power generation and 65% of primary energy supply.[58] Currently, RE constitutes about 24% of global power generation and 16% of primary energy supply.[59] There is a comprehensive list of benefits of RE. Not only does RE reduce GHG emissions, the IRENA report shows that it will also bring socioeconomic benefits. IRENA reported that the reduction in global carbon dioxide emissions 2050, with increased economic activity driven by investments in renewables and energy efficiency, along with pro-growth policies such as carbon pricing and revenue raising.[60] Furthermore, a broader measure of welfare, local economic value creation, and improved livelihoods are one of the many benefits of RE.[61]

Countries come together to show their commitment to achieving climate targets by signing the Paris Agreement ("PA"). It is a legally binding international treaty concerning climate change that aims to limit global warming to 1.5°C.[62] It brings all nations together to tackle climate change and signatory states are to assist one another to achieve this target in GHG reduction. There is also a Climate Change Conference (COP, short) that will be held annually. The conferences are global forums to discuss climate change matters.[63] The COP conferences serve two purposes, namely, to review the implementation of the United Nations Framework Convention on ClimateChange(, Kyoto Protocol and Paris Agreement and to adopt decisions to help

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58 IRENA, "Perspectives for the Energy Transition: Investment Needs for a Low-Carbon Energy Transition", (2017), <https://www.irena.org/publications/2017/Mar/Perspectives-for-the-energy-transition-Investment-needs-for-a-low-carbon-energy-system> accessed 7 November 2022.

59 Ibid.

60 IRENA, "Renewable Energy Benefits: Understanding the Socio-Economics", p 2.

61 Ibid.

62 United Nations Climate Change, 'The Paris Agreement', (*United Nations Climate Change*, n.d.), <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 7 November 2022.

63 UNFCCC, "What are United Nations Climate Change Conferences?," (*United Nations*, n.d.), <https://unfccc.int/process-and-meetings/what-are-united-nations-climate-change-conferences?gclid=Cj0KCQiAgribBhDkARIsAASA5btBLDtsuoOMurUtpoPy4_vGmvRRncWO-MecsX1f6vdqngBel8M4TDYaAvCoEALw_wcB> accessed 11 November 2022.

develop further and implement these three instruments.[64] The Dubai, United Arab Emirates, Climate Change Conference ("COP28") 2023 is being held in November 2023. In COP27 held in 2022 in Sharm el-Sheikh, Egypt, all COP participating countries agreed that the phase-out of coal power and fossil fuels subsidies needed to be accelerated.[65] In addition, COP27 emphasised the urgent need for reducing GHG emissions through increase in low-emission and renewable energy. . COP28 will focus on fast-tracking the energy transition and slashing emissions before 2030.[66]

MALAYSIA'S EFFORTS IN IMPLEMENTING RENEWABLE ENERGY

Malaysia signed the PA on 22 April 2016 and ratified it on 16 November 2016.[67] Malaysia has been attending COP conferences since COP1 and is now participating in the COP28. Malaysia expressed its commitment to climate change at the COP26 conference, stating that Malaysia will update the Nationally Determined Contribution ("NDC").[68] In July 2021, Malaysia had previously updated its NDC, indicating that it will increase its mitigation ambition to reduce carbon intensity against GDP by 45% from the initial 35% by 2030.[69] In

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64 Ibid.

65 Global Witness, "Everything You need to know about COP," (*Global Witness*, 6 November 2023), <https://www.globalwitness.org/en/blog/everything-you-need-know-about-cop/?gclid=Cj0KCQiAgribBhDkARIsAASA5bs_s7UOmo6fPdQR2mcpoEF7RGycgt_KORHCdmU684ZY8xIEdZnTTGYaAjzLEALw_wcB> accessed 28 November 2023.

66 *Global Witness* (n 17).

67 United Nations Climate Change, 'Malaysia', (*United Nations Climate Change*, n.d.), <https://unfccc.int/node/61107> accessed 7 November 2022.

68 Statement by Head of Delegation, Ministry of Environment and Water Malaysia, 'For the Resumed Fifth Session of the United Nations Environment Assembly', <https://wedocs.unep.org/bitstream/handle/20.500.11822/38517/Malaysia%20Country%20Statement_UNEA%205.2%2C%201%20March%202022.pdf?sequence=1&isAllowed=y> accessed 11 November 2022.

69 United Nations Climate Promise, 'Malaysia', (*UNDP*, n.d.), <https://climatepromise.undp.org/what-we-do/where-we-work/malaysia#:~:text=Malaysia%20increased%20its%20mitigation%20ambition,being%20conditional%20on%20external%20support.> accessed 7 November 2022.

addition, the revised NDC now covers seven GHG instead of the four previously covered.[70] Furthermore, at COP26, Malaysia submitted a climate target to commit to stop deforestations by 2030 and reduce methane emissions, in addition to reducing overall GHG emissions.[71] With such great ambition and new pledges at the conference, Malaysia ought to put in greater effort in achieving the said targets.

One way to achieve the target of reducing GHG emissions in line with the PA is by implementing the use of RE. As will be discussed below, there are many methods of implementation, by way of introducing RE programmes or legislation. Regardless, how well would RE be implemented in Malaysia depends on how well the planned initiatives are being enforced. Malaysia implemented the Fifth Fuel Policy under the 8th and 9th Malaysia Plan to achieve the installation of up to 500MW of grid-connected RE power.[72] This policy aims to establish RE as the fifth source of energy in Malaysia, targeting a contribution of 5.5% to the overall energy mix[73]. In terms of legislation concerning RE, Malaysia enacted the Renewable Energy Act 2011 and Sustainability Energy Development Authority Act 2011.Moreover, in 2021 the Sustainability Energy Development Authority put in place a Renewable Energy Roadmap ("MyRER") which was set out to help achieve a 31% RE share in the national capacity mix by 2025.[74]

MyRER outlined various key actions up to 2025 for the different types of RE available in Malaysia. According to 2019 statistics, Hydro and bioenergy generate more RE supply, while solar contributes just

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70 Ibid.

71 Tan Zhai Yun, "Cop 27: Malaysia's Climate Commitments at the International Stage" (*the Edge Malaysia*, 25 August 2022), < https://www.theedgemarkets.com/article/cop-27-malaysias-climate-commitments-international-stage#:~:text=During%20COP26%2C%20many%20countries%20%E2%80%94%20including,neutrality%20as%20early%20as%202050.> accessed 11 November 2022.

72 A.L Maulud and H. Saidi, "The Malaysian Fifth Fuel Policy: Re-strategising the Malaysian Renewable Energy Initiatives", (2012), Energy Policy 48, 88-92, 88.

73 Ibid.

74 Sustainable Energy Development Authority Malaysia, "Malaysia Renewable Energy Roadmap (MyRER)", (*SEDA*, n.d.), <https://www.seda.gov.my/reportal/myrer/#1630302447960-89cc071a-f8ac> accessed 7 November 2022.

1% to the RE mix. MyRER is structured around four strategic pillars ("SPs"): solar, hydro, bio-energy and new technology and solutions. It isis separated into two parts, one specifying the respective milestones to be achieved by 2025 and another covering the period from 2025 to 2035.[75] Each of the SPs aim to achieve its 2025 target by enhancing the current programmes and its 2035 target by implementing new business models.[76]

The key initiatives provided under SEDA's MyRER include Malaysia's Feed-In Tariff ("FIT"), a system mandated under the Renewable Energy Act 2011 andmanaged by SEDA, a statutory body formed under the Sustainable Energy Development Authority Act 2011.[77] FIT requires Distribution Licensees to purchase Feed-in Approval Holders electricity produced from RE.[78] SEDA initiated the Net Energy Metering ("NEM") programme, allowing excess solar energy to be exported back to the grid on a 'one-on-one offset basis'.[79] Lastly, there is also the Large Scale Solar ("LSS") programme, which is implemented by the Energy Commission[80] and is discussed below.

Other RE programmes include the implementation of renewable energy certificates ("RECs"). RECs are issued to bearers owning one megawatt-hour (MWh) of RE.[81] It is a market-based instrument, meaning that there are trading platforms for RECs such as the Malaysia Green Attribute Tracking System ("mGATS"), I-REC and TiGRs, with mGATS being the national marketplace for RECs.[82] mGATS is operated by TNBX Sdn Bhd[83]. RECs encourage the use of RE, with the certificates holding a certain value that is tradeable in the market.

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75 SEDA (n 24).

76 Ibid. The strategic pillars are summarised in the SEDA's MyRER, which each strategic pillars are the forms of RE in Malaysia. It states also the key actions required in achieving both targets by 2025 and post 2025 to 2035.

77 Sustainable Energy Development Authority Malaysia, 'Overview of SEDA', (*SEDA*, n.d.), <https://www.seda.gov.my/about-seda/overview-of-seda/> accessed 7 November 2022.

78 Department of Statistics Malaysia, "Renewable Energy (RE)", DOSM/BPPAS/1.2021/Series 17

79 SEDA (n 24).

80 Ibid.

81 Ibid.

82 Ibid.

83 Ibid.

Although it is only voluntary, it can certainly contribute to Malaysia's progress towards achieving its climate targets.

There are also initiatives made in relation to tax and financing that would encourage Malaysia to transition towards achieving its climate target, namely the Green Technology Financing Scheme ("GTFS") and the Green Investment Tax Allowance ("GITA") and Green Income Tax Exemption ("GITE"). These are the initiatives taken by Government which are also included in the planning of the national budget. GTFS is a scheme in which the government provides a rebate of 2% annually on the interest fees charged for loans for the first seven years of the loan and guarantees 60% of the green component cost.[84] Due to the positive response to participating in GTFS, GTFS 3.0 has been launched by the Ministry of Finance to provide further financial support to the RE related projects.[85] The GITA, on the other hand, allows for 70% of the Qualifying Capital Expenditure to be offset against 70% of statutory income , while GITE provides a 70% exemption of statutory income for green service providers.[86]

Malaysia, as a signatory State of the PA, has implemented many initiatives to uphold its obligations under the PA and work towards Malaysia's target of net-zero emissions by 2050. However, every initiative aimed at encouraging RE faces challenges that hinder the overall pace of RE generation. One challenge is the lack of regulatory framework for various REs. For example, there is a lack of a regulation concerning the upstream development of small and large hydro projects, and there is also a deficiency in the lack of a regulatory framework supporting customer choice by introducing a third-party access framework for the implementation of corporate power purchase agreements.[87]

MILESTONES IN IMPLEMENTING RENEWABLE ENERGY IN MALAYSIA

As discussed above, there are many initiatives considered by Malaysia in implementing renewable energy and playing an active role

84 Ibid.
85 Ibid.
86 Ibid.
87 SEDA (n 24).

in reducing and preventing GHG emissions in line with the PA. The article will review the milestones in the implementation of RE with the contribution and effort of Tenaga Nasional Berhad ("TNB") and the Energy Commission ("EC"). It will assess whether these efforts have resulted in positive progression towards achieving climate targets, taking into consideration how efficiently TNB and EC execute programmes and initiatives.

