
DOMESTICATING INTERNATIONAL LEGAL INSTRUMENTS IN MALAYSIA: THE CHALLENGES AND PROSPECTS RELATING TO ANTI HUMAN TRAFFICKING LAWS

Khairil Azmin Mokhtar

LL.B(Hons)(IIUM), MCL(IIUM), Ph.D(Aberystwyth)
International Islamic University Malaysia

Zuraini Ab Hamid

LL.B(Hons)(IIUM), MCL(IIUM)

ABSTRACT: The international framework of human trafficking has become the main guiding framework for most of the countries around the globe in combating the crime. The issue of human trafficking was brought to global attention mainly through United Nations Universal Declaration of Human Rights 1948 (UDHR) followed by Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children. It is the objective of UDHR to recognize the inherent dignity, equality and inalienable rights of a man which become the basis of freedom, justice and peace regardless the gender, race and religion of the person. The UN Protocol has supplemented the Declaration by providing a standard approach to state parties in combating the trafficking. It is known as "3Ps" model which aim to prevent the crime, protect the victim and prosecute the perpetrator. This paper provide legal analyses to determine whether the Malaysia's legal response through its' Anti Trafficking in Persons and Smuggling of Migrants Act 2007 and other supplemented Acts are in compliance with the UN Declaration and Protocol. It is an important area of study because the most recent U. S Department of Trafficking in Persons' report shows that Malaysia has lack of "3Ps" approaches in its legal framework. This paper concludes that a reformation to Malaysia's legal response is significant to ensure its compliance with the international framework and to be more successful in combating the crime.

KEYWORDS: human trafficking; international framework; United Nations; "3Ps" models, Malaysia

1.0 INTRODUCTION

Most people are of the view that human slavery has ended in the nineteenth century, and it is a thing of the past. On the contrary statistics has proven that there are more enslaved people now compared to the times when slavery was prohibited some 200 years ago.¹ Today's modern day slavery is a global phenomenon. It is a real threat in all countries including Malaysia. The crime of human trafficking is by nature a transnational organized crime, the commission of which cuts across national borders. However, it could also happen within the country as stated in the U.S report that internal trafficking may take place in many states in the forms of force labour, prostitution and forced marriage.²

The success rate in combating human trafficking is different from one country to another. In the Trafficking in Persons Report prepared by the US State Department, Australia is at Tier 1 by virtue

¹ Anna Jonsson. Human Trafficking and Human Security 5 (Anna Jonsson ed., Routledge Taylor & Francis Group 2005) (2009).

² U.S Department of State's. 2005. Trafficking in Persons Report, June, Washington, DC: Department of State.

of the Trafficking in Persons reports from 2004 until 2013³ while Saudi Arabia and China are in Tier 3.⁴ The tier position and achievement of the countries are dependent on their extensive efforts in combating the crime of human trafficking, coupled with compliance with the international legal framework which is supposed to have assisted them in enacting their own domestic laws catering for the phenomenon.

This article attempts to critically examine the response by the Government of Malaysia to the human trafficking issue. It will begin with reference to the international legal framework on the issue, together with the "3Ps" approaches to the problem, followed by an assessment on the efforts made by Malaysia to combat the crime of human trafficking. The effectiveness of efforts by the authority shall be examined in order to determine whether they are in compliance with the "3Ps" approaches. The strength and weaknesses of the efforts will be assessed on the premises of the Trafficking in Persons report. The article also highlights areas that require attentions from the relevant authorities and need further more efforts to improve it. These views and recommendations may possible lead to legislative and policy reforms to a certain extent.

2.0 INTERNATIONAL APPROACHES IN COMBATING HUMAN TRAFFICKING

Among the international laws governing the issue of human trafficking are the United Nations' Universal Declaration of Human Rights 1948 (hereafter referred to as UDHR) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter referred to as the Protocol). The latter strengthens the UDHR by providing an excellent framework for the "3Ps" approaches to combat human trafficking. The "3Ps" model is aimed at Preventing human trafficking, Protecting the victim of trafficking and Prosecuting the perpetrator.⁵

2.1 "First P": Prevention of Human Trafficking

Prevention is the foundation to combat human trafficking at earliest stage. The methods of prevention comprise long and short term types.

