

COMBATING CHILD TRAFFICKING: IS THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC) AND EXISTING LAWS IN MALAYSIA ADEQUATE?

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ABSTRACT

This article is a study on human trafficking, which is the second most lucrative and profitable transnational organized crime in the world after drug trafficking. This crime is also known as a form of modern slavery, where humans are used as commodities to generate profit, and victims are prevented from accessing their fundamental rights. The victims of this crime are women, men, and children; however, the repercussions are far more serious when involving children. Human trafficking devastates the prospects of the future generation, where children are often forced into sexual exploitation, forced labour, illegal adoption and child marriage. In addition, such crime not only impacts the social, politic, economic and national security of a country but is also a grave violation of the child victims' human rights. The main objective of the present article is to address the adequacy of Malaysian law in dealing with child trafficking and to see whether it is in line with international standards. The study suggests that many gaps exist in the current legislation dealing with human trafficking. These gaps need to be addressed especially those dealing with child trafficking. A qualitative approach was utilized in this study, where it involved library research to analyze the protection given by the Convention on the Rights of the Child and the extent of its implementation into domestic legislation, in order to combat child trafficking in Malaysia. This study found that Malaysia's existing laws are inadequate to protect child victims of trafficking in Malaysia and need to meet the current standards and protection for victims, which include the identification of identity, appointment of a guardian, providing interim care protection, durable solution, and access to justice.

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Keywords: Convention on the Rights of the Child, Malaysian law on child trafficking, protection of children, combating child trafficking.

PEMBENTERASAN PEMERDAGANGAN KANAK-KANAK: ADAKAH KONVENSYEN HAK KANAK-KANAK DAN UNDANG-UNDANG DI MALAYSIA MEMADAI?

ABSTRAK

Kajian ini melihat bagaimana pemerdagangan manusia sebagai jenayah yang menguntungkan, dimana ianya merupakan jenayah transnasional kedua terbesar yang memberi keuntungan selepas jenayah pemerdagangan dadah. Jenayah ini juga dikenali sebagai perhambaan moden dimana manusia dijadikan barang dagangan untuk memperolehi keuntungan dan menghalang mangsa untuk mengakses hak-hak asasi mereka. Di samping itu, mangsa adalah dikalangan wanita, lelaki dan kanak-kanak. Walau bagaimanapun, jenayah tersebut menjadi semakin serius apabila melibatkan kanak-kanak kerana ianya merosakkan generasi yang akan datang, dimana mereka seringkali dieksploitasi sebagai seks komersial, buruh paksaan, pengangkatan haram dan perkahwinan kanak-kanak. Tambahan pula, jenayah ini bukan sahaja memberi kesan dari sudut ekonomi, politik dan keselamatan nasional negara, tetapi ia juga adalah pencabulan hak asasi manusia mangsa kanak-kanak. Objektif utama makalah ini ialah untuk meneliti ketidakcukupan undang-undang Malaysia berhubung dengan pemerdagangan kanak-kanak selaras dengan standard konvensyen antarabangsa yang dinamakan Konvensyen Hak Kanak-kanak. Kajian ini mencadangkan supaya kelemahan undang-undang sedia ada yang mengawal pemerdagangan manusia dikenalpasti apabila ianya berkaitan dengan pemerdagangan kanak-kanak. Justeru, kajian menggunakan kaedah kualitatif sebagai asas untuk mengkaji hak-hak perlindungan yang diberikan oleh Konvensyen Hak Kanak-kanak kepada mangsa kanak-kanak. Hasil kajian mendapati ketidakcukupan undang-undang sedia ada dalam memberi perlindungan kepada mangsa kanak-kanak di Malaysia dimana ia sepatutnya meliputi, pengenalan identiti, perlantikan penjaga, penjagaan dan perlindungan interim, penyelesaian yang kekal dan akses kepada keadilan.

Kata kunci: Konvensyen Hak Kanak-kanak, undang-undang Malaysia dan mengenai pemerdagangan kanak-kanak, mangsa pemerdagangan kanak-kanak, perlindungan kanak-kanak, mengatasi pemerdagangan kanak-kanak.

INTRODUCTION

The issue of child trafficking is a global problem. There is a need to first look at the definition of the word ‘child’ before further extrapolating further on the efficacy of existing international and domestic legislation. According to mainstream international treaties, a child is a person under the age of 18.¹ Therefore, for issues relating to child trafficking in Malaysia that identify someone as a child, reference is made to the following Malaysian statutes; the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM) 2007,² and the Child Act 2001.³ However, the Evidence of Child Witness Act 2007⁴ defines a child witness as anyone under the age of 16. While the Child and Young Persons (Employment) Act 1966 and (Amendment) 2019, a child refers to a person who has not reached the age of 15.⁵ If these definitions are taken into consideration, the term “child trafficking” would include, the act of acquiring or maintaining the labour or services through coercion, recruiting, conveyance, transferring, harbouring, providing or receiving of a person under the age of 18 for exploitation. Meanwhile, the term “exploitation” can take the forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or removal of human organs.⁶ For the purpose of this study, a ‘child’ refers to a minor below the age of 18 years old.