TNB is a state-owned power company distributing electric supplies to most parts of Malaysia. TNB has always been an active player in environmental sustainability and has initiated various RE projects in an effort to reduce GHG emissions. Powers are mainly generated from hydroelectric and thermal plants.[88] Recently, TNB declared their intention to go full force in accelerating the green agenda to help achieve net-zero emissions by 2050.[89] TNB's target is to reach an RE capacity of 8,300 MW by 2025 and its focus areas of technology are wind turbines, solar panels, and green hydrogen.[90] TNB's sustainability pathway also involves a 35% reduction of energy intensity and a 50% reduction in coal capacity by 2035 and eventually achieving net-zero emissions by 2050.[91] In order to achieve these targets, TNB is building key collaborations and partnerships with various companies that would be of advantage in pushing the energy transition agenda, such as partnering with N.U.R Power Sdn Bhd to provide smart energy solutions and RE as the main type of electricity for NUR Power customers.[92]

With the Supply Agreement with Renewable Energy ("SARE") in place – an agreement for supply renewable energy in Malaysia –

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88 Tenaga Nasional, "Generation", (*TNB*, n.d.), < https://www.tnb.com.my/about-tnb/our-business/core-business/generation/> accessed 11 November 2022.

89 Zuraimi Abdullah, "TNB Aims to Accelerate Green Agenda", (*New Straits Times*, 3 August 2022), <https://www.nst.com.my/business/2022/08/818890/tnb-aims-accelerate-green-agenda> accessed 7 November 2022.

90 Yvonne Tan, "TNB to Focus on Technology Partnerships", (*the Star*, 27 May 2022), <https://www.tnb.com.my/assets/newsclip/27052022a2.pdf> accessed 7 November 2022.

91 Ibid.

92 The Star, "TNB, NUR Power Sign MoU on Green Energy Initiatives', (*The Star*, 5 September 2022), <https://www.thestar.com.my/business/business-news/2022/09/05/tnb-nur-power-sign-mou-on-green-energy-initiatives#:~:text=%E2%80%9CTNB%20aspires%20to%20achieve%20net,Energy%20Transition%20agenda%20even%20further.> accessed 7 November 2022.

TNB has implemented various initiatives, including the Smart Grid Initiative, Green Electricity Tariff (GET), mGATS, and many more. The Smart Grid supports the ongoing RE initiatives that aim to achieve the growth of RE capacity to 8.3GW by 2025.[93] It is TNB's target to achieve a 40% RE generation capacity mix by 2025 which is in line with the "UN Sustainable Development Goals" Climate Action & Shared Prosperity Vision 2030's Strategic Thrust.[94] TNB commits to working towards a low-carbon economy by encouraging RE generation and reducing GHG emissions in line with the PA.[95] TNB supports a variety of green energy initiatives, such as SEDA's FIT and NEM schemes, as mentioned earlier. . In addition, TNB introduced the Green Electricity Tariff (GET) program, an initiative that allows consumers to virtually purchase renewable energy through a nominal surchage, without having to invest in costly RE system installations.[96] It attracts many public and private sectors who emphasise Environmental, Social, and Governance(ESG) to subscribe to the GET programme, as it helps consumers reduce their carbon footprints.[97] Subscribers of GET also get a REC[98] which can be placed on the national marketplace, mGATS[99]. Despite mGATS transactions complying with international standards such as CDP and Greenhouse Gas Protocol, and mRECs meeting the requirements of the Bursa Malaysia Reporting Guide, mRECs are not tradable in Malaysia.[100] They can only be redeemed or retired by end customers.[101]TNB has its subsidiary, GSPARX, which continues to grow the sales of self-generation solar solutions under the NEM and SARE. GSPARX also works withthe Ministry of Energy and

93 Tenaga Nasional, 'TNB Smart Grid Initiatives', (*TNB*, n.d.), < https://www.tnb.com.my/smart-grid/> accessed 11 November 2022.

94 Ibid.

95 Ibid.

96 Ibid.

97 Tenaga Nasional, "Green Electric Tariff", (*TNB*, n.d.), < https://www.tnb.com.my/get> accessed 11 November 2022.

98 Ibid

99 Malaysia Green Attribute Tracking System, "Malaysia Renewable Energy Certificates", (*mGATS*, n.d.), <https://www.mgats.com.my/> accessed 9 November 2022.

100 Ibid.

101 Ibid.

Natural Resources to install more solar PV through pilot projects involving government agencies, local councils and schools.[102]

The LSS programme, is implemented by the EC.[103] LSS is a competitive bidding programme that aims to lower the Levelized Cost of Energy through the development of LSS plants.[104] This programme allows for the development of large-scale solar power plants,[105] where the electricity generated from solar PV farms can then be sold to the grid.[106] The progress of LLS reached 57.7% at the end of June 2023, with increases in Penang, Perak and Kelantan totalling 50.99MW.[107]

The implementation of RE in Malaysia is a collaborative initiative, between the Government, SEDA, TNB and EC. The Government and SEDA are responsible for setting out the aims and strategies to achieve those aims, while TNB executes the strategies by making the programmes available and running. The programmes and schemes provided allow both the public and private sectors to play their part in transitioning to RE by participating in the various programmes initiated. There is no doubt that Malaysia is putting effort into working towards the climate targets, as pledged in PA and at the Climate Conferences.

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102 Tenaga Nasional (n 45).

103 Department of Statistics Malaysia, 'Renewable Energy (RE)', (*DOSM*, 2021), DOSM/BPPAS/1.2021/series17, < https://www.dosm.gov.my/v1/uploads/files/6_Newsletter/Newsletter%202021/DOSM_BPPAS_1-2021-Series-17.pdf> accessed 11 November 2022.

104 SEDA, "Large Scale Solar", (*SEDA*, n.d.), < https://www.seda.gov.my/reportal/large-scale-solar/> accessed 11 November 2022.

105 Rodl & Partner, "Tenders for large-scale solar projects in Malaysia – an overview", (*Rodl & Partner*, n.d.), < https://www.roedl.com/insights/renewable-energy/2019-05/tenders-for-large-scale-solar-projects-in-malaysia> accessed 11 November 2022.

106 Tenaga Nasional, 'Large Scale Solar (LSS)', (*myTNB*, n.d.), < https://www.mytnb.com.my/renewable-energy/large-scale-solar> accessed 11 November 2022.

107 Izzul Ikram, "Large Scale Solar Scheme Progress Rises to 57.7% in 2Q2023 After Six-month Lull", (*The Edge* Malaysia, 8 September 2023), <https://theedgemalaysia.com/node/681840>, accessed 28 November 2023.

ASEAN RE ROADMAP

Apart from the PA being universally binding to signatory States as a form of encouragement in contributing to environmental sustainability, there are many organisations which also provide various suggestions and support for the implementation of RE. One prominent organisation is the International Renewable Energy Agency ("IRENA") with HQ in Abu Dhabi, which is an intergovernmental organisation, supporting countries in the transition to a sustainable future.[108] It is a platform providing the policy, resources, technology and financial knowledge on renewable energy.[109]

The IRENA report, "Renewable Energy Outlook for ASEAN: Towards A Regional Energy Transition" (IRENA Report) was published in September 2022. This report analyses and evaluates the potential pathways or roadmaps for renewable and low-carbon technology and power sectors in the ASEAN Member States ("AMS") with a medium-term focus to 2030 and a long-term focus to 2050.[110] Most importantly, it has provided options catered for ASEAN in speeding up the deployment of renewables, emerging of low-carbon technologies, end-user electrification, and energy efficiency and conservation.[111] Malaysia, being an AMS, has aligned its renewable energy roadmap established by SEDA with the medium and long-term pathways outlined by IRENA.

The IRENA report was established through various methodologies and the main reference case is the Planned Energy Scenario ("PES").[112] PES reflects the current plans and other expected or approved objectives or policies.[113] Studies show that solar PV, hydropower and geothermal energy are important in the ASEAN's electricity generation under the PES, but, unfortunately, for the

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108 International Renewable Energy Agency, "About IRENA", (*IRENA*, n.d.), <https://www.irena.org/About> accessed 8 November 2022.

109 Ibid.

110 IRENA, "Renewable Energy Outlook for ASEAN: Towards A Regional Energy Transition", (IRENA, 2nd Edition), ISBN: 978-92-9260-467-7, pp 26.

111 ASEAN, "Joint Ministerial Statement of the 40th ASEAN Ministers on Energy Meeting", (*ASEAN,* 15 September 2022), <https://asean.org/wp-content/uploads/2022/09/40th-AMEM-JMS_Final_15-Sep-_cln.pdf> accessed 9 November 2022.

112 IRENA (n 63) at pp 28.

113 Ibid.

ASEAN power sectors, electricity generation will continue to be dominated by coal and natural gas.[114]

Based on statistical data, the total renewable power generation capacity in Malaysia for 2021 amounted to 8,898 MW as compared to 2020 of 8,570 MW, there had been a slight increase.[115] In fact, there had a constant increase in the total capacity since 2017. SEDA along with the implementing agencies like TNB and EC did contribute to the growth of the RE sectors in Malaysia. It was reported that the above programmes had contributed to a 12.1% compound annual growth rate ("CAGR") of installed RE capacity from 2012 to 2019.[116] That represents a growth from 3.7 GW to 8.2 GW in the same period.[117] Additionally, the Malaysia Renewable Energy Market is also to expect a CAGR of 8.5% between 2022 to 2027 with the Government's effort in implementing policies and incentives for the growth of solar energy.[118]

Attention should be given to the most recent Malaysian Government initiative, the National Energy Policy 2022 – 2040 ("NEP") published on 19 September 2022. The NEP covers all sources of energy, both renewable and non-renewables and the use of energy across all sectors of economy.[119] With the NEP, it aims to help improve

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114 IRENA (n 63) at pp 36.

115 Statista Research Department, "Total Renewable Power Generation Capacity in Malaysia from 2012 to 2021', (*Statista*, 5 October 2022), <https://www.statista.com/statistics/872508/total-renewable-power-generation-capacity-in-malaysia/#:~:text=Total%20renewable%20power%20generation%20capacity%20in%20Malaysia%202012%2D2021&text=In%202021%2C%20the%20capacity%20amounted,eight%20thousand%20megawatts%20since%202012.> accessed 9 November 2022.

116 Ybhg. Dato' Hamzah bin Hussain and Energy Watch, "A Decade of Renewable Growth in Malaysia, Where Do We Go From Here?", (*Energy Watch*, 20 August 2021), <https://www.energywatch.com.my/blog/2021/08/20/a-decade-of-renewables-growth-in-malaysia-where-do-we-go-from-here/> accessed 9 November 2022.