Essentially, the short term method is realized by public awareness campaign. The public will be educated with information relating to the crime which includes the potential victims, source and destination countries for human trafficking. The governments use the campaigns to warn the danger and educate its citizen on how to identify the vulnerable victims of human trafficking.⁶ Indonesia, for example, has conducted the campaigns wherein its module covers the risks of migration and the rights of migrants in foreign countries.

Normally, the long-term method is adopted through implementation of the laws. Nowadays, policy and law in a country has become one of the effective tools in combating human trafficking. The power of laws restraining an individual from committing an illegal act, omission or an offence cannot be denied. The laws relating to labor, migrants, and its enforcement enhances UN state parties to combat the trafficking. They are regarded as the best modes to

³ "Trafficking in Persons Report (2001-2012)", U.S. Department of State, <<http://www.state.gov/j/tip/rls/tiprpt/>> (accessed 3 Jan, 2013).

⁴ "Tier Placements- Trafficking In Person Report 2013," U.S. Department of State, <<http://www.state.gov/j/tip/rls/tiprpt/2013/210548.htm>> (accessed 19 November, 2013).

⁵ Sanja Milivojevic and Marie Segrave, in "Responses to sex trafficking: gender, boarder and home", edited by Leslie Holmes (Edward Elgar Publishing Ltd, 2010), 45.

⁶ "The 3Ps: Prevention, Protection, and Prosecution," United States Department of State <<http://www.state.gov/documents/organization/167334.pdf>> (accessed 23 November 2013).

eliminate the "supply and demand" in human trafficking. Therefore, a state government should use this tool to effectively preventing the crime.

This can be done if the government has clear rule in its legal framework. For example, sex trade is among the main form of exploitation in human trafficking cases. Therefore, the prohibition on prostitution should be made clear by all state governments in their laws and policies. As in Iran and Saudi Arabia, their laws clearly regard prostitution as a crime which punishable by death. However in Thailand, its illegality on prostitution can be argued for its ambiguity. Its governing laws in Penal Code Amendment Act (No. 17) B.E. 2547 (2003), Prevention and Suppression of Prostitution Act, B.E. 2539 (1996), Entertainment Places Act of B.E. 2509 (1966) failed to prevent the sex trade in the countries.⁷

The other example is in regards with discrimination, which can cause poverty as poverty can cause discrimination.⁸ The gender based discrimination against women in employment and education, disproportionate burden economic restructuring places on women and the feminization of poverty have become the major contribution to the trafficking of women.⁹ Under Article 26 of the International Covenant for Civil and Political Rights, states are obliged to refrain from discrimination practices and adopt punitive measures to ensure the equality and nondiscrimination regardless of the gender.¹⁰ Therefore, the Committee on the Elimination of Discrimination against Women (CEDAW) Optional Protocol is adopted on 6 October 1999 to curb with the issue. By ratifying the Optional Protocol, the state parties have recognized the competence of the body to monitor their compliance to the Convention. It also gives rights to the victim to lodge complaints against the state members when her rights in CEDAW are violated. The women's committees will conduct an investigation and inquiry to the state party in response to the complaint in order to protect the victim from being victimized due to the discrimination.¹¹

2.2 "Second P": Protection of the Trafficking Victim

Protection of the victim is very important. The victim is the source person who can give information about the crime to the government and helps the prosecution in collecting evidence against the perpetrator. Therefore, a principle of non-punishment of the victim is introduced in few international principles. For example, the Trafficking Victims Protection Act (TVPA) entails the U. S Department to take this principle as a consideration before putting a country at any tier in Trafficking in Persons report to ensure that the victim is not improperly confine.¹²

⁷ "Current Legal Framework: Prostitution in Thailand," International Models Project on Women's Rights, <<http://www.impowr.org/content/current-legal-framework-prostitution-thailand>> (accessed 25 November, 2013).