Regrettably, according to the ECPAT,⁷ Malaysia is a country which is a checkpoint, transit point, and destination for human

¹ United Nations Protocol to Prevent, Suppress, Punish Trafficking in Persons especially Women and Children 2000, (adopted 15 November 2000, entered into force 25 December 2003), article 3 (d) & United Nations Convention on the Rights of the Child 1989, (adopted 20 November 1989, entered into force 2 September 1990), Article 1.

² Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 2.

³ Child Act 2001, section 2.

⁴ Evidence of Child Witness Act 2007, section 2.

⁵ Child and Young Persons (Employment) Act 1966 and (Amendment) 2019, section 1(A).

⁶ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 2.

⁷ ECPAT stands for End Child Prostitution and Trafficking. This is a network of worldwide organizations that “works towards ending child

trafficking. It has been found that adult men and women and also children are mostly trafficked from South East Asian countries such as the Philippines, Myanmar, Thailand and Cambodia, compared to children trafficked from Malaysia.⁸ The Malaysia non-governmental organization, TENAGANITA reported that Malaysia has a black market for the sale of children, where Bangladeshi and Rohingya men living in Malaysia can marry minors from their home countries. Among the 40 child trafficking cases handled by TENAGANITA, many of them included cases involving the trafficking of child brides.⁹ According to the Trafficking in Persons (2015) report, refugees in Malaysia, including Rohingya men, women, and children were vulnerable to trafficking due to lack of formal status or legal work permit. Aside from that, an estimated 80,000 Filipino Muslims without legal status, including 10,000 children, are residing in Sabah, where those children are reportedly subjected to forced begging.¹⁰

Trafficking leaves both short and long-term effects, the impact of which can last a lifetime on a child victim. For example, the psychological impact of being separated from family, friends, community and culture can make a child victim feel distressed and alienated. Children who are exploited for domestic servitude and forced labour can suffer physical injuries, develop problems with their emotional health and are denied access to education. To add to that, children trafficked for sexual exploitation are at high risk of exposure to prolonged sexual violence, physical injuries, sexually transmitted infections and for girls, multiple pregnancies.¹¹ Child victims of

prostitution and trafficking. For further information see their official website at www.ecpat.org.

⁸ "Sex Trafficking of Children in Malaysia", ECPAT, 2016, accessed July 8, 2019,

https://www.ecpat.org/wpcontent/uploads/legacy/Factsheet_Malaysia.pd.

⁹ "8-year-old child bride in Tenaganita shelter," *News Strait Times*, June 28, 2015, accessed 8 July, 2015, <https://www.nst.com.my/news/2015/09/8-year-old-child-bride-tenaganita-shelter>.

¹⁰ "Trafficking in Persons Report-Malaysia 2015", Refworld, July 27, 2015, accessed October 9, 2019, <https://www.refworld.org/docid/55b73bbc15.html>.

¹¹ "Effects of Child Trafficking", National Society for the Prevention of Cruelty (NSPCC), accessed October, 10, 2019, <https://www.nspc.org.uk/what-is-child-abuse/types-of-abuse/childtrafficking>.

trafficking are entitled to protection provided by their rights under international law. As such, the Malaysian government needs to adopt these protections into domestic law. The loopholes in the existing laws in Malaysia that protect child victims of trafficking leads to a reluctance to cooperate with officers investigating the perpetrators. Moreover, child victims are further traumatized and revictimized after being repatriated to their country of origin.

THE LEGAL FRAMEWORK

The Convention on the Rights of the Child (CRC) is the first international treaty designed to protect and enhance the position of children. Prior to the establishment of the CRC, children were recognized as, at the very least, a legitimate object of international law. The issue of child trafficking has been addressed from various aspects. One of them is the protection of the rights of trafficked children. The word ‘protection’ means that there are specific measures taken in enabling a person who is in the worst situation to enjoy the rights and assistance provided by international conventions.¹² As a result, the CRC is a primary guideline for providing protection and rights of children, which should be implied by governmental, non-governmental and intergovernmental bodies into domestic legislation for child victims of trafficking. Protecting someone means recognizing that a person has rights and the authorities who exercise power over them have a duty to implement their obligations adequately and effectively.¹³ Thus, states are responsible for taking action to protect trafficked children as required under the CRC, which mentions that child abuse is, “*all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care parent(s), legal guardian(s) or any other person who has the care of the child.*”¹⁴

¹² *Child Trafficking and Child Protection: Ensuring that Child Protection Mechanisms Protect the Rights and Meet the Needs of Child Victims of Human Trafficking*, (Austria: OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2018), p.17.

¹³ *Ibid*, at p.18.

¹⁴ United Nations Convention on the Rights of the Child 1989, Article 19.