117 Ibid.

118 Mordor Intelligence, "Malaysia Renewable Energy Market-growth, Trends, Covid-19 Impact, and Forecasts (2022-2027)", (*Mordor Intelligence*, n.d.), <https://www.mordorintelligence.com/industry-reports/malaysia-renewable-energy-market> accessed 9 November 2022

119 Chor Jack, Christopher Lee, Lim Siaw Wan, "The Government of Malaysia Launches the National Energy Policy 2022 – 2040: What it Means for the

Malaysia's economic resilience while also to ensure environmental sustainability.[120] Overall, the NEP is established to harmonise existing energy policies, creating a long-term vision and response plan, provide the most recent direction of the energy sector and ensuring a coordinated response from the energy sector and ensuring they keep in line with the national aspirations and agendas.[121] The NEP sets out its targets in relation to RE energy, the grid systems and GHG reporting to include initiatives such as enhancing of potential solar, hydroelectric and bioenergy resources.[122] Focusing only on solar energy, the NEP aims to maintain a long-term pipeline for LLS projects with "indicative total package and lot sizes, optimised between large solar parks and smaller scale packages".[123] The NEP aims to increase the competitions in private capital for solar investments, with optimisation of equity holding rules and strengthening the due diligence process during bidding and evaluation process.[124] Moreover, the NEP also aims to extend the existing NEM programme, which is in line with the Prime Minister announcement given during the Fifth International Sustainable Energy Summit 2022 that there will be 1,200MW worth of quota to be allocated to solar projects like the NEM.[125] The NEP ensures that there will be an increase in the accessibility of RE to businesses in line with ESG (define) standards.[126] RE would be one of the key factors for considered by multinational companies when deciding whether to invest in a country.[127] In fact, corporates that obtain most of its energy from renewable sources attracts investment as investors are more keen on projects that are ESG friendly, improving

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Renewables Landscape", (*Christopher & Lee Ong*, September 2022), < https://www.christopherleeong.com/media/5070/2022-09_the-govt-of-msia-launches-the-national-energy-policy-2022-2.pdf> accessed 10 November 2022.

120 Business Today Editorial, "National Energy Policy (NEP) 2022 – 2040 Launched Today as a New Narrative For Energy Transition", (*Business Today*, 19 September 2022), <https://www.businesstoday.com.my/2022/09/19/national-energy-policy-nep-2022-2040-launched-today-as-a-new-narrative-for-energy-transition/> accessed 10 November 2022.

121 Business Today Editorial (n 73).

122 Business Today Editorial (n 73).

123 Chor Jack *et al* (n 72).

124 Ibid.

125 Ibid.

126 Ibid.

127 Ibid.

their portfolios. Apart from enhancing the existing RE programmes, NEP also aims to explore other potential REs such as wind and geothermal.[128] These two types of RE are of great potential considering the geographical location of a certain region in Malaysia. The plans listed in the NEP are actually more than what has been discussed above, and ultimately, the NEP sets out a clear roadmap to improve the nation's socioeconomically and keep in line with other policies to achieve net-zero GHG emissions by 2050.[129] For the NEP to be executed in such manner, the Malaysian Government still plays an important role in ensuring that the implementation plans are properly introduced for each initiative set out in the NEP.[130]

As mentioned, the global mission requires nations to collaborate, cooperate, and support each other in achieving climate targets, as evidenced in the PA and each annual COP. One example of support given by another fellow member state is the United Kingdom ('UK') which announced at COP26 its support by providing £110 million of financial aid to the ASEAN Catalytic Green Finance Facility which will support new sustainable infrastructures[131] and £274 million fund for UK Climate Action for a Resilient Asia (CARA) programme that will strengthen the climate adaptation across the Indo-Pacific region[132]. Other forms of assistance come in a form of studies and strategy recommendations such as from IRENA above, or the EU-ASEAN

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128 Economic Planning Unit, "National Policy 2022 – 2040", (*EPU*, n.d.), <https://www.epu.gov.my/sites/default/files/2022-09/National%20Energy%20Policy_2022_2040.pdf> accessed 10.11.2022.

129 Baker McKenzie, "Malaysia: Malaysian National Energy Policy 2022-2040", (*Baker McKenzie*, 26 September 2022), <https://insightplus.bakermckenzie.com/bm/energy-mining-infrastructure_1/international-malaysian-national-energy-policy-2022-2024> accessed 10 November 2022.

130 Baker McKenzie (n 82).

131 Foreign, Commonwealth & Development Office and The Rt Hon Elizabeth Truss MP, "Truss Announces Major Investment in Clean Infrastructure in Asia', (*Gov.UK*, 3 November 2021), <https://www.gov.uk/government/news/truss-announces-major-investment-in-clean-infrastructure-in-asia> accessed 11 November 2022.

132 Foreign, Commonwealth & Development Office and The Rt Hon Amanda Milling MP, "UK Announces £274m Boost to Climate Resilience Across Indo-Pacific', (*Gov.UK*, 8 November 2022), <https://www.gov.uk/government/news/uk-announces-274m-boost-to-climate-resilience-across-indo-pacific> accessed 11 November 2022.

Business Council ("EABC") where their strategies aim to serve as a guideline for ASEAN to work towards the challenges faced in the energy transition. EABC suggested that it is crucial to first strengthen the ASEAN's Sustainable Finance Ecosystem.[133] EABC also identified that AMS needs to improve the access to low-carbon technologies at a reasonable cost.[134] For that, the EU has in place practical resources and expertise to provide the support required in terms of technology and finance.[135]

UNITED KINGDOM'S MILESTONES IN RE

As Malaysia strives to achieve its climate targets, the United Kingdom ("UK") also set the same target to reach net zero by 2050 with a transition to an electrical system with 100% zero-carbon generation and with much of this generated from renewable energy.[136] In 2023 Q2, 42.13% of the power in the UK came from RE sources, including wind (21.1%), bioenergy (11.2%), solar (8.6%), and hydropower (1.1%). .[137] The zero-carbon power generated from the above RE has increased from 20% to 43% since 2010, while the power generated by fossil fuels has significantly decreased from 75% in 2010 to around 38.8% in 2023.[138]

Similarly, such impressive achievement has been achievable with various schemes in the UK that provide financial support for RE to encourage technology development and greater adaptation of renewables.[139] Like Malaysia, the UK has also implemented a FIT

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133 EU-ASEAN Business Council, "Powering ASEAN's Energy Transition" (2021) at pp 15.

134 Ibid.

135 Ibid.

136 National Grid, 'How Much of the UK's Energy is Renewable?', (*National Grid*, n.d.), <https://www.nationalgrid.com/stories/energy-explained/how-much-uks-energy-renewable> accessed 10 November 2022.

137 Department for Energy Security & Net Zero, *Energy Trends UK April to June 2023*, (UK Government, 2023) <https://assets.publishing.service.gov.uk/media/6513fe8ef6746b000da4bab5/Energy_Trends_September_2023.pdf >, accessed 28 November 2023.

138 Ibid; National Grid (n88).

139 Energy UK, "Renewable Generation", (*Energy UK*, n.d.), <https://www.energy-uk.org.uk/energy-industry/renewable-

scheme that requires participating licenced electricity suppliers to make payments for the electricity generated and exported by accredited installations, such as wind turbines and solar panels. .[140] The UK also pledged to accelerate the UK's transition to RE at the COP27. For that, the UK plans to incur £65.5 million for the Clean Energy Innovation Facility where researchers and scientists in developing countries can speed up the development of clean technology.[141]

Although based on the achievements of the UK in energy transition, regulatory support mechanisms like the FIT, are designed and implemented differently from one country to another according to Crossley.[142] This is true because there is no sole mechanism or combined mechanism that can meet the needs of each country considering that each country will have its natural resources, legislation, governmental structures and customs.[143] Hence, it cannot be a direct comparison with the UK, in the hope of adapting their method of implementation for the better progress in Malaysia. Instead, the UK's implementation can serve as guidance or an example for Malaysia.

MALAYSIA AND THE UNITED KINGDOM

As part of a global effort in achieving climate targets, the UK and Malaysia have signed the 'UK-Malaysia Memorandum of Understanding 2022' for both countries to work together in stepping up the action plan on climate and biodiversity to reducing GHG emissions. [144] This partnership will remain in effect for a period of five

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generation.html#:~:text=Fuel%20sources%20include%20wind%2C%20wave,increase%20to%2030%25%20by%202020.> accessed 11 November 2022.

140 Ofgem, "Feed-in Tariffs", (*Ofgem*, n.d.), <https://www.ofgem.gov.uk/environmental-and-social-schemes/feed-tariffs-fit>, accessed 29 November 2023.

141 Prime Minister's Office, 'UK announces major new package of climate support at COP27', (*Gov UK*, 7 November 2022), <https://www.gov.uk/government/news/uk-announces-major-new-package-of-climate-support-at-cop27> accessed 11 November 2022.

142 Penelope Crossley, "Renewable Energy Law: An International Assessment" 2019, (Cambridge University Press), ISBN 9781107185760.

143 Ibid

144 Foreign, Commonwealth & Development Office and the Rt Hon Lord Goldsmith, "UK-Malaysia Climate Ties Strengthened with New Climate Partnership",

years and may be extended for another five years with mutual agreement of both countries.[145] This partnership will only strengthen the climate ties between Malaysia and the UK. Prior to this partnership, the UK had been delivering projects in Malaysia, and to name a few, the UK contributed to the strengthening of the nature-based solutions in the Terengganu forest, supporting low-carbon city planning in Iskandar Malaysia and promoting sustainable urbanisation in Kuala Lumpur.[146]

In this new partnership, Malaysia and the UK have to take necessary steps to encourage and promote technical cooperation in the main areas, namely, collaboration on climate and biodiversity issues, knowledge sharing, promoting scientific and technical collaboration, supporting private sector involvement and promoting outreach activities.[147] Both countries will collaborate and co-operate in the climate change, mitigation and adaptation related area such as clean energy, low carbon planning, industrial processes and product use (IPPU), waste, agriculture, forestry and land use, and biodiversity.[148] Additionally, both countries will also collaborate and co-operate in Green / Sustainable Finance to support Malaysia's transition to a low carbon economy and in Communication, Education and Public Awareness (CEPA) and climate change related technology.[149]

CONCLUSION

Malaysia has in fact made great progress in the implementation of RE. There are a variety of initiatives taken not only by the government but also by the organisation and energy supplier of Malaysia. Everyone is

(*Gov.UK*, 7 June 2022), <https://www.gov.uk/government/news/uk-malaysia-climate-ties-strengthened-with-new-climate-partnership> accessed 11 November 2022.

145 Paragraph 10 of the Memorandum of Understanding between the Government of United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia on Co-operation in Climate Actions (Sustainable Growth), pp 5.

146 Foreign, Commonwealth & Development Office and the Rt Hon Lord Goldsmith (n 72).

147 Memorandum of Understanding between the Government of United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia on Co-operation in Climate Actions (Sustainable Growth) (n 95) at Paragraph 2, pp 2.

148 Ibid at Paragraph 3, pp 3.

149 Ibid.

working towards the same objective and target in reducing GHG emissions and reaching environmental sustainability. Nonetheless, merely putting forward initiatives or programmes does not guarantee their effectiveness in contributing to the achievement of Malaysia's climate targets. It depends on the execution of the project or implementation and the extent to which it has reached the general public, determining the level of voluntary participation in existing programmes. That being one of the factors which would affect the progress of the RE transition in Malaysia, another factor is the financial challenge. That is where a country like the UK's financial aid would impact the transitioning process, especially in ASEAN countries.