⁸ United Nations, Office of the High Commissioner for Human Rights, Human Rights and Poverty Reduction: A Conceptual Framework 17 (2004).

⁹ Janic Chuang, "Beyond a Snapshot: Preventing Human Trafficking in the Global Economy", Indiana Journal of Global Legal Studies, vol.13, no. 1 (2006): 27.

¹⁰ International Covenant on Civil and Political Rights, G. A. RES. 2200, U. N. GOAR, 21st Sess., Supp. No. 16, at 52, U. N. Doc, A6316 (Dec 16, 1966).

¹¹ "Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women," United Nation, < <http://www.un.org/womenwatch/daw/cedaw/protocol/>> (accessed 4 December, 2013).

¹² "Non-Criminalization of Victims for Crimes Committed in the Course of Being Trafficked," U.S Department of State, <<http://www.state.gov/j/tip/rls/fs/2013/211629.htm>> (accessed 2 December, 2013).

This principle is in line with the Principle 7 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the United Nations Office of the High Commissioner for Human Rights. It provides the responsibility of state parties to protect and assist the trafficking victim. Therefore, for the purpose:

"Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons."¹³

In order to ensure that the effective protection of the victims is executed, the "3Rs" principles which represent rescue, rehabilitation and reintegration¹⁴ are intensely introduced.

2.2.1 First "R": Rescue

Rescue literally means 'to save someone from a dangerous or difficult situation'.¹⁵ It requires a skill to identify the victim and the trafficker. The skill is also crucial to ensure the victim receives a reasonable support and resource which including shelter, medical assistance, work and safe environment for the victims.¹⁶

Guideline 2 of Recommended Principles and Guidelines on Human Rights and Human Trafficking put an obligation to the states members to put its diligence in identifying the traffickers and the victims. Therefore, the guideline suggested that:

- (i) The authorities and officials of the state members should have guidelines and procedures in a precise identification of trafficked persons.¹⁷
- (ii) The authorities and officials of the state members should have appropriate training in the identification of the victims.¹⁸
- (iii) The authorities, officials and non-governmental organizations in the state members should have cooperation for the purpose of identification and assistance of victims.¹⁹

2.2.2 Second "R": Rehabilitation²⁰

Rehabilitation can be defined as a restore of someone to health or normal life by training and therapy after imprisonment, addiction, or illness. It is also an act to restore someone to former privileges or reputation after a period of disfavor.²¹

¹³ "Recommended Principles and Guidelines on Human Rights and Human Trafficking," Office of the High Commissioner for Human Rights, <<http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>> (accessed 2 December, 2013).

¹⁴ "The 3Ps: Prevention, Protection, and Prosecution," United States Department of State <<http://www.state.gov/documents/organization/167334.pdf>> (accessed 23 November 2013).

¹⁵ Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/rescue?q=rescue>> (accessed 25 November, 2013).

¹⁶ "The 3Ps: Prevention, Protection, and Prosecution," United States Department of State, <<http://www.state.gov/documents/organization/167334.pdf>> (accessed 23 November 2013).

¹⁷ Guideline 2(1), Recommended Principles and Guidelines on Human Rights and Human Trafficking.

¹⁸ Guideline 2(2), Recommended Principles and Guidelines on Human Rights and Human Trafficking.

¹⁹ Guideline 2(3), Recommended Principles and Guidelines on Human Rights and Human Trafficking.

²⁰ "The 3Ps: Prevention, Protection, and Prosecution," United States Department of State, <<http://www.state.gov/documents/organization/167334.pdf>> (accessed 23 November 2013).