Furthermore, the Universal Declaration of Human Rights (UDHR) 1948 also covers children, which guarantees specific rights for “everyone.” The UDHR 1948 does not, however, clearly espouse the idea of children as rights holders, but merely draws attention to their needs for special protection. Article 25 (2) provides that “*motherhood and childhood are entitled to special care and assistance.*”¹⁵

Malaysia signed the CRC on 17 February 1995, with reservations made to 12 of the Articles on the grounds of inconsistency with the country’s Constitution, national laws, and national policies. Subsequently, four of the reservations were removed, leaving 8 reservations altogether. Malaysia submitted the first report on 27 January 2007. As a state party of the CRC, the Malaysian government is bound to fulfil the duties that are set out therein.¹⁶ For example, Malaysia introduced the National Child Protection Policy and National Child Policy in compliance with the CRC and Malaysia Child Act 2001, where the primary concern was to protect children in Malaysia from neglect, abuse, violence and exploitation. Trafficking of children was also one of the issues that was focused on under those policies, stressing that children are entitled to protection by the Malaysian government.¹⁷

The Child Act 2001 was promulgated with the intention of protecting the rights of two groups of children. The first are children who need protection and rehabilitation and second are children in need of care and protection in reference to trafficking and abduction of children.¹⁸ However, Malaysian laws are inconsistent in addressing the issue of child trafficking, which requires not only referring to the Child Act 2001, but other laws as well in complying with the provisions of the CRC.

¹⁵ Uche Ewelukwa Ofodile, “The Universal Declaration of Human Rights and the African Child Today: Progress or Problem?”, *American University International Law Review* 25, no.1 (2009): p.42.

¹⁶ Farah Nini Dusuki, “The UN Convention on the Rights of Child and the Administration of Juvenile Justice: An Examination of the Legal Framework in Malaysia”, *Asian Law Quarterly*, no.1 (2009): 142-143.

¹⁷ “Policy/Plan Action”, Department of Social Welfare Ministry of Women, Family and Community Development, accessed March, 22, 2021, <https://www.jkm.gov.my>.

¹⁸ Child Act 2001, Part V & Part IV.

The supreme law of Malaysia, the Federal Constitution itself expressly states that slavery and forced labour are prohibited. Indirectly, this indicates that child trafficking is an offence in accordance with the Constitution.¹⁹ However, it was only in 2007 that the Anti-Trafficking and Anti-Smuggling of Migrants (ATIPSON) was enacted by the Malaysian Parliament, but this legislation deals with all types of trafficking and smuggling of migrants. Hence, there is inadequacy of Malaysian law in specifically combating child trafficking. Currently, several issues in Malaysia are concerned with the following issues: the identification of identity, appointment of a guardian, interim care and protection, durable solution and access of justice for the child victims. The proceeding part of this article deals with these areas in further detail.

Identification of identity

Identification of identity is a necessary action that needs to be taken by the authorities after identifying a person as a victim of trafficking. The purpose of identification is a prerequisite in order to ensure that a victim of trafficking is eligible to have access to protection and assistance. According to the CRC, a child has the right to preserve his/her identity, including his/her nationality, name, and family relations. The state party has an obligation to provide protection and assistance to child victims and also to reestablish their identity.²⁰ In cases of child trafficking, a child victim is entitled to this right, which is a prerequisite to access protection under the CRC. Information about nationality, upbringing and ethnicity, as well as cultural and linguistic background of the child is required in accessing the child victim's identity in the course of assessing their best interest. This assessment should also identify particular vulnerabilities and protection that are connected to the child's identity and background. Establishing the age of the child is required for the evaluation of the identity of the child victim, which will allow him or her access to the rights under the CRC and national law concerning children. Age does not only differentiate and determine the service protection that can be provided such as shelter or adequate accommodation between adult and child, but a child

¹⁹ Malaysia Federal Constitution, Article 6 (1).

²⁰ United Nations Convention on the Rights of the Child 1989, article 8 (1) & 8 (2).

or younger adolescents might be under the responsibility of different authorities. Besides, age will also determine the appointment of a guardian, the right to be heard, the child's views into account as they relate to legal proceedings, to appeal against the decision independently, and to have legal assistance and representation.²¹

Assessment of age is a crucial part of the identification of child victims because many children who are trafficked into another country are without possession of a valid document or the validity of their documentation is questionable. Reliable information about their age and identity might not be easy for authorities to access in the destination country, especially in cases where children who come from less developed countries were not even registered at birth. Regarding this issue, international guidelines recommend that the person shall be assumed to be under the age of 18 and referred to child protection services so that a guardian can be appointed.²²

The identity of child victims is also affected due to falsification of their age assessment. A child is defined under the CRC as a person under the age of 18 unless there is a law applicable to the child's age of majority attained earlier.²³ Malaysian law defines a child as a person who is under the age of eighteen in compliance with the CRC.²⁴ Age assessment needs to be done because in trafficking cases, a young person under the age of 18 may be given forged documents stating that they are adults. This enables them to cross borders without immigration checks to identify whether they are accompanied by their parents or have obtained permission from their parents to travel abroad.²⁵ Next, there are 4 indicators in age assessment that will be taken into consideration, namely physical consideration, maturity, the young person's statement and the document that she or he carries. However, if the child age is still in doubt, the next 2 checks could be a medical examination and inspection with an embassy of the country of origin.