ADDRESSING THE REFUGEE CRISIS THROUGH THE LENS OF ISLAMIC INTERNATIONAL LAW

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ABSTRACT

This paper aims to examine the current refugee crisis through the lens of Islamic international law. Refugee crisis is one of the most urgent humanitarian challenges of our time and it involves the majority of Muslim nations worldwide. Critical analysis and library research are used to uncover the issue. It is found that Islamic principles like human dignity (*Karamah*), preservation of life (*Hifz Al-Nafs*), and communal responsibility (*Ukhuwwah*) are align to the modern international refugee law in its ethical, moral and humane treatment of refugees and the importance of global cooperation to curb the issue especially among the Muslim countries. The paper also discusses the political, social, and economic impact of refugees in the host countries and relevant Islamic principles to combat them, such as balance and equity (*Mizan, Wasatiyyah*), shared responsibility (*Takaful*), implementing gradual changes (*Tadarruj*), and prioritising security and welfare (*Maslahah*). It is concluded that Islamic principles can enrich and complement the modern international refugee law to develop kinder, fairer, and more sustainable answers to the global refugee challenge. Ultimately, the paper seeks to preserve the lives and well-being of refugees and to address their issue from the perspective of Islamic international law.

Keywords: Refugee crisis, Islamic principles, *Maqāṣid Syariah*, Islamic International Law.

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INTRODUCTION

According to the UNHCR, at least 89.3 million individuals have been forced to evacuate their homes around the world. Nearly 27.1 million refugees are among them, with nearly 41% of them being under the age of 18. UNHCR today employs 20,739 people in 135 countries. They have assisted almost 50 million refugees in successfully resuming their lives, and they continue to safeguard and assist the 108.4 million individuals who are now displaced.[150]

Understanding the intricacies of the global refugee problem necessitates a multifaceted approach that transcends traditional legal and geopolitical analyses. One such perspective involves examining the crisis through the lens of Islamic International Law, a rich legal tradition that has navigated complex societal issues, including migration and refuge, for centuries. Examining the refugee problem through International Islamic Law is relevant and significant in the contemporary global landscape.

Islamic International Law, often termed *Siyar*, is a vast and multifaceted legal discipline rooted in religious scripture and a rich tradition of jurisprudence. It is derived from various sources, including the *Quran*, the *Hadith* (Prophet Muhammad's sayings and actions), *Ijma'* (consensus of scholars), and *Qiyas* (analogical reasoning). This complex legal discipline has guided millions of Muslims in their personal, communal, and societal conduct for over a millennium. It plays a vital role in Muslim-majority nations and among Muslim communities worldwide[151].

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol are the two primary legal instruments that define "refugees." A person who

> "has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion…"

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150 "108.4 Million People Worldwide Were Forcibly Displaced". United Nations High Commissioner for Refugees (UNHDR). June 14, 2023. https://www.unhcr.org/my/about-unhcr/who-we-are/figures-glance

151 "The World's Muslims: Religion, Politics and Society," *Pew Research Center*, April 30, 2013, https://www.pewresearch.org/religion/2013/04/30/the-worlds-muslims-religion-politics-society-overview/.

is defined as a refugee by the Convention. The person is abroad and is unable or unwilling to invoke the protection of his country of nationality or place of habitual residence due to his fear of persecution.152 The refugee problem is a pressing global issue, exacerbated by many factors, including conflict, persecution, environmental crises, and a lack of political will to address the issue effectively.

Islamic International Law can offer a valuable perspective on the refugee problem for multiple reasons. First, it provides a unique ethical framework that underscores human dignity, protection of life, and community responsibility, all of which are central to refugee protection. Second, it holds significant influence in many countries that are primary sources or hosts of refugees, making its tenets particularly relevant in these contexts. Lastly, it provides a potentially practical approach to refugee protection that can complement and enrich International Refugee Law.

This paper delves into the intricate relationship between the refugee problem and Islamic International Law, examining how this legal framework addresses the rights and duties of refugees and the responsibilities of host states. It explores the intersection of Islamic International Law with International Refugee Law, providing a comparative analysis that uncovers similarities, differences, and potential points of synergy. The paper also considers the impacts of large-scale refugee influx on host countries and how they might be effectively managed under International Islamic Law.

Case studies involving countries such as Malaysia and their response to refugee situations, particularly the Rohingya crisis, are incorporated to provide practical insights. The study concludes by evaluating the future prospects of Islamic International Law in addressing the global refugee crisis, suggesting recommendations for overcoming challenges and enhancing its effectiveness. The conclusions drawn aim to provide a diverse, inclusive, and comprehensive approach to solving the refugee problem, thereby contributing to the broader discourse on refugee protection and human rights.

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152 "Convention Relating to the Status of Refugees," (1951), article 1; “Protocol Relating to the Status of Refugees," (1967).

Understanding Refugees and Islamic International Law

Delving deeper into the refugee crisis demands an in-depth understanding of who qualifies as a refugee. According to the United Nations High Commissioner for Refugees (UNHCR), a refugee is someone who is unable or unwilling to return to their country of origin due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion[153]. This legal definition, enshrined in the 1951 Refugee Convention, frames the issue in global discussions[154].

However, in Islamic International Law, the term 'refugee' corresponds closely to the Arabic term "*muhajir*". A *muhajir* is an individual who migrates from a place of persecution or harm to a place of safety, primarily to preserve their faith[155]. This concept stems from early Islamic history when Muslims migrated from Mecca to Medina to escape religious persecution. Thus, the Islamic definition of refugees is rooted in a historical context of migration for the preservation of faith and life.

The global refugee problem, while appearing to be a contemporary issue, has deep historical roots. Modern history has witnessed several significant refugee crises, from the displacement caused by World Wars to the ongoing crises induced by regional conflicts and persecutions[156]. The evolution of this issue has been marked by the growing complexity of causes of displacement, including non-traditional factors such as climate change and the increasing resistance of states to admit and accommodate refugees.

Islamic International Law, or *Siyar*, is an extensive legal and moral code that provides guidance on various aspects of life.

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153 "What is a refugee?," United Nations High Commissioner for Refugees (UNHCR), accessed July 23, 2023, https://www.unhcr.org/what-refugee.

154 UN General Assembly, *Convention Relating to the Status of Refugees*, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137, accessed July 23, 2023, https://www.refworld.org/docid/3be01b964.html.

155 Arafat Madi Shoukri, "*Amān* (safe conduct) in the Islamic Tradition," in *Refugee Status in Islam* (New York: I. B. Tauris & Co Ltd, 2011), pp. 51-55.

156 Mark Cutts and Office of the United Nations High Commissioner for Refugees (UNHCR), "Chapter 1: The early years," in *The State of the World's Refugees: Fifty Years of Humanitarian Action* (Geneva, New York: UNHCR, Oxford University Press, 2000), pp. 13-36. https://www.unhcr.org/media/state-worlds-refugees-2000-fifty-years-humanitarian-action-chapter-1-early-years.

Originating from the *Sharia*, its sources are religious scriptures of the *Quran* and the *Hadith*, and it has been expanded and interpreted through *Ijma'* (consensus among scholars) and *Qiyas* (analogical reasoning)[157]. The principles enshrined within International Islamic Law, such as human dignity (*Karamah*), preservation of life (*Hifz Al-Nafs*), and communal responsibility (*Ukhuwwah*), have significant relevance to the refugee issue[158]. These principles promote a culture of protection and assistance towards those facing persecution, a position aligning well with the aims of the international community in addressing the refugee crisis.

Historically, the Islamic world has witnessed numerous forced migration and refuge instances. The most notable was the *Hijrah*, the aforementioned migration of Prophet Muhammad and his followers from Mecca to Medina to escape religious persecution[159]. This event is so significant that it marks the beginning of the Islamic calendar. Additionally, Muslim empires throughout history have often accepted those seeking refuge from persecution, reflecting the Islamic principles of asylum (*Istijarah*) and protection of life (*Hifz Al-Nafs*)[160].

An examination of Islamic history and tradition further illuminates the plight of refugees. For instance, the narrative of Prophet Ibrahim (Abraham), who left his home and migrated to escape religious persecution, is similar to the experiences of contemporary refugees[161]. Prophet Musa (Moses) was also a refugee in Islamic tradition, leading his people away from Pharaoh's oppression in Egypt towards safety[162]. Such historical instances of forced migration to preserve faith and

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157 Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (Selangor: Thomson Reuters Asia Sdn Bhd, 2019), p. 19.

158 Kirsten Zaat, "The protection of forced migrants in Islamic law," UNHCR, December 2007, accessed July 23, 2023, https://www.unhcr.org/media/protection-forced-migrants-islamic-law-kirsten-zaat.

159 Arafat Madi Shoukri, "*Jiwār* in the Islamic Tradition in the Meccan period," in *Refugee Status in Islam* (New York: I. B. Tauris & Co Ltd, 2011), pp. 33-43.

160 Abdul Rahman Latif, "Be Brothers"—Case Studies of Muslim Receptions of Refugees in History," last updated October 20, 2020, https://yaqeeninstitute.org.my/read/paper/be-brothers-case-studies-of-muslim-receptions-of-refugees-in-history.

161 Fahad Ansari, "Refugee Crisis: the Islamic Approach," last updated June 22, 2022, https://www.islam21c.com/islamic-thought/refugee-crisis-where-are-the-muslim-voices/.

162 *Ibid*.

safety in Islamic traditions resonate with the current global refugee crisis.

Understanding the universal and Islamic perspectives on refugees, and the historical context, offers a nuanced foundation for exploring how International Islamic Law addresses the current global refugee problem.

International Islamic Legal Principles and Refugees

The provisions of Islamic International Law encompass a range of principles that hold profound significance for refugees. Exploring these selected principles - *Karamah*, *Hifz Al-Nafs*, *Ukhuwwah*, *Istijarah*, and *Hijrah* - yields a comprehensive understanding of the obligations and rights of refugees and host countries alike.

Human dignity, or *Karamah*, is a central tenet of Islam, as emphasised in the Quran: "We have honoured the children of Adam" (Quran 17:70). This belief bestows upon every human being an inherent and inviolable dignity, irrespective of their race, religion, or circumstance[163]. In the context of refugees, this principle mandates that they be treated with respect and honour, thereby implying a duty on the part of host nations to uphold the dignity of refugees.

Preservation of life, or *Hifz Al-Nafs*, is another critical Islamic principle relevant to refugees. *Hifz Al-Nafs* is one of the five central traditional elements in *Maqāṣid Syariah* (objectives of Sharia) elaborated by al-Ghazali apart from preserving one's property (*al-māl*), intellect (*al-'aql*), religion (*ad-dīn*), and dignity/lineage (*an-naṣb*)[164]. It is rooted in the Quranic verse: "Whoever saves one life, it is as if he saved the whole of mankind" (Quran 5:32). This principle emphasises the sanctity of life and the obligation to preserve it. Therefore, it

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163 Mohammad Hashim Kamali, "Chapter 1: The Qur'ānic View of Human Dignity," in *The Dignity of Man: An Islamic Perspective* (Cambridge: The Islamic Texts Society, 2002), pp. 1-4.