²¹ Oxford Dictionaries, <<http://www.oxforddictionaries.com/definition/english/rehabilitate>> (accessed 25 November 2013).

To rehabilitate the victim to his family or society is not an easy task, especially in the situation when the victim suffers a psychological injury resulted being tortured and physical abuse for a long period. In addition, they might be infected with various kinds of sexually transmitted infections (STIs) such as HIV and AIDS. In this situation, it is really hard for most of the victims' family to accept their physical and mental condition.

Therefore, the rehabilitation process is one of the best solutions to cater this problem. The state government should provide the rehabilitation center as a temporary and institutional care as a primary means to protect the victim. This center will be a good place for the victim to regain their strength to mingle with the community, which will help the reintegration process.

2.2.3 Third "R": Reintegration²²

Reintegrate can be defined as to integrate someone back into society²³ or to integrate again into an entity.²⁴ This is a process which follows the "rescue" principle and to pursue the criminal justice outcomes.²⁵ This principle is linked to the rehabilitation process. Without the reintegration, the return of the victim to its own country will expose them to the risk of being re-victimized and re-exploited as trafficking victims by the syndicate.

Article 8 of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children²⁶ provides basic framework for reintegration of the trafficking victims.

- (i) Article 8 (1) of the Protocol requires State Parties to facilitate the repatriation of citizens or nationals with due regard for the safety of the victim to return the victim without unreasonable delay.
In this case, the state party must ensure that the safety of the victim is guaranteed if he or she is returned to their home state. If the victim is a child, the state party must satisfy that there is a trustworthy guardian who can take care and protect the children.²⁷
- (ii) Article 8 (2) state that there three (3) consideration must be given by the state parties before repatriation or rehabilitation of the victim to its home country:
 - (a) the return shall be with due regard for the safety of that person
 - (b) the status of the victim in any legal proceedings related to the trafficking case
 - (c) The repatriation shall preferably be voluntary.
- (iii) Article 8 (3) provides that the state party must verify whether the victim of is the national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.
- (iv) Article 8 (4) further stated that in order to facilitate the return of a victim who having no proper documentation, the State Party must provide the necessary travel

²² "The 3Ps: Prevention, Protection, and Prosecution," United States Department of State, <<http://www.state.gov/documents/organization/167334.pdf>> (accessed 23 November 2013).

²³ Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/reintegrate?q=reintegration#reintegrate_14> (accessed 25 November, 2013).

²⁴ Merriam-Webster, <<http://www.merriam-webster.com/dictionary/reintegrate>> > (accessed 25 November, 2013).

²⁵ Sanja Milivojevic and Marie Segrave, in "Responses to sex trafficking: gender, boarder and home", edited by Leslie Holmes (Edward Elgar Publishing Ltd, 2010), 46.

²⁶ United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, opened for signature 15 December. 2000, 2237 UNTS, Annex II.

²⁷ UNODC, 'Legislative Guideline for the Implementation of the United Nations against Transnational Organized Crime and the Protocols Thereto' (New York, NY: UN 2004) 290.

documents or other authorization as may be necessary to enable the victim to travel to and re-enter its territory.

In addition to this, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children has been supported by Model Laws against Trafficking in Persons, provided by the United Nations Office on Drugs and Crime.²⁸ The model can be regarded as a technical assistance to the state parties in adoption of laws, review, or amendment of the existing legislation in line with the international framework.

For example, Article 33 of the model has supports the Article 8 of the Protocol. Both articles require state parties to repatriate the victims to his or her origin country without unnecessary delay by providing them the relevant travel documents, after considering their rights and safety. Article 33 further strengthens that the principle of non-refoulement²⁹ and of the prohibition of inhuman or degrading treatment will be applied in the returning process. The return of the victim should not be done if there is a tendency that the victim's life or his family will be endangered due his return such as the risk to be violent, detained and prosecuted by state authority. In addition, the Model Law³⁰ requires the victim's reason for returning or personal data is not recorded in any identity paper or database.