²¹ Daja Wenke, *Guidelines on Promoting the Human Rights and the Best Interest of the Child in Transnational Child Protection Cases*, (Sweden: The Council of Baltic Sea States Secretariat, 2015), p. 46.

²² Ibid, at p. 48.

²³ United Nations Convention on the Rights of the Child 1989, Article 1.

²⁴ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 2 & Child Act 2001, section 2.

²⁵ Mike Dottridge, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, (Switzerland: UNICEF, 2006), p.44.

Before proceedings with these inspections, a guardian would be appointed to ensure the best interests of the child is safeguarded.²⁶

Although Malaysian law defines a child as a person under the age of 18, there are laws that are not in line with ATIPSOM 2007 and Child Act 2001 in defining what is a ‘child’. Therefore, in the case of trafficking, apart from identifying identity, the age of a child victim is important to decide whether the child victim is eligible to access the rights to protection under Malaysia law. Medical officers are often asked to assist in determining the age of the child as in the *case Mohammad Nizam Mohammad Selihin & Anor v PP* [2018] MLJU 1624. In this case, the employer employed a girl as a domestic helper, who was a minor, through an illegal agency. The helper was threatened and exploited. The issue of the age of the helper was raised and the court asked for a medical examination to determine the age. The girl was referred to a dentist, who confirmed that the girl was a minor.

Furthermore, the Child Act focuses on the offense of falsification made by perpetrators in importing trafficked children to Malaysia. Consequently, a person who has committed this crime is liable to pay a fine of not more than RM10, 000.²⁷ This is one of the efforts to prevent trafficking of child victims from another country under false identity by the traffickers. Such trafficked children may come into Malaysia from Cambodia and are exploited as recruited domestic workers. Their true age is often falsified. In such cases, the authorities take the stipulated age on a person’s identity documents at face value and do not conduct proper age verification procedures. In the end, the child victim is deprived of the rights and measures of protection that he or she is entitled to under the CRC.²⁸ At the same time, the child victim is also not eligible to access their rights under domestic legislation.

²⁶ Ibid, at p.46.

²⁷ Child Act 2001, section 49.

²⁸ “Status Report on Children's Right in Malaysia by Child Rights Coalition Malaysia”, UNICEF, accessed July 2, 2018, https://www.unicef.org/malaysia/Report_on_Childrens_Rights.pdf.

The appointment of a guardian

The arrangement in appointing a guardian for the unaccompanied child or separated child is done after the child has been identified and is made as soon as possible. This arrangement needs to be ensured by the state until the child reaches the age of majority or the child leaves the territory or jurisdiction of the state permanently.²⁹ This principle is also applied to the child victims of trafficking where trafficking is one of the reasons a child is unaccompanied or separated.³⁰ In accordance with the CRC, there are two crucial roles of a guardian in protecting the rights of the child. Therefore, the appointment of a guardian is required by the State Parties, which is “*held responsible for giving appropriate assistance to the parents or guardians in representing child rearing and to ensure the development of any services and facilities for the care of children*”.³¹ At the same time, a child’s view shall be taken into account by the relevant authorities regarding the appointment of guardianship and will keep the child informed.³²

The person who is appointed as guardian of the child victim must have relevant child protection experience, knowledge of child rights or human rights and an understanding of the specific needs of child victims, including those according to gender.³³ The role of the guardian is to be an advocate for the child and to oversee the child in the future, especially in the decision-making process for the best interest of the child, with the primary concerns relating to immigration and appeal hearings, care arrangements and all efforts to search for a durable solution.³⁴ The guardian is also a link between the child with the various agencies that the child comes in contact with. The purpose of

²⁹ Committee on the Rights of the Child, General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, September 1 2005, para 33, CRC/GC/2005/6.

³⁰ Ibid, para 2.

³¹ United Nations Convention on the Rights of the Child 1989, article 18 (2).

³² *Guidelines on the Protection of Child Victims of Trafficking*, (USA: UNICEF, 2006), p.16.

³³ Ibid.