164 Zulfaqar Mamat, Rodziana Mohamed Razali, Wan Abdul Fattah Wan Ismail, and Tasneem Rahmatullah, "Kajian Awalan Pendekatan Maqāṣid Syariah Sebagai Alternatif Dalam Dasar Dan Perundangan Berkaitan Pelarian Di Malaysia: A Preliminary Study of Maqāṣid Sharīah Approach as An Alternative in Policy and Legislation Related to Refugees in Malaysia," *AL-MAQASID The International Journal of Maqāṣid Studies and Advanced Islamic Research* 1, no. 1 (2020): 1-14, https://doi.org/10.55265/almaqasid.v1i1.4.

necessitates that refugee - fleeing threats to their lives - should be granted protection by the host countries to ensure their safety.

The principle of brotherhood and mutual responsibility, or *Ukhuwwah*, finds expression in the Hadith:

> "The Believers, in their mutual love, mercy and compassion, are like one body: if one organ complained, the rest of the body develops a fever"[165].

This principle underscores the collective responsibility of the global community, including host states, to support refugees as if they were their own kin[166].

Asylum, or *Istijarah*, is directly related to the treatment of refugees. It originates from the Prophet's practice of protecting those seeking refuge, reflecting an Islamic tradition of sanctuary[167]. Under this principle, refugees have the right to seek asylum, and host countries have the duty to offer refuge and protection.

The principle of *Hijrah*, or migration for the sake of religion, harks back to the earliest instances of forced migration in Islamic history. It denotes the act of fleeing from persecution, especially in the preservation of one's faith, which mirrors the current reality of many refugees[168]. The principle of *Hijrah* upholds the right of refugees to seek sanctuary and the responsibility of host countries to provide it.

Collectively, these principles of Islamic International Law construct a comprehensive framework for the rights and duties of refugees, as well as the obligations of host states. They uphold the rights of refugees to dignity, life, brotherhood, asylum, and migration while concurrently asserting the duties of host states to protect and assist refugees. The principles align closely with international

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165 Muḥammad Ibn Ismā'īl Bukhārī. Sahih Al-Boukhari : Arabe-Franc¸Ais. Tome 2, Du Hadith No.1773 Au Hadith No. 6011. Paris: Al Qalam, 2012.

166 M. Alvi Syahrin, "The Rohingya Refugee Crisis: Legal Protection on International Law and Islamic Law," paper presented at the *1st International Conference on Indonesian Legal Studies (ICILS 2018), Semarang, Central Java, Indonesia, July 25, 2018,* https://www.atlantis-press.com/article/25903147.pdf.

167 Muhammad Nur Manuty, "The Protection of Refugees in Islam: Pluralism and Inclusivity," *Refugee Survey Quarterly* 27, no. 2 (2008): 24-29, https://www.jstor.org/stable/45054314.

168 Khaled Abou El Fadl, "Islamic Ethics, Human Rights and Migration,"in *Migration and Islamic Ethics* (Leiden, The Netherlands: Brill, 2019), pp. 13-27, doi: https://doi.org/10.1163/9789004417342_003.

standards on refugee protection, reflecting the deep-rooted Islamic tradition of upholding human rights, providing refuge and ensuring safety for the persecuted.

Comparison between Islamic International Law and International Refugee Law

International Refugee Law is a collection of international legal instruments that provide a framework for the rights of refugees and the obligations of states. The cornerstone of this legal framework is the 1951 Refugee Convention and its 1967 Protocol[169]. These legal instruments define who is a refugee, set out the rights of individuals granted asylum, and outline the responsibilities of nations that grant asylum. They are complemented by regional instruments such as the 1969 Organisation of African Unity (OAU) Convention[170] and the 1984 Cartagena Declaration in Latin America[171]. Furthermore, they interact with and are complemented by international human rights and humanitarian law.

In parallel, Islamic International Law, deriving from Quranic teachings, *Hadith*, *Ijma'* (consensus), and *Qiyas* (analogical reasoning), offers robust principles guiding the treatment of refugees. These principles, as previously outlined, include *Karamah* (human dignity), *Hifz Al-Nafs* (preservation of life), *Ukhuwwah* (brotherhood), *Istijarah* (asylum), and *Hijrah* (migration).

A comparative analysis of the two legal systems reveals both similarities and differences, particularly concerning refugee treatment. Both systems are founded on the principles of preserving human

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169 UN General Assembly, *Convention Relating to the Status of Refugees*, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 137, https://www.refworld.org/docid/3be01b964.html; UN General Assembly, *Protocol Relating to the Status of Refugees*, January 31, 1967, United Nations, Treaty Series, vol. 606, p. 267, https://www.refworld.org/docid/3ae6b3ae4.html. [accessed July 23, 2023]

170 Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, September 10, 1969, 1001 U.N.T.S. 45, accessed July 23, 2023, https://www.refworld.org/docid/3ae6b36018.html.

171 Organization of American States (OAS), *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, November 1984, accessed July 23, 2023, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.

dignity and life, indicative of a shared understanding of the inherent worth of every individual, including refugees.

In both Islamic International Law and International Refugee Law, the right to seek asylum is acknowledged. The principle of *Istijarah* in Islamic law aligns with the 1951 Convention's stipulation of non-refoulement, a crucial aspect of the right to seek asylum[172]. Similarly, *Hijrah*, or the right to migrate due to persecution, bears a resemblance to the Convention's definition of a refugee as someone unable or unwilling to return to their country of origin due to fear of persecution.

While both legal frameworks advocate shared responsibility for refugees, some differences exist. The principle of *Ukhuwwah* in Islamic Law extends a sense of kinship and collective responsibility for refugees to all believers. In contrast, International Refugee Law distributes responsibilities based on capacities and resources, emphasising states' physical proximity to crises[173].

Points of conflict between the two systems may emerge from different interpretations and applications of principles. International Refugee Law, being predominantly secular and regional in nature, might face resistance in settings where Islamic Law is applied. Furthermore, the interpretation and application of Islamic principles can vary widely among Muslim-majority countries, presenting potential obstacles to a uniform refugee policy guided by Islamic Law[174].

However, these differences still need to diminish the potential for these two systems to complement and reinforce each other in addressing the refugee crisis. By understanding the commonalities and unique strengths of each, it is possible to develop an approach that leverages the strengths of both systems while accommodating their differences. This comparative analysis thus presents an opportunity for

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172 Arafat Madi Shoukri, "The 1951 Geneva Convention relating to the Status of Refugees in the light of Islamic tradition," in *Refugee Status in Islam* (New York: I. B. Tauris & Co Ltd, 2011), pp. 106-114.

173 Dana Schmalz, "The principle of responsibility-sharing in refugee protection: An emerging norm of customary international law," *Völkerrechtsblog*, March 6, 2019, https://voelkerrechtsblog.org/de/the-principle-of-responsibility-sharing-in-refugee-protection/.

174 "The World's Muslims: Religion, Politics and Society," *Pew Research Center*, n. 1.

improved refugee protection within a harmonised and holistic legal framework, incorporating both International Refugee Law and International Islamic Law.

The Impact of Refugee Influx on Host Countries

The phenomenon of large-scale refugee influxes presents significant challenges for host countries, particularly when those are already grappling with their own socio-economic issues. The scope of these challenges often depends on the scale of the influx, the socio-economic context of the host country, and the availability of international support.

In socio-economic terms, the sudden arrival of a large refugee population can strain a host country's resources, infrastructure, and services. This strain includes pressure on public services such as healthcare, education, housing, and social welfare systems. For example, public services have been overstretched in Lebanon, hosting approximately 1.5 million Syrian refugees, contributing to increased tension between host communities and refugees[175].

Refugees often require access to the labour market to sustain themselves and their families. However, their integration into local economies can be a double-edged sword. While their participation can stimulate economic activity and contribute to the host country's economy, it can also lead to job competition, potentially fuelling tension and xenophobia, especially in countries with high unemployment rates[176].

Culturally, the arrival of a large number of refugees can have profound effects on host societies. Integrating new cultures, languages, and religious practices may enrich local communities, fostering cultural diversity and exchange. However, it can also lead to cultural

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175 Omer Karasapan and Sajjad Shah, "Why Syrian refugees in Lebanon are a crisis within a crisis," *The Brookings Institution*, April 15, 2021, https://www.brookings.edu/articles/why-syrian-refugees-in-lebanon-are-a-crisis-within-a-crisis/.

176 Paolo Verme, "Theory and evidence on the impact of refugees on host communities," *World Bank Group*, March 28, 2023, https://blogs.worldbank.org/dev4peace/theory-and-evidence-impact-refugees-host-communities.

clashes and resistance from host communities, especially when cultural differences are substantial[177].

In terms of security, while it is vital to challenge the stereotype that associates refugees with higher crime rates, the arrival of a large number of refugees can present security challenges. These range from potential tensions with host communities to concerns about the infiltration of armed groups[178]. Some host countries express concerns about radicalisation within refugee populations, mainly if they come from regions beset by conflict and extremist ideologies.

These impacts are not merely theoretical but have been observed in real-world contexts. Challenges in countries like Jordan[179] and Lebanon[180], which host significant numbers of Syrian refugees, include strained public services, socio-economic tensions, and complex cultural and security dynamics. Similarly, Turkey, the country hosting the most refugees worldwide, has faced significant integration challenges, although it has also seen examples of successful integration and economic contribution from refugees[181].

In summary, the influx of refugees can significantly impact host countries across multiple dimensions. This highlights the importance of comprehensive and long-term approaches to refugee management, ideally involving international cooperation and burden-sharing. It also underscores the potential of International Islamic Law's principles, emphasising solidarity, human dignity, and the shared responsibility of

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177 Sanjugta Vas Dev, "The reluctant host: the socio-cultural impact of refugees on developing communities," *Mots Pluries* 21 (2002). https://motspluriels.arts.uwa.edu.au/MP2102s.html.

178 Simon Bell, "Why Refugees Are a Threat to National Security," accessed July 23, 2023, https://www.academia.edu/7188234/Why_Refugees_Are_a_Threat_to_National_Security.

179 Mazen A. S. Alougili, "The impact of Syrian refugee on Jordanian national security," *European Journal of Social Sciences* 2, no. 3 (2019): 83-99, https://revistia.org/files/articles/ejss_v2_i3_19/Alougili.pdf.

180 Omer Karasapan, and Sajjad Shah, "Why Syrian refugees in Lebanon are a crisis within a crisis," n. 23.

181 Yusuf Emre Akgündüz, Marcel van den Berg, and Wolter Hassink, "The Impact of Refugee Crises on Host Labor Markets: The Case of the Syrian Refugee Crisis in Turkey," *IZA Discussion Paper*, no. 8841 (2015), https://dx.doi.org/10.2139/ssrn.2564974.