3.0 "Third P": Prosecution of the Perpetrators

The prosecution against the perpetrator of human trafficking is one of the effective approaches in preventing human trafficking at large. The United Nation in its written guidelines³¹ has outlined the needs of the UN state members to take some extensive efforts in combating the crime which among others includes:

- (i) The state members should have legislation and laws provide offence of trafficking.³²
- (ii) The state should efficiently prosecute and resolve the trafficking.³³
- (iii) The state should provide proper sentence and punishment for the person who found guilty of the trafficking offence.³⁴

The U.S. State Department recommends that the state members should provide at least maximum four (4) year imprisonments, with comparatively longer sentences based on the severity of their actions. The severity of punishment is not only for punishing the perpetrator, but

²⁸ "Model Laws and Treaties," United Nations Office on Drugs and Crime <<http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html>> (accessed 10 December, 2013).

²⁹ *Non-refoulement* is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

³⁰ Article 4 of Model Laws against Trafficking in Persons, UNODC & UN. GIFT (Vienna: United Nations, 2009).

³¹ "Recommended Principles and Guidelines on Human Rights and Human Trafficking," Office of the High Commissioner for Human Rights, <<http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>> (accessed 3 December, 2013).

³² Criminalization, Punishment and Redress, No. 12, Recommended Principles and Guidelines on Human Rights and Human Trafficking.

³³ Criminalization, Punishment and Redress, No. 13, Recommended Principles and Guidelines on Human Rights and Human Trafficking.

³⁴ Criminalization, Punishment and Redress, No. 15, Recommended Principles and Guidelines on Human Rights and Human Trafficking.

to restrain other from committing the same offence. As for Australia, the offences relating to trafficking in children will carry to a maximum penalty of (25) years' imprisonment.³⁵

In addition, the success of state government in prosecution also is vital since it will contribute to the state position in TIP report. In most of the cases, the prosecution failed to prove their case because the uncooperative³⁶ and the weak testimony given by the victims in the trafficking case. There are some cases where the victims simply refused to identify the traffickers for fear of adverse repercussions which will endanger their families in their origin country. To ensure the successful in prosecution case, the prosecutors in some countries like Philippine play their active roles by involving themselves in human trafficking cases at the very beginning, either in investigation or prosecution stage.³⁷

4.0 MALAYSIA APPROACHES IN COMBATING HUMAN TRAFFICKING

International instruments that have dealt with human trafficking date back to the abolition of slavery. They include provisions within the Slavery Convention (1926) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956). Additional tools of international law that include segments against the trafficking of persons include: the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights (1966), The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (1979). These instruments laid the foundation for the contemporary conventions and efforts to eliminating trafficking.

International law is a powerful conduit for combating human trafficking. The most reputable and recent instruments of international law that have set the course for how to define, prevent, and prosecute human trafficking are the United Nations Convention against Transnational Organized Crime and its two related protocols:

- The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and
- The United Nations Protocol against the Smuggling of Migrants by Land, Sea, and Air .³⁸

Malaysian government has referred to these international laws as guidance and benchmark in dealing with the heinous crime of human trafficking. This part analyses whether Malaysia's response to human trafficking laws are in compliance with the "3Ps" approaches in combating human trafficking.

4.1 "First P": Prevention of Human Trafficking

³⁵ Section 2271.4 and 271.7, Australia Criminal Code Act 1995.

³⁶ Royal Malaysian Police. (2013, September). Organised Crime: Government Initiatives, Laws and Investigation of Human Trafficking in Person and Smuggling of Migrants in Malaysia. Paper presented at International Conference on Trafficking organized by World Youth Foundation, Malacca.

³⁷ World Youth Foundation. (2013, September). Group Presentation on Human Trafficking. Paper presented at International Conference on Trafficking organized by World Youth Foundation, Malacca.