³⁴ Committee on the Rights of the Child, General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, September 1 2005, para 33, CRC/GC/2005/6.

this is to ensure that the child is kept informed with any relevant development that relates to the child victims.³⁵

Conversely, in criminal or civil proceedings, a guardian is given the right to refuse the child victims' right to provide testimony. The same rights also apply to a guardian, who can refuse to give testimony about the child if it is in the best interest of the child.³⁶ Therefore, the guardian should be consulted and informed regarding all actions taken that are related to the child.³⁷ On the other hand, the appointment shall also take a child's view into account by the competent authorities and keep the child informed.³⁸ Other requirements include having relevant child protection experience, knowledge of child rights or human rights and understanding of the specific needs of the child victims, including those particular genders will be considered in appointing a guardian for child victims of trafficking.³⁹

Under Malaysian law, the protection of child victims is governed by the Child Act 2001 and the ATIPSOM Act 2007. Child victims of trafficking will be surrendered to a Protection Officer after the child victim has been rescued and completed the Protection Order (PO) period. A Protection Officer is appointed from amongst the Social Welfare Officers of the Social Welfare Department, who is held responsible for caring and protecting the child, preparing a report and supervising the trafficked person.⁴⁰ The provisions of the Act generally refer to a trafficked person. But, indirectly it includes child victims of trafficking, where persons found guilty of trafficking children may be punished by imprisonment for a term not less than three years and liable to fine.⁴¹ The Social Welfare Officer or Protector is not given right to present his or her opinion in judicial proceedings to any question

³⁵ Mike Dottridge, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, p.51.

³⁶ Ibid, at p.54.

³⁷ Committee on the Rights of the Child, General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, September 1 2005, para 33, CRC/GC/2005/6.

³⁸ *Guidelines on the Protection of Child Victims of Trafficking*, p.16.

³⁹ Ibid.

⁴⁰ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 43 (1) (2).

⁴¹ Ibid, section 14.

related to any case dealt by him.⁴² Even though the Welfare Office is a protector, the Child Act 2001 does not authorize the officer to represent the child victim in criminal and civil proceedings.

Interim care and protection

Child victims of trafficking are entitled to access interim care and protection provided by the state soon after they have been rescued. This is in line with CRC's provision that stipulates that the state is responsible for providing special protection and assistance to any child who is temporarily or permanently deprived of his or her family.⁴³ During this period, the security, food and accommodation in a safe place, access to health care, psychosocial support, legal assistance, social services and education are provided for the child victims.⁴⁴ For example, a safe accommodation is crucial for the trafficked child victim, either temporary or medium-term accommodation, which they need to give testimony against traffickers. Secure accommodation is not accessible to traffickers, and this accommodation is to protect them from being further exploited. Also, the accommodation address shall be kept secret.⁴⁵ Apart from that, they also need counselling or trauma service and other health facilities.⁴⁶ Psychosocial support is vital to assist trafficked children who were sexually abused or exploited, leaving an adverse effect on their physical, intellectual, emotional and social functioning. Therefore, the State Parties need to provide technical and financial support, and training to the staff to ensure this type of intervention is delivered safely and effectively.⁴⁷ However, there are situations that would supposedly not be applicable when providing interim care and protection for child victims of trafficking. First, child victims of trafficking should not be placed with adult

⁴² Child Act 2001, section 8.

⁴³ United Nations Convention on the Rights of the Child 1989, article 20 (1).

⁴⁴ Mike Dottridge, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, p.65.

⁴⁵ Ibid, at p.66.

⁴⁶ *Combating Trafficking in Children for Labour Exploitation a Resource Kit for POLICY-Makers and Practitioners*, (Geneva: International Labour Organization (ILO), 2008), p.53.

⁴⁷ Lorraine Radford, Debra Allnock and Patricia Hynes, *Preventing and Responding to Child Sexual Abuse and Exploitation: Evidence Review*, (United Kingdom: UNICEF, 2015), p.80.

victims of trafficking, whether in shelters or detentions centres.⁴⁸ This complies with the requirement under the CRC for the state party to provide a suitable place for the care of children.⁴⁹ Second, it must be appropriate according to the child's age, culture identity, and origin.⁵⁰

In Malaysia, child victims will be placed at the Social Welfare Department of Malaysia shelter soon after they have been rescued. Then, the Magistrate will release an interim protection order (IPO) after the child is identified as a victim of trafficking for 21 days for investigation by the enforcement officer with assistance from the Protection Officer.⁵¹ The Protection Order (PO) is given after the Magistrate reads the report, by which a trafficked child is in need of care and protection and will stay at a place of refuge for three months. This is for victims who are citizens or permanent residents of Malaysia and foreign trafficked children from the date of Protection Order released until the investigation is completed.⁵²

This place of refuge is set up by the Social Welfare Department of Malaysia and separated according to the gender of the child as ATIP protection homes. Currently, there are two locations in Rembau, Negeri Sembilan for male child victims of trafficking, while the place in Bukit Senyum, Johor is only for female child victims of trafficking. To ensure a child victim is given psychosocial treatment, there are several services provided at ATIP protection homes such as medical assessment, education, training and vocational skills training, counselling, and recreation.⁵³ ATIPSOM 2007 was amended by inserting the provision that allows victims of trafficking to move freely and work during the Protective Order (PO). Child victims of trafficking are generally not allowed to work, so they are given an allowance similar to that provided to adult victims of trafficking.⁵⁴

⁴⁸ Mike Dottridge, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, p.65.

⁴⁹ United Nations Convention on the Rights of the Child 1989, article 20 (3).