Ummah, to offer valuable insights and strategies for managing these challenges.

Regulating Refugee Influx under Islamic International Law

International Islamic Law provides clear guidance on how nations should respond to an influx of refugees. These guidelines include principles of balance and equity (*Mizan, Wasatiyyah*), shared responsibility (*Takaful*), implementing gradual changes (*Tadarruj*), and prioritising security and welfare (*Maslahah*).

The principles of *Mizan* and *Wasatiyyah* underline the Islamic emphasis on moderation and balance in all aspects of life[182]. This aspect can extend to refugee management, wherein nations strive to accommodate refugees in a manner that maintains socio-economic balance. This implies creating policies that welcome refugees while also considering the carrying capacity of the state and the potential impact on host communities. The policies can be made by the Muslim government of the Islamic nations as it is their responsibility to establish the rules as stipulated in the Quran (4:59).

Responsibility Sharing, or *Takaful,* is another significant principle of International Islamic Law that can be applied to the refugee issue. This principle emphasises mutual assistance and shared responsibilities within the Islamic community (*Ummah*)[183]. In practice, this can translate into a more equitable distribution of refugees among nations, thereby mitigating the pressure on countries most affected by refugee influxes. *Takaful* can provide an Islamic foundation for an international response to refugee crises based on solidarity and burden-sharing. For instance, in 2019, the UNCHR introduced Refugee Zakat Fund with support from Islamic scholars and fatwas[184]. This initiative allows Muslims to participate in burden-sharing regarding refugees in the Muslim world.

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182 Khaled Abou El Fadl, "Qurʾanic Ethics and Islamic Law", *Journal of Islamic Ethics* 1, no. 1-2 (2017): 7-28, https://doi.org/10.1163/24685542-12340002.

183 Hossameldeen Mohammed and Ray Jureidini, "Umma and the nation-state: dilemmas in refuge ethics," *Journal of International Humanitarian Action* 7, no. 17 (2022), pp. 11-13, https://doi.org/10.1186/s41018-022-00124-z.

184 *Ibid.*, pp. 16-20; see also "The Refugee Zakat Fund," UNCHR, accessed July 23, 2023, https://zakat.unhcr.org/en/about-zakat.

Tadarruj, the principle of gradualism in Islam, advocates for changes to be made systematically and incrementally[185]. This principle could guide the phased integration of refugees into the host societies, thus ensuring the process is manageable and sustainable. For example, refugees' access to certain services or job markets could be introduced progressively to prevent sudden shocks to the system. Introducing refugees into the labour landscape not only strengthens the host country's human resources but also allows the refugees to make a living to fulfil their other needs. Again, the government can create a policy to facilitate this.

Finally, *Maslahah* prioritises public interest, security, and welfare, underscoring the need for policies that benefit the majority while protecting vulnerable minority groups like refugees[186]. This principle may guide countries to develop refugee policies that balance the needs of refugees and host communities, maintaining social harmony and national security, which complements the principles of *Mizan* and *Wasatiyyah*.

Practical applications of these principles can be observed in various Islamic-majority countries. For instance, Turkey, which hosts the most significant number of refugees globally, has adopted a phased integration approach, implementing policies gradually while prioritising public interest and security. The Turkish government has begun to allow Syrian refugee children to enter Turkish public schools[187].

Similarly, in Jordan, a country that hosts a significant number of Syrian refugees, the principle of *Takaful* is demonstrated through its efforts to provide asylum and share the responsibility with international

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185 Amir Husin Mohd Nor, "Tadarruj (Beransur-ansur) Dalam Pelaksanaan Hukum Islam Masa Kini," *Jurnal Syariah* 9, no. 1 (2019): 1-12, https://ejournal.um.edu.my/index.php/JS/article/view/22910; Muhammad Shahrul Ifwat Ishak, Ahmad Akram Mahmad Robbi, and Nur Syahirah Mohammad Nasir, "The Principle of Tadarruj in Islamic Finance: A Conceptual Review," *Journal of Islamic Finance* 10, no. 1 (2021): 15-24, https://journals.iium.edu.my/iiibf-journal/index.php/jif/article/download/558/248.

186 Kirsten Zaat, "The protection of forced migrants in Islamic law," pp. 31-32, n. 7.

187 Alan Makovsky, "Turkey's Refugee Dilemma: Tiptoeing Toward Integration," *Center for American Progress*, March 13, 2019, https://www.americanprogress.org/article/turkeys-refugee-dilemma/.

actors[188]. However, the struggle to maintain balance and equity in the face of the overwhelming refugee influx also underlines the need for broader global action based on the *Takaful* principle.

In short, International Islamic Law provides valuable principles for regulating the refugee influx. These principles can inform robust, sustainable, and ethical responses to the global refugee crisis when coupled with other legal systems. Thus, implementing these principles presents an opportunity for synergising Islamic ethics with global humanitarian efforts.

Challenges and Opportunities in Applying Islamic International Law to the Refugee issue

As with any legal and ethical framework, applying Islamic International Law to the refugee problem presents challenges and opportunities.

Politically, resistance may come from various quarters, both within and outside Muslim-majority countries. These countries' resistance can be rooted in national interests, fears of instability, or a desire to limit foreign influence. The geopolitical complexities of certain regions, such as the Middle East, can also hinder the implementation of Islamic International Law in a manner that addresses the refugee crisis comprehensively and effectively.

Legally, there is considerable diversity in the interpretation and application of Islamic law across different countries and schools of thought[189]. While a strength in many respects, this diversity can make it challenging to reach a consensus on specific legal issues, including refugee rights and responsibilities. Discrepancies between national laws, International Islamic Law, and International Refugee Law can create additional complexities, necessitating careful negotiation and legal acumen.

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188 Bouthaina Ben Kridis, "The Jordan Compact: A model for burden-sharing in the refugee crisis," *Refugee Law Initiative*, May 17, 2021, https://rli.blogs.sas.ac.uk/2021/05/17/the-jordan-compact-a-model-for-burden-sharing-in-the-refugee-crisis/.

189 Emad Hamdeh, "What is a Madhhab? Exploring the Role of Islamic Schools of Law," last updated March 22, 2021, https://yaqeeninstitute.org.my/read/paper/what-is-a-madhhab-exploring-the-role-of-islamic-schools-of-law.

Culturally, while many Muslim-majority countries share a common faith, their cultural practices and societal norms can vary significantly. This diversity can lead to differing views on the treatment and integration of refugees, which can challenge a harmonised approach to refugee management. For example, the legal treatment of refugees in Saudi Arabia is confined to the *kafala* system, which is highly debated whether it is cultural or religious in nature[190].

Despite these challenges, applying International Islamic Law to the refugee problem also presents several opportunities. The emphasis on human dignity, brotherhood, and mutual responsibility can foster increased international cooperation in managing refugee issues. Islamic law principles can complement and enhance existing international law frameworks, adding a rich, faith-based dimension to global discussions on refugee rights and responsibilities[191].

Moreover, Islamic International Law can contribute to the empowerment of refugees. By recognising the rights of refugees, countries can better facilitate their integration, enabling them to contribute positively to their host societies[192]. This empowerment can have significant benefits in terms of social harmony, economic productivity, and cultural enrichment.

Further, promoting human rights is a crucial aspect of International Islamic Law. Therefore, its application to the refugee issue can help strengthen the global human rights regime, ensuring that the rights of some of the world's most vulnerable individuals are protected and upheld[193].

While challenges exist in applying Islamic International Law to the refugee problem, they are outweighed by the potential benefits.

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190 Charlotte Lysa, "Governing Refugees in Saudi Arabia (1948–2022)," *Refugee Survey Quarterly* 42, no. 1 (2023), pp. 1–28, https://doi.org/10.1093/rsq/hdac027.

191 Ahmed Al-Dawoody and Tilman Rodenhäuser, "The principle of non-refoulement under Islamic law and international law: complementing international legal protection in Muslim contexts," *International Committee of The Red Cross*, June 20, 2021, https://blogs.icrc.org/law-and-policy/2021/06/20/non-refoulement-islamic-law/.

192 "Promoting integration through social connections," UNCHR, accessed July 23, 2023, https://www.unhcr.org/handbooks/ih/social-connections/promoting-integration-through-social-connections.

193 Ahmed Al-Dawoody and Tilman Rodenhäuser, "The principle of non-refoulement under Islamic law and international law," n. 39.

These include fostering international cooperation, empowering refugees, and promoting human rights. The key lies in negotiating the complexities and leveraging the strengths of International Islamic Law to forge more compassionate, equitable, and effective responses to the global refugee crisis.

Islamic International Law and Refugees issue in Malaysia

One of the most pertinent examples of applying Islamic International Law to the refugee problem is Malaysia's handling of the Rohingya refugee crisis.

The Rohingya, an ethnic minority from Myanmar, have faced severe persecution in their homeland, resulting in one of the largest forced migrations in recent years[194]. Despite not being a signatory to the 1951 Refugee Convention or its 1967 Protocol, Malaysia has become a significant destination for these refugees, primarily due to its geographical proximity and socio-cultural affinity with the Rohingya, who are predominantly Muslim[195][196].

Malaysia has responded to this crisis in a variety of ways. While it has stopped short of formally recognising the Rohingya as refugees, it has allowed a significant number to reside within its borders, which is in accordance with the Islamic principle of hospitality and asylum (*Istijarah*)[197]. This approach also reflects the principle of preservation of life (*Hifz Al-Nafs*), as the Rohingya are fleeing severe threats to their safety and well-being.

The Malaysian government has also made concerted efforts to provide for the needs of the Rohingya, in line with the Islamic principle

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194 "Rohingya emergency," UNHCR, accessed July 23, 2023, https://www.unhcr.org/emergencies/rohingya-emergency.

195 Farid Sufian Shuaib and Saiful Izan bin Nordin, "Protecting Refugees, Preserving State Sovereignty and Mandating Equitable International Burdensharing: Finding The Balance for Malaysia," *INSAF - The Journal of the Malaysian Bar* 39, no. 1 (2022), pp. 42-73, https://insaf.malaysianbar.org.my/ojs/index.php/jmr/article/view/10.

196 Ruhanas Harun, "The Rohingya Refugees in Malaysia: issues, Approaches, national Security Implications and Challenges," *Journal of Public Security and Safety* 9, no. 1 (2019): 47-63, https://www.moha.gov.my/images/maklumat_bahagian/ipsom/jurnal/volume9/no4_volume_9_2019.pdf.

197 "Malaysia," UNCHR, accessed July 23, 2023, https://www.unhcr.org/countries/malaysia.

of brotherhood (*Ukhuwwah*). Various non-governmental organisations (NGOs) and Islamic charitable organisations have been pivotal in these efforts, providing food, healthcare, education, and other forms of support[198][199].

However, applying Islamic International Law in this context has also posed specific challenges. Balancing the needs of the local population with those of the Rohingya refugees, following the principle of balance and equity (*Mizan*, *Wasatiyyah*), has proven difficult. There have been tensions due to perceived competition for resources and jobs, leading to social discord in some instances[200].