³⁸ Malaysia has not ratified any of the treaties and protocols above except CEDAW and The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children
https://www.unodc.org/documents/treaties/organized_crime/COP6/CTOC_COP_2012_CRP/

Malaysia has used its legal framework as a main tool to prevent the crime. Malaysia has proven its seriousness in addressing the problem by proclaiming the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM 2007). This Act is supported by eight supplemented Acts, namely Immigration Act 1959/63 [Act 155], Malaysian Maritime Enforcement Agency Act 2004 [Act 633], Customs Act 1967 [Act 235], Evidence Act 1950 [Act 56], Court of Judicature Act 1964 [Act 91], Child Act 2001 [Act 611], Penal Code [Act 574], Prevention of Crime Act 1950 [Act 297].

Besides the laws Malaysian Anti-trafficking National Action Plan (NAP) was introduced in 2012. Through NAP, the government of Malaysia has planned to conduct its public awareness programs on trafficking in persons through educational programs where the campaigns on the danger of the crime are conducted through its electronic media. As a result, Malaysia is reported has done more than 5,500 public service announcements on human trafficking via its national and state radio.³⁹

4.2 "Second P": Protection of the Trafficking Victim

Malaysia has put some efforts through its laws to protect the victim. The law requires an enforcement officer to save and protect any potential exploited victim. The prompt action should taken once they received information,⁴⁰ complaint or report⁴¹ regarding the victimisation. The investigation officer will record the victim's or witness's statement in accordance with the power given under Section 34 of the ATIPSOM 2007. The officer also should bring the victim for medical examination or treatment.⁴² In the case where the victim is hospitalised, it is the duty of the enforcement officer to secure and protect the victim.⁴³

Once the victim is rescued, the enforcement officer should apply an Interim Protection Order (IPO) from a Magistrate within (24) hours as mentioned under Section 44 (1) of the Act. If the Magistrate satisfied that the victim is a trafficked person, he shall make an IPO for the victim to be placed in the adult women shelter home, adult male shelter home or children shelter home for (14) days for the purpose of an investigation by the enforcement officer.⁴⁴ After the investigation, the victim will be placed in the shelter for a certain period if the Magistrate satisfied that the victim is trafficked and is required to support the prosecution case. The local victim might be placed at the shelter up to (2) years. For foreign victim, he might be placed at the shelter for (3) months and subject to be extended if necessary.⁴⁵ While in the shelter, the victim's need and welfare such as food, shelter, and safety will be provided.

The government of Malaysia also adopts a "voluntary repatriation" approach. This approach is in line with the international practice and human right law which gives the rights for the victims

³⁹ "Trafficking in Persons Report 2013," U.S. Department of State, <<http://www.state.gov/documents/organization/210740.pdf>> (accessed 4 December, 2013).

⁴⁰ Information might be received through oral information, phone call, a piece of paper, or from an informant.

⁴¹ Section 107 of Criminal Procedure Code [Act 593] provides procedures in regards with First Information Report.

⁴² Section 45 of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007 (Act No. 2 of 2007).

⁴³ Section 48 of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007 (Act No. 2 of 2007).

⁴⁴ Section 44 (2) of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007 (Act No. 2 of 2007).

⁴⁵ Section 51 (3) of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007 (Act No. 2 of 2007).

to return to their origin countries voluntarily. The process will be managed by Malaysia in cooperation with trafficked persons' country embassies.

In the latest TIP report 2014,⁴⁶ the US State Department acknowledged Malaysian effort in protecting the labour trafficking victims by allowing some of them to stay and work in Malaysia.

4.3 "Third P": Prosecution of the Perpetrators

The government of Malaysia has made some progress in its law enforcement against human trafficking by enacting laws and prosecuting the offenders. The prohibition of all forms of exploitation in human trafficking is done through Anti-Trafficking in Persons and Smuggling of Migrants 2007 which provides severe punishment for the offender. The Act provides maximum life imprisonment (20) years and fine RM1 million for the trafficking offence committed. Trafficking in Persons report 2013⁴⁷ reported that there is an increasing in the number of cases for investigations, prosecutions and convictions in 2013 compare with 2012.