⁵⁰ *Guidelines on the Protection of Child Victims of Trafficking*, p.22.

⁵¹ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 44 (2).

⁵² Ibid, section 51 (3).

⁵³ Rumah Perlindungan (RP) ATIP, Jabatan Kebajikan Masyarakat, accessed October, 19, 2009, <https://www.jkm.gov.my>.

⁵⁴ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 51A.

The above discussion shows that the government of Malaysia is committed in ensuring compliance with the standards of the CRC, although further improvement is necessary. This is due to the fact that a child victim of trafficking who is placed at the refuge place is not just for Malaysian citizens or permanent residents, but also for foreigners. Nevertheless, Malaysian law has loopholes that need to be addressed where the Trafficking in Person report claims that Malaysia lacks professional interpreters in the shelter to facilitate communication between the victim and the shelter staff. Therefore, this problem requires Malaysia to establish a legal framework for appointing interpreters not only during the investigation stage, but it shall also extend even after investigation has been completed and where the child is repatriated to his or her country of origin. It is a necessity to comply with the CRC and it must be emphasized that a child needs to be assisted by an interpreter if the child cannot understand or speak the language used.⁵⁵ Next there is the issue of what rational actions need to be taken and who shall be responsible if the protective order (PO) needs to be extended after 3 months because the investigation and trial failed to finish within the period. Another question is where the child victim shall be placed, because according to the current legislation, a Protection Officer shall be held responsible for the trafficked victim for 3 months and the same period also applies to allow a trafficked victim to remain in the shelter. Staying for long periods of time at the shelter could make a trafficked child become emotionally depressed and cause the shelter to become crowded.⁵⁶

Durable solution

A durable solution is a long-term sustainable arrangement made for child asylum seekers, including those who have been trafficked. It implies that the child will be able to live in peace and that assistance will be readily available throughout their childhood with a view to safeguard their future. It gives the children stability, security, and a chance to heal and develop. It also plays a role in preventing re-

⁵⁵ United Nations Convention on the Rights of the Child 1989, Article 10.

⁵⁶ Interview by Author with officer from Department of Social Welfare, Putrajaya on 19th March 2018.

trafficking.⁵⁷ Thus, there are various steps that need to be taken to implement a durable solution which depends on local integration, return to the child's country of origin, or resettlement and integration in a third country. Reuniting the child with family is in line with the provisions of the CRC, which shall be dealt with in a positive, humane and expeditious manner. The State Party shall apply for the child to leave or enter the State Party for family reunification. The State Party will also be held responsible for ensuring the application entails no adverse consequences to the child and their family members.⁵⁸ Thus, in implementing durable solutions, some aspects need to be considered to ensure the repatriation and reintegration of the child victim in the state is indeed for the best interest of the child.

Return to the original country will only proceed if it is in the best interest of the child to be returned, where an individual plan should be prepared together with the child where possible, for his or her sustainable reintegration.⁵⁹ The return to the country of origin shall also be considered if family reunification is safely arranged or immediate protection and care upon arrival can be provided by the authorities or guardian or non-governmental in the country or place of origin.⁶⁰ However, such return is not an option if there is a reasonable risk that leads to a violation of the fundamental human rights of the child, particularly if the non-refoulement⁶¹ principles apply.⁶² For example, in some cases, child refugees who are victims of trafficking may request asylum in the country where they have been trafficked.

⁵⁷ Achieving A Durable Solution for Trafficked Children, 2015 Research from UNICEF UK, accessed October 10, 2019, <https://www.unicef.org.uk>.

⁵⁸ United Nations Convention on the Rights of the Child 1989, section 10.

⁵⁹ Committee on the Rights of the Child, General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, September 1 2005, para 84, CRC/GC/2005/6.

⁶⁰ *Guidelines on the Protection of Child Victims of Trafficking*, p. 29.

⁶¹ Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status.

⁶² Committee on the Rights of the Child, General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, September 1 2005, para 84, CRC/GC/2005/6.

Such children would not be repatriated or sent to other countries from which the authorities might repatriate them because this is refoulement, and this will expose them to further persecution.⁶³

On the other hand, to ensure the safe return or arrival at the country of origin, the child victim must be accompanied by an adult who is responsible as guardian service and also responsible for the social services of the receiving states. The person also possesses verifying documents that will be transferred to the care of a guardian or the representative of social service in the child victim's country of origin.⁶⁴

As for the aspect of repatriation and reintegration in the country of origin, the child victim has a guardian and is entitled to access long-term care. Long-term care is provided in the event it is possible for child victims to be reunited with their family. If it is impossible within an appropriate period, other medium and long-term options such as foster care, group homes or adoption will need to be arranged.⁶⁵ Integration in the host country is the primary option given to the child victim of trafficking if return to the country of origin is impossible or is not in the best interest of the child. Therefore, the host country where the child was found to be trafficked shall allow the child victims the same rights as enjoyed by the local children's rights to access psychosocial support and social service, education,⁶⁶ health care,⁶⁷ regardless of whether they are nationals or residents of the host country.⁶⁸ Despite that child victims shall be given necessary humanitarian assistance based on the national law, this does not provide a residence permit to allow them to remain in the host country with secure legal status.⁶⁹

⁶³ Mike Dottridge, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, p. 85.