Furthermore, Malaysia's non-recognition of the Rohingya as refugees, while in some ways a pragmatic response to a complex situation, has also hindered the implementation of more structured, long-term solutions for their integration and welfare[201]. This presents a dilemma regarding the principle of human dignity (*Karamah*), as the lack of legal status often leaves refugees vulnerable and precarious.

Similarly, Malaysia did not recognise the Rohingyas' status as immigrants or refugees, so they are considered lawless and not bound to any state or international jurisdictions. This “stateless” status has led some Rohingya refugees to commit crimes and other illegal acts, creating tensions within the local community. Their status also allows them to be free from being imposed Malaysian tax, which makes some Malaysians feel threatened. This somehow fed into xenophobia and was used by some parties to “scare” the public into questioning their

198 Ratu Ayu Asih Kusuma Putri and Dennyza Gabiella, “The Organisational Pattern of Rohingya Refugee Community in Malaysia: Structural Opportunities, Constraints, and Intra-Community Dynamics,” *Refugee Survey Quarterly* 41, no. 4 (2022), pp. 673–699, https://doi.org/10.1093/rsq/hdac010.

199 Hemamalani Kunapalan, Norafidah Binti Ismail, and Aminurraasyid Bin Yatiban, “The Roles of Non-Governmental Organisations (NGOs) in Assisting Refugees: From Malaysia Context,” *Malaysian Journal of Social Sciences and Humanities (MJSSH)* 5, no. 5 (2020), pp. 89 - 94, https://doi.org/10.47405/mjssh.v5i5.401.

200 Richard J. Towle, “Challenges and Way Forward in Handling Rohingya refugees in Malaysia” (presentation speech, Putrajaya, Malaysia, March 14 – 16, 2017), UNHCR, https://www.unhcr.org/my/news/challenges-and-way-forward-handling-rohingya-refugees-malaysia.

201 Christine H. Kim, “Challenges to the Rohingya Population in Malaysia,” *Center for Strategic & International Studies*, July 10, 2020, https://www.csis.org/blogs/new-perspectives-asia/challenges-rohingya-population-malaysia.

rights as Malaysian citizens and protecting their *status quo,* especially since the COVID-19 pandemic hit[202].

Thus, the case of the Rohingya in Malaysia provides valuable insights into the complexities of applying Islamic International Law to refugee situations. It demonstrates the potential of Islamic principles to guide compassionate and supportive responses, but also highlights the challenges inherent in balancing competing interests and needs. Despite these challenges, the Malaysian example accentuates the relevance and applicability of Islamic International Law in addressing the refugee problem.

CONCLUSION

The analysis presented in this paper underscores the significant potential of Islamic International Law in addressing the global refugee crisis. The ethical and legal principles embodied within this framework, ranging from the preservation of life to the principle of brotherhood, offer an alternative lens through which to view and address refugee situations. It reaffirms the rights and dignity of refugees while also delineating the responsibilities of host states.

For Islamic International Law to be more effectively employed in addressing the refugee problem, several vital recommendations must be considered. Firstly, concerted efforts should be made to reach a consensus on interpreting and applying Islamic International Law to refugee issues. This may necessitate scholarly dialogue and the formation of consensus-building institutions or committees, particularly within Muslim-majority states.

Secondly, increased cooperation between Muslim-majority states and the broader international community is crucial. This could involve partnerships in areas such as policy formulation, refugee management, and resource sharing. More significant integration of Islamic principles within global refugee frameworks may also promote increased acceptance and compliance by Muslim-majority states.

Lastly, measures should be taken to address societal tensions and ensure harmonious coexistence between refugees and host

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202 Huei Ting Cheong, "In Malaysia, why has solidarity turned to hostility for Rohingya refugees?" *Globe Media Asia*, December 11, 2020, https://southeastasiaglobe.com/rohingya-xenophobia-malaysia/.

communities. Cultural sensitivity training, community dialogue initiatives, and policies promoting equity and inclusion may be particularly beneficial[203].

This paper has highlighted the rich and complex interplay between Islamic International Law and the global refugee problem. It has identified critical Islamic principles that have bearing on refugee issues, explored the impact of refugee influx on host countries, and analysed the challenges and opportunities that arise when applying Islamic International Law to refugee situations. The case of the Rohingya refugees in Malaysia served as a practical example, demonstrating both the potential and the challenges inherent in this approach.

In conclusion, it is evident that the refugee problem requires a diverse, inclusive, and practical approach. Indeed, Islamic International Law, emphasises human dignity, equality, brotherhood, and social justice and provides a crucial perspective in this effort. By weaving these principles into the fabric of the international response to the refugee crisis, it may be possible to forge more compassionate, equitable, and sustainable solutions to one of the most pressing humanitarian issues of the current era.

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203 "Promoting welcoming and inclusive societies," UNCHR, accessed July 23, 2023, https://www.unhcr.org/handbooks/ih/welcoming-inclusive-societies/promoting-welcoming-and-inclusive-societies.

THE WRITE-OFFS OF CREDIT SUISSE'S AT1 BONDS: OPTIONS FOR MALAYSIAN INVESTORS

Harald Sippel*

In March 2023, Swiss banking giant UBS' acquisition of Credit Suisse dominated the news all around the world. However, while the collapse of Credit Suisse, which had been in existence for well over 150 years, itself came as a shock to financial markets, the decision by the Swiss Financial Market Regulator *Finanzmarktaufsicht* ("FINMA") to completely write off AT1 bonds stood out even more.

As a result of FINMA's decision to zero the value of the bonds, investors around the world, but predominantly located in Europe and Asia, lost 100% of their investment. According to reports, the combined amount of the affected bonds exceeds the equivalent of approximately RM 70 billion.

About a week after Credit Suisse's fall, we published a write-up entitled *The US$ 17 billion loss in Credit Suisse and available avenues for Malaysian investors: a preliminary overview*[204] in which we gave a summary of potential avenues available to Malaysian investors. Since then, a few Malaysian banks have had discussions with us in respect of the sale of Credit Suisse's AT1 bonds.

As banks and investors in Malaysia alike are in search of avenues to recoup their losses, we note from our discussions with affected Malaysian investors and banks, which sold the AT1 bonds to these investors, that there is a misconception: everyone seems to have the impression that only a Singaporean firm is taking action, for investors from Singapore. However, several actions have been taken around the world in the last few months as follows:

(i) Investors from the USA

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204 Mubashir Bin Mansor, Dr. Harald Sippel and Vishnu Vijandran, The US$ 17 billion loss in Credit Suisse and available avenues for Malaysian investors: a preliminary overview, 28th March 2023, available at www.skrine.com/insights/alerts/march-2023/the-us$-17-billion-loss-in-credit-suisse-and-avail (last accessed on 3rd June 2023).

We understand from the news that investors from the USA have challenged *FINMA's* decision on an administrative level before the Federal Administrative Court.[205] This was possible because *FINMA's* decision to order Credit Suisse to write off the bonds is an administrative decision. Challenging the decision on an administrative level was only possible up to 3rd May 2023; such action is now time barred.

(ii) Investors from Singapore

According to news reports, investors from Singapore are in the process of preparing an investor-state arbitration against Switzerland. Their claim is based on the free trade agreement ("FTA") between Singapore and the European Free Trade Association ("EFTA"), which includes Switzerland.[206] The Singapore-based investors claim that the circumstances of the takeover breached the FTA's provisions for investment protection.[207] Malaysia and EFTA have been in discussions over an FTA since 2014. However, no agreement has been reached to date, despite almost a decade having passed.[208]

(iii) Investors from Japan

It is further known from news reports that Japanese investors are examining the possibility to initiate an investment arbitration. Their claims are based on the Japan-Switzerland Economic Partnership Agreement (JSEPA).[209] The JSEPA provides for disputes to be resolved under the International Centre for Settlement of Investment

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205 CNN business, Credit Suisse bondholders file lawsuit against Swiss authorities, 21st April 2023, available at www.edition.cnn.com/2023/04/21/business/credit-suisse-bondholder-lawsuit/index.html (last accessed on 3rd June 2023).

206 For details, *see* Global Arbitration Review, Bondholders prepare treaty claim over Credit Suisse, 19th April 2023, available at www.globalarbitrationreview.com/article/bondholders-prepare-treaty-claim-over-credit-suisse (last accessed on 3rd June 2023).

207 Ibid.

208 EFTA,Malaysia, available at www.efta.int/free-trade/ongoing-negotiations-talks/malaysia (last accessed on 3rd June 2023).

209 For details, *see* Global Arbitration Review, More Credit Suisse Bondholder claims loom 18th May 2023, available at www.globalarbitrationreview.com/article/more-credit-suisse-bondholder-claims-loom (last accessed on 3rd June 2023).

Dispute (ICSID) Rules or the United Nations Commission on International Trade Law (UNCITRAL) Rules.[210]

(iv) Investors from Qatar

It is noteworthy that according to news reports, Credit Suisse's formerly second-largest investor, the Qatar Investment Authority (QIA), is examining the possibility of initiating a claim.[211] We understand that they base their claims on the Qatar – Switzerland BIT from 2001. As is the case under the JSEPA, this treaty also allows for disputes to be resolved under the ICSID Rules.[212] Importantly, QIA would initiate arbitration as a *shareholder*, not as a bondholder.

LOST COURT BATTLE AND MORE TROUBLE AHEAD FOR CREDIT SUISSE

Aside from the AT1 bonds, Credit Suisse also ended up in the news for losing legal battles. *The Star* reported earlier in 2023 that the Singapore International Commercial Court (SICC) ruled in favour of former Georgian Prime Minister Ivanishvili in a dispute between him and Credit Suisse. The SICC ordered Credit Suisse to pay an ex-Georgian prime minister US$926 million (RM4.26 billion) for failing in its duty to safeguard his assets.[213]

Already before *FINMA's* drastic action on 19th March 2023, investors in the USA filed a claim against Credit Suisse, saying the latter had made "materially false and misleading statements" in its 2021 annual report. Credit Suisse acknowledged that the hold-up on its 2022 annual report was because of "material weaknesses" in its reporting and controls procedure which may have led to

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210 *Ibid*.

211 Reuters, Exclusive: Qatar Fund explored claims against Switzerland for Credit Suisse losses, Reuters, 18th May 2023, available at www.reuters.com/business/finance/qatar-fund-explored-claims-against-switzerland-credit-suisse-losses-2023-05-17 (last accessed on 3rd June 2023).

212 For details, *see* United Nations Conference on Trade and Development, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2815/qatar---switzerland-bit-2001- (last accessed on 3rd June 2023).

213 The Star, Singapore court orders Credit Suisse to pay Georgian ex-PM RM4.26 billion, 27th May 2023, available at www.thestar.com.my/aseanplus/aseanplus-news/2023/05/27/singapore-court-orders-credit-suisse-to-pay-georgian-ex-pm-rm426-billion (last accessed on 3rd June 2023).