AN EVALUATION: MALAYSIA APPROACHES IN TIP REPORT

Despite of Malaysia's compliance to the international legal framework and the "3Ps" approaches, it is continuously being criticized for its ineffectiveness in making insufficient progress and improvement in areas of prosecution, prevention and protection.⁴⁸ The major criticism is in regards with the protection of victim where Malaysia is not fully complying with minimum standards.⁴⁹ The report claims that Malaysia has not made a tangible improvement to its system in identifying and protecting the victim. The front-line enforcement officers also failed to recognize the human trafficking's indicator which lead the victims remaining unidentified and subject to be punished under the national law.

Malaysia has been alleged to treat trafficking victim as criminal. The reason being suspected criminal who is under arrest seems to enjoy greater freedom than a victim under protection. As mentioned earlier once the victim is saved, he will be placed under police 24-hour custody. If the Interim Protection Order is granted, he will be placed at government shelter for a certain period of time and his freedom is restricted.

The difference between the victim and the perpetrator is the latter has the choice to be freed once he pays the bail after being charged in court. Even the perpetrator is locked up, he still can have contact with the world outside via mail, telephone and receive visits by family members, friends and defense counsels. All these are also available to the victim under protection. On the other hand the detention of victims in shelter home has denied their basic human rights such as the right of movement and right to be employed. They only can go out from the shelters accompanied by the respective officers for the purpose of giving testimony in court, hospital visit or other procedural matters.

⁴⁶ "Wisma Putra disappointed over US Trafficking in Person report 2014," New Straits Times Online, <<http://www.nst.com.my/node/5250>> (accessed 23 June, 2014).

⁴⁷ "Tier Placements- Trafficking In Person Report 2013," U.S. Department of State, <<http://www.state.gov/j/tip/rls/tiprpt/2013/210548.htm>> (accessed 13 December, 2013).

⁴⁸ "Wisma Putra disappointed over US Trafficking in Person report 2014," New Straits Times Online, <<http://www.nst.com.my/node/5250>> (accessed 23 June, 2014).

⁴⁹ "Trafficking in Persons Report 2013," U.S. Department of State, <<http://www.state.gov/documents/organization/210740.pdf>> (accessed 4 December, 2013).

It is reported that the government of Malaysia gives poor treatment and incentives to the victims during the investigation and prosecution process. In this situation, they are putting in emotional and psychological torture.⁵⁰ As a result, on 14 December 2009, a riot has happened at Women Home Shelter at Bukit Ledang, Kuala Lumpur, resulted from dissatisfaction of a few Indonesian women on the extension of the three (3) months Interim Protection Order on them.⁵¹

The denial of the basic rights will re-traumatize the victims after being exploited. The situation becomes worse when the government facilities are not supported by medical officers or trained psychologist.⁵² These are among the reasons why the victims refuse to give testimony in court. They prefer to be a criminal and being punished under Immigration Act 1959/ 63 rather than be a witness to trafficking case which they will indirectly receive a severe 'punishment'.

In addition, Malaysia is criticized by the TIP report⁵³ for its actions which not contribute to the prevention of crime but to the increasing of it. This includes the government policy in 2013 when its new policy shifted the responsibility to pay the immigration costs and employment processing fees from the employer to the foreign worker. This new policy has trapped the victims into the usurious debt which tie them to debt-bondage with the trafficker.

Likewise, the government of Malaysia has been criticized in Trafficking in Person report in regards to the deportation of victim. According to the report,⁵⁴ after the victims finished giving testimony in court, the government discontinued its policy of treating certified victims as illegal aliens and transferring them to detention facilities for deportation which managed by the Immigration Department.