⁶⁴ Isabella Orfano, *Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons in Europe: TRM-EU*, (Italy: International Centre for Migration Policy Department, 2010), p.89.

⁶⁵ International Community of the Red Cross, *Inter-agency Guiding Principles and Unaccompanied and Separated Children*, (Switzerland: ICRC Central Tracing Agency and Protection Division, 2004), p.54.

⁶⁶ United Nations Convention on the Rights of the Child 1989, Article 29.

⁶⁷ Ibid, Article 20.

⁶⁸ Ibid, Article 2.

⁶⁹ *Guidelines on the Protection of Child Victims of Trafficking*, p. 27.

As mentioned earlier, resettlement and integration in a third country could be an option if the country of origin and the host country cannot possibly offer a durable solution for the child victim.⁷⁰ In Malaysia, trafficked child victims will be released after the PO is revoked or expired. Compared to a foreign trafficked child, an Immigration Officer must take all necessary steps to facilitate the return of the trafficked child victim to the country of origin without unnecessary delay for the safety of the child victim.

In another situation, the PO will be extended for a certain duration by the Magistrate if the trafficked children need further care and protection.⁷¹ If the children are to be returned to their country, the repatriation process will be done by the Immigration Officer following the Immigration Act.⁷² However, there is a situation where the country refuses to accept the return of the children, and the authorities will have to find a place or country that is willing to accept them, even though the law is silent on the return of the child to a third country similar to refugee children. Therefore, this issue needs to be legally addressed in the ATIPSOM Act 2007.

Access to justice

A child victim of trafficking has the right to justice as a victim and witness in criminal justice proceedings to prevent any hardship as a result of their participation. Thus, a trafficked child is entitled to a given reflection period before engaging in criminal proceedings against traffickers, in line with the provision under CRC that states recovery and rehabilitation shall be provided to any child who has experienced any form of neglect, exploitation, or abuse, torture and armed conflict.⁷³ This reflection period is time for the trafficked children to recover from the trauma of their experience. Also, if they are unsure of what is going to happen next, they may be unable to decide if law enforcement asks them to make up their mind swiftly and willingly to

⁷⁰ Committee on the Rights of the Child, General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, September 1 2005, para 92, CRC/GC/2005/6.

⁷¹ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, section 54.

⁷² Immigration Act 1959/63 (Act 155), section 46 (1) (a).

⁷³ United Nations Convention on the Rights of the Child 1989, Article 39.

testify against someone who has harmed or exploited them.⁷⁴ The purpose of this period is to allow the child victim time to calm down to think more clearly about what they want to do and to do it freely, without being influenced by the traumatic experiences of the threatening presence of the offenders.

Subsequently, a child victim of trafficking must be guaranteed legal or appropriate assistance in preparation and presentation of defense, which is required under CRC.⁷⁵ A legal representative will be appointed by a child's guardian, where both play a vital role in determining what the best interest of the child is. For example, a child's guardian will consider with the child whether, based on the advice of a legal representative, either participation of the trafficked child victim in criminal and civil proceedings is in the best interest of the child. Besides, there is also a consideration of whether providing information to the authorities' officers that can be utilized in the trial would lead to the discovery of a child's identity by traffickers and their accomplices.⁷⁶

On the other hand, there is also a child-sensitive procedure available to avoid the individual trial and legal proceedings that may harm the child and enable a trafficked child and legal representative to prosecute the abuser and some form of compensation. This includes the provision of child-friendly information, advice and advocacy.⁷⁷ At the same time, the trafficked children are also entitled to the service of an interpreter.⁷⁸ The service of an interpreter is necessary because they often cannot speak the language of the country which they are trafficked to and should be provided at all stages of the legal proceedings. Besides, the interpreter is trained to work with children, because the use and understanding of the mother tongue of the trafficked children might be different from that of adults. Lack of knowledge and experience may impede the child's full understanding

⁷⁴ Mike Dottridge, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, p.139.

⁷⁵ United Nations Convention on the Rights of the Child 1989, article 40 (2)(b)(ii).

⁷⁶ *Guidelines on the Protection of Child Victims of Trafficking*, p.102.

⁷⁷ Mike Dottridge, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, p.100.