"misstatements" of financial results.[214] It was reported in September 2023 that the United States Securities and Exchange Commission was looking into that matter.[215]

Meanwhile, there are also reports that hundreds of bankers are leaving Credit Suisse every week. We understand that Credit Suisse has offered retention bonuses to key employees, but that this was not enough to stop bankers from talking to rivals.[216] Importantly for investors from Malaysia and other countries in Southeast Asia, among the key employees to leave is Robert Huray, Credit Suisse's Vice Chairman for Southeast Asia.[217]

FORMER BONDHOLDERS TAKING ACTIONS AGAINST BANKS

In addition to the above, news has also emerged that former bondholders have taken actions directly against the financial institutions that were selling them the Credit Suisse AT1 bonds, usually claiming that they were not advised properly about the risks involved.

It emerged in the news already in May that a Malaysian retiree was suing his bank, claiming that he lost MYR 500,000 in AT1 bonds. According to the reports, he was told that his investment into the AT1 bonds was a low-risk income fund and that he was not told about the possible consequences.[218]

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214 The Guardian, Credit Suisse hit by legal action from US investors amid banking turmoil, 17th March 2023, available at www.theguardian.com/business/2023/mar/17/credit-suisse-legal-action-us-investors-banking (last accessed on 3rd June 2023).

215 Reuters, US authorities scrutinize if Credit Suisse misled investors before rescue -filing, 20th September 2023, available at www.reuters.com/business/finance/us-authorities-scrutinize-if-credit-suisse-mislead-investors-before-rescue-2023-09-19 (last accessed on 27th December 2023).

216 Financial News, Credit Suisse is losing 200 bankers every week after UBS takeover, 31st May 2023, available at www.fnlondon.com/articles/credit-suisse-is-losing-200-bankers-every-week-after-ubs-takeover-20230531 (last accessed on 3 June 2023).

217 Bloomberg, Credit Suisse's Huray to Join Deutsche Bank as SEA Vice Chair, 1st June 2023, available at www.bloomberg.com/news/articles/2023-06-01/credit-suisse-s-huray-to-join-deutsche-bank-as-sea-vice-chair (last accessed on 3 June 2023).

218 Free Malaysia Today, Retiree says Credit Suisse collapse cost him RM500,000, 13th May 2023, available at

Meanwhile, *Bloomberg* reported at the end of July that a Japanese citizen has also sued his bank, for similar reasons, claiming that his bank had been mis-selling risky debt. This is after in June, other investors had already made it clear that they were going to sue their banks in an attempt to limit the losses they had suffered.[219] Credit Suisse's bonds exceeding the value of one billion US Dollars were sold to Japanese investors.

Over the next months, it must be expected that further disgruntled investors will turn against their banks. Whether these banks will be entitled to raise a claim against Switzerland remains to be seen. As they were not the purchasers of bonds themselves, they would likely not qualify as "investors" under applicable investment treaties, although a case-by-case analysis will be required to determine this point.

POSSIBLE RECOURSE FOR AFFECTED MALAYSIAN BONDHOLDERS

As we highlighted in our update on 28th March 2023, Malaysian investors in Credit Suisse AT1 bonds might be protected by provisions in the Malaysia Switzerland BIT of 1978[220] (the "BIT"). The BIT contains a definition of the term "investment", which among others includes as examples

"*Shares and other forms of equity participation*" and "*Monetary claims and rights to any performance having an economic value*."[221] Arguably, this definition includes AT1 bonds.

According to the BIT, Switzerland agreed that it

www.freemalaysiatoday.com/category/nation/2023/05/13/retiree-says-credit-suisse-collapse-cost-him-rm500000 (last accessed on 18 June 2023).

219 Nikkei Asia, Japanese investors plan to sue MUFG unit over Credit Suisse bonds, 9th June 2023, available at https://asia.nikkei.com/Business/Finance/Japanese-investors-plan-to-sue-MUFG-unit-over-Credit-Suisse-bonds (last accessed on 18 June 2023).

220 The full name of the agreement is *Agreement between the Government of the Swiss Confederation and the Government of Malaysia concerning the promotion and reciprocal protection of investments* (1978).

221 Article 3(2) of the BIT.

"*Shall protect within its territory investments made in accordance with its legislation by nationals or companies of the other Contracting Party*."[222]

This among others includes the expropriation of an investment. To that end, expropriations are only allowed if the measures are taken (i) in the public interest; (ii) on a non-discriminatory basis (iii) in observance of legal requirements; and (iv) when there is effective and adequate compensation.

Given that Credit Suisse wrote off the bonds upon the instruction of *FINMA*, the Swiss Regulator acting for the government, there is room to argue that by making such write-off and at the same time giving priority to shareholders, the investment of AT1 bondholders was deprived of its value in a discriminatory manner and without receiving effective and adequate compensation in return. It is therefore arguable that the writing-off amounts to an expropriation, which is not permitted under the BIT.

In addition to the above, the BIT obliges Switzerland to give "*fair and equitable treatment to investments of [Malaysian] nationals or companies.*"[223] This is commonly referred to as "FET" – **f**air and **e**quitable **t**reatment. The FET standard generally protects against (i) any treatment that is considered unreasonable, arbitrary and discriminatory; (ii) the host country's failure to offer a stable and predictable legal framework; (iii) the host country's failure to provide for transparency, as well as due process and justice; and (iv) the frustration of the investor's legitimate expectations.

The decision by *FINMA* to instruct Credit Suisse to completely write-off the bonds and at the same time giving preferential treatment to shareholders, who are generally compensated *after* bondholders in the hierarchy of claims in the Swiss legal framework is questionable against this standard. In addition to that, it is noteworthy that contrary to the write-off, *FINMA* previously stated that Credit Suisse's capital

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222 Article 3(1) of the BIT. For the avoidance of doubt, this obligation applies equally to Malaysia with respect to Swiss nationals/companies investing in Malaysia.

223 Article 3(2) of the BIT. For the avoidance of doubt, this obligation applies equally to Malaysia with respect to Swiss nationals/companies investing in Malaysia.

requirements were met and that Credit Suisse's liquidity would be guaranteed.[224]

INCREASED DOUBTS OVER THE SWISS AUTHORITIES' ACTIONS

Following FINMA's write-down, time over time more information has emerged, which has cast doubts over FINMA's actions. While this cannot be regarded as the "missing piece of the puzzle" evidencing that FINMA acted in breach of bilateral investment treaties, it certainly does not leave the regulator, and the authorities overall, in a positive light:

A full six months prior to the write-down of the AT1 bonds, the head of the Swiss central bank wanted to inject 50 billion Swiss francs (approx. USD57.5 billion) into Credit Suisse and nationalise it, according to three sources with direct knowledge of the matter. Since FINMA and the Swiss Finance Ministry opposed the idea, as did Credit Suisse's management, the Swiss authorities ultimately decided the best solution was to let the company find its own way, the three sources added.[225]

There also appears to be somewhat of a power struggle at the moment, with FINMA demanding the authority to impose fines, a move that the Swiss Bankers Association clearly opposes (although accepting some other demands by FINMA).[226] This reconfirms that even within Switzerland, many were not satisfied with FINMA's decisions in March 2023.

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224 FINMA, Finma and the SNB issue statement on Market Uncertainty, 15th March 2023, available at www.finma.ch/en/news/2023/03/20230315-mm-statement/ (last accessed on 3rd June 2023).

225 Reuters, How Swiss authorities bungled Credit Suisse oversight, 19th December 2023, available at www.reuters.com/business/finance/how-swiss-authorities-bungled-credit-suisse-oversight-2023-12-18 (last accessed on 28th June 2023).

226 Marketscreener, Swiss bankers open to talks on some of measures demanded by country's regulator, 19th December 2023, available at www.marketscreener.com/quote/stock/UBS-GROUP-AG-19156942/news/Swiss-bankers-open-to-talks-on-some-of-measures-demanded-by-country-s-regulator-45599627 (last accessed on 28th June 2023).

CLAIMS FOR PROTECTION BY INVESTORS – DEMYSTIFYING RUMOURS

There are many rumours, including among the legal fraternity in Malaysia, that supposedly, Malaysian investors cannot initiate a claim against Switzerland themselves. The general view is that such a possibility is only open to the Malaysian government and that the Malaysian government is rather unlikely to ever take any according actions.

This view is based on the wording of Article 9 of the BIT:

(i) It' para. 1 makes it clears that disputes: "*as to the interpretation or application of the provisions of this Agreement*" are to be settled via diplomatic channels; and
(ii) its para. 2 allows for either of the Contracting Parties – that is either Malaysia or Switzerland – to initiate arbitration; however,
(iii) there is no provision allowing investors to take recourse against a Contracting Party. In other words, according to Article 9 (or any other provision in the BIT), only either of the countries, Malaysia or Switzerland, as the case may be, is entitled to initiate arbitration proceedings.

In spite of its seemingly clear wording, it is important to not read this provision in isolation of the rest of the BIT. Article 3(2) sets forth that the treatment that Switzerland gives to Malaysia (and vice versa)

"*Shall not be less favourable than that granted […] to nationals or companies of the most favoured nation*."

Switzerland must his give the same treatment to Malaysian investors that it gives to investors from other countries (and vice versa). This is referred to in investment law as MFN (the principle of the most favoured nation or most favoured nation clause).

While there is not one single view on this matter, arbitral tribunals acting in investment arbitration matters previously found that such treatment encompasses the dispute resolution mechanism.[227] The Malaysian High Court relied on one of these arbitrations and the reasoning therein in a decision from 27th November 2023 in a dispute

[227] E.g. *Emilio Augustín Maffezini v The Kingdom of Spain* (ICSID Case ARB/97/7).

arising out of an investment arbitration by investors in Zimbabwe, who pursued their claims and ultimately won their arbitration.[228]

Based on the position taken by arbitral tribunals that the MFN clause should extend to the dispute resolution mechanism, which as shown above is not a novel argument in investment arbitration and, indeed one, that the Malaysian High Court relied upon recently, arguably, Malaysian investors are entitled to pursue their claims directly. They should, of course, only do this with the help of counsel, who is very experienced in international arbitration matters.

CONCLUSION

To what extent Malaysian investors in AT1 bonds – both institutional and retail – can claim protection under the BIT will depend on various factors, which need to be assessed on a case-by-case basis.

Importantly, it is very common in international investment arbitration to see settlement. Indeed, many dispute resolution mechanisms provide for a mandatory negotiation phase before recourse to arbitration is possible. While there is no guarantee for this, there is a great likelihood that the Swiss government would be want to avoid a public investment arbitration, with all details surrounding FINMA's decision and potentially other confidential information possibly becoming public. This could potentially allow Malaysian investors to find it much easier to get back at least some of their investment.

While every investor must decide on his own whether he wants to pursue his potential claim against Switzerland, it is necessary for investors to remember that with third party funding opportunities available, the financial risk they have in pursuing a claim is close to zero. The only visible risk is having high hopes and not ending up with anything after all. However, this is exactly the same outcome when just not taking any action altogether.

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228 *See Elisabeth Regina Maria Gabriele Von Pezold & Ors v Republic of Zimbabwe* [2023] MLJU 2657.