CONCLUSION

The government of Malaysia has proved its seriousness in combating the illicit criminal activity. It is done by ratifying the Trafficking Protocol, adopting the "3Ps" approach, introducing its Anti Trafficking in Persons and Smuggling of Migrants Act 2007, and taken commendable efforts to prevent the crime, protect the victim, and punish the wrongdoer. Regrettably, Trafficking in Persons reports provided by U. S Department has continuously putting Malaysia in a discourage position where it has risk Malaysia to the sanctions of William Trafficking Victims Protection Reauthorization Act 2008.⁵⁵ On 20th June 2014, United States (US) State Department Trafficking in Persons Report 2014 has making the threat as a truth when the TIP report has downgraded Malaysia to Tier 3 from the previous standing of the Tier 2 Watch List.⁵⁶ As a consequence, now Malaysia is in a danger position where it is facing sanction from U.S government where the latter

⁵⁰ "Trafficking in Persons Report 2013," U.S. Department of State, <<http://www.state.gov/documents/organization/210740.pdf>> (accessed 4 December, 2013).

⁵¹ Umar Saifuddin bin Jaafar, "Cabaran Pelaksanaan Seksyen 52 Akta Anti Pmerdagangan Orang 2007," Attorney General Chambers, <<http://agc-blog.agc.gov.my/agc-blog/?p=171#more-171>> (accessed 17 July, 2012).

⁵² "Trafficking in Persons Report 2013," U.S. Department of State, <<http://www.state.gov/documents/organization/210740.pdf>> (accessed 4 December, 2013).

⁵³ "Trafficking in Persons Report 2013," U.S. Department of State, <<http://www.state.gov/documents/organization/210740.pdf>> (accessed 4 December, 2013).

⁵⁴ "Trafficking in Persons Report 2012" U. S. Department of State, <<http://www.state.gov/j/tip/rls/tiprpt/2012/192367.htm>> (accessed 5 December 2013).

⁵⁵ "Trafficking in Persons Report 2011," U.S. Department of State, <<http://www.state.gov/j/tip/rls/tiprpt/2011/164222.htm>> (accessed on 10 May 2013).

⁵⁶ "Wisma Putra disappointed over US Trafficking in Person report 2014," New Straits Times Online, <<http://www.nst.com.my/node/5250>> (accessed 23 June, 2014).

may withhold or withdraw non-humanitarian and non-trade-related foreign assistance to Malaysia.

Therefore, the government of Malaysia should take other extensive efforts in combating the crime since its improvement in investigation and prosecuting the offenders does not much help Malaysia in removing the serious threat. This paper recommends that the government of Malaysia give more protection to the trafficking victim by reforming its legal approach such as by providing a comfortable shelter to the victim, give freedom of work, support their physical and emotion needs. These enhancements should be done together with other service providers and NGOs to ease the government burden and to find the best solution in eradicating human trafficking.

AUTHOR'S BIOGRAPHY

Khairil Azmin bin Mokhtar is an associate professor at the Ahmad Ibrahim Kulliyah of Laws, IIUM. He is the coordinator of CANGGIH (Constitution, Administration, Good Governance, Integrity and Human Rights) and has been teaching various law subjects and supervising undergraduate and postgraduate law students for Master and PhD theses for more than 20 years. Recently he has published two books titled 'Law and You: Election' and 'Constitutional Law and Human Rights in Malaysia: Topical Issues and Perspectives'. The books are published by world renowned legal publisher namely Sweet & Maxwell Asia and Thomson and Reuters. He can be contacted via email kamokhtar@gmail.com or ka_mokhtar@iium.edu.my

Zuraini binti Ab Hamid is an Academic Trainee at International Islamic University Malaysia. She was a former Deputy Public Prosecutor at Attorney General Chambers of Malaysia, handled commercial and criminal cases at lower and high court including human trafficking cases. Currently, she is doing her Doctor of Philosophy titled on human trafficking and working under IIUM's research grant. She can be contacted via email zuraini.abhamid@gmail.com.