⁷⁸ United Nations Convention on the Rights of the Child 1989, article (2) (iv).

of the questions raised and interfere with the right to a fair trial and to effective participation.⁷⁹

Videotapes of the child's testimony shall be included in the child-friendly court proceedings and presented as official evidence in court. The purpose is to protect the child from having to be physically present in the court where they feel overwhelmed by the formality proceeding. Besides, it also prevents the child from being threatened by the presence of someone who abused them. However, such provision requires amendments of criminal procedure codes in many countries, which benefits not only trafficked children but also includes abused children.⁸⁰

Malaysia has taken action to comply with the CRC by providing legal companion services requested by the child victim as a witness for legal proceedings to the legal aid department of Malaysia. A role of a legal companion is not only to accompany the child victim during legal proceedings, but it also extends to advising the guardian on what kind of civil action shall be taken for the child victim and speak on behalf of the child victim with the court's permission.⁸¹ This legal aid companion applies only to child victims under the age of 18 and have Malaysian citizenship.⁸² Aside from that, the Social Welfare Department provides Witness Support Service, where it is responsible for accompanying the witness at court, offering emotional support for the witness and family, make visits to the court before the beginning of trial with the purpose to familiarize a child victim with a court proceeding, and assistance of transport for the witness to go to court. Conversely, a Witness Support Service is not allowed to discuss the related case and giving legal advice to the witness.⁸³

However, there is obscurity in the legal framework regarding this issue. First, if the foreign child victim willingly becomes a witness

⁷⁹ Committee on the Rights of the Child, General Comment No.10 (2007): Children Rights in Juvenile Justice, April 25 2007, para 62, CRC/C/GC/10.

⁸⁰ Mike Dottridge, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 100.

⁸¹ Legal Aid 1971 Act, section 29 i (1).

⁸² Ibid, section 2.

⁸³ *Garis Panduan Khas untuk Mengendalikan Kes-kes Kesalahan Seksual terhadap Kanak-kanak*, (Kuala Lumpur: Pejabat Ketua Pendaftar Mahkamah Persekutuan Malaysia, 2017): p.63.

of legal proceedings, then the same protection service should be provided to them. Alas, according to existing law, legal aid is only provided to child victims who have Malaysia citizenship and are under the age of 18. In other words, it applies to Malaysians only. The issue is that there is no significant legal framework under the Act that provides for a foreign child victim of trafficking. This appears to discriminate foreign child victims of trafficking and at the same time deny them the rights of a foreign child victim to access justice, even though Malaysia adheres to Article 2 of the CRC on discrimination and violation to human rights. Second, is the age limitation of a child witness in giving evidence for the trial. This issue is governed by the Evidence of Child Witness Act 2007. The purpose of introducing this Act is to highlight the procedures that apply to a child witness in giving evidence. However, there is the question of the age limit, where only child witnesses under the age of 16 have access to rights given under this Act.

Conversely, a child above 16 is not eligible to access the rights under this Act. Although they are included in the definition of a child as mentioned under CRC and Child Act 2001, there is no specific or rational reason why a child is defined differently to be a witness in giving evidence. As a result, this shows Malaysian laws are inconsistent in providing protection and recognition of the children.⁸⁴

However, the Child Act (Amendment) 2016 contains a clause that allows child victims of trafficking to be protected as a witness during the investigation, pre-trial, trial, and post-trial stages. As a result of this clause, the identity of the child victim, such as his or her name, address, or educational institution, is prevented from being disclosed in the media or released. At the same time, the child victim's photograph is not to be published in any newspaper or magazine.⁸⁵ This safeguard is necessary to ensure the child victim's and his or her family's safety and security.⁸⁶ Since disseminating details that may lead

⁸⁴ Aminuddin Mustafa & Siti Nurul Aziera Moharani, "Isu dan Permasalahan Kanak-kanak di bawah Undang-undang Malaysia: Satu Penilaian", *Jurnal Fakulti Undang-undang dan Hubungan Antarabangsa*, 24 KANUN (1), (2012): p.56.

⁸⁵ Child Act (Amendment) 2016, section 15.

⁸⁶ *Guidelines on the Protection of Child Victims of Trafficking*, p.13.

to the detection of the child victim by traffickers, journalists, or members of the general public is prohibited.⁸⁷

CONCLUSION

The study reveals that international conventions implements a holistic approach in providing protection to children especially for children who are the victims of abuse, neglect and exploitation, which is an excellent guideline when implementing into domestic legislation. However, Malaysian law is still inadequate when protecting trafficked children, especially in meeting the requirements to protect child victims. Admittedly, Malaysia has made significant progress in establishing and strengthening the protection rights of children in Malaysia. Nonetheless, there remains lacuna in existing laws and these provisions are very general. Therefore, it is suggested that a more comprehensive legal framework exclusively for child victims of trafficking should be proposed to reduce the trauma of children involved in child trafficking. Cooperation with related agencies in enforcing the law both in criminal and civil proceedings is essential to prevent the children from being revictimized by trafficking circles.

⁸⁷ OSCE/ Office for Special Representative and Co-Ordinator for Combating Trafficking in Human Beings, *Child Trafficking and Child Protection: Ensuring that Child Protection Mechanism Protects the Rights and Meets the Needs of Child Victims of Human Trafficking*, (Austria: OSCE/ Office for Special Representative and Co-Ordinator for Combating Trafficking in Human Beings, 2018), p.18.