

# Malaysia and the Rome Statute of the International Criminal Court: A Call for Ratification

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## ABSTRACT

*Malaysia recently withdrew its accession to the Rome Statute of the International Criminal Court citing constitutional and judicial concerns. This article discusses these concerns and the possible implications of the Rome Statute on Malaysia's implementation of international and domestic criminal justice. Beginning with a brief summary of existing Malaysian law dealing with international crimes and an overview of the main crimes under the Rome Statute, the article analyses the outcome of accession or otherwise on Malaysia. The article considers elements that could already be put in place in Malaysian law while Malaysia again considers whether to embark on the road to eventual accession to the Rome Statute. Several concerns such as the position of the United States and sovereign immunity have consistently been raised as barriers to Malaysia's accession to the Rome Statute. These issues are discussed with reference to different States' approaches to this challenge. Possible options available to Malaysia apart from accession to the Rome Statute are also outlined.*

**Keywords:** Asia-Pacific, international humanitarian law, international criminal law, Rome Statute, International Criminal Court.

## Introduction

Malaysia announced on 4 March 2019<sup>1</sup> that it was acceding to the Rome Statute of the International Criminal Court (Rome Statute).<sup>2</sup> On 5 April

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<sup>1</sup> Depository Notification of Malaysia's Accession to the Rome Statute of the International Criminal Court, UN Doc. C.N.69.2019.TREATIES-XVIII.10, 17 July 1998, available at: <https://treaties.un.org/doc/Publication/CN/2019/CN.69.2019-Eng.pdf> (all internet references were accessed on 16 July 2020).

<sup>2</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (hereinafter "Rome Statute").

2019, the decision was made to withdraw Malaysia's instrument of accession. The prime minister referred to "political confusion about what it entails"<sup>3</sup> while certain quarters observed that consent had not been granted by the Conference of Rulers. Interestingly, the notice of withdrawal by the minister of foreign affairs speaks of Malaysia's enduring commitment to:

[T]he rule of law and justice for the perpetrators of genocide, crimes against humanity, war crimes; and crime of aggression. This is in line with the policy of the new government to firmly espouse the principles of truth, human rights, rule of law, justice, good governance, integrity and accountability.

Murmurs continue that Malaysia might yet again accede to the Rome Statute. The time is ripe to examine Malaysia's interest and challenges with the International Criminal Court (ICC).

Malaysia has a somewhat contradictory relationship with international criminal law (ICL) and international humanitarian law (IHL). It is a staunch member of the Association of Southeast Asian Nations (ASEAN) and thereby embraces the inconsistency of adhering to human rights and humanitarian law under the ASEAN Charter, while also being a strong supporter of the principle of non-interference in a State's internal affairs.<sup>4</sup> On the one hand, it has ratified few IHL treaties<sup>5</sup>

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<sup>3</sup> Depository Notification of Malaysia's Withdrawal of the Instrument of Accession to the Rome Statute, UN Doc. C.N.185.2019.TREATIES-XVIII.10, 29 April 2019, available at: <https://treaties.un.org/doc/Publication/CN/2019/CN.185.2019-Eng.pdf>; "Malaysia Withdraws from the Rome Statute", *Star Online*, 5 April 2019, available at: <https://www.thestar.com.my/news/nation/2019/04/05/malaysia-withdraws-from-the-rome-statute>.

<sup>4</sup> Association of Southeast Asian Nations Charter, 2007, Art. 2(2)(a), available at: [http://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05\\_-April-2016-IJP.pdf](http://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf) (hereinafter "ASEAN Charter").

<sup>5</sup> The current list at 2019 consists of six: Geneva Conventions of 1949, Hague Convention on the Protection of Cultural Property of 1954 and its First Protocol, Convention on the Prohibition of Biological Weapons of 1972, Convention prohibiting Chemical Weapons of 1993, Anti-Personnel Mine Ban Convention of 1997. On a quick count, there are over fifteen treaties related to IHL which the Malaysian government may possibly ratify or

and has not become a party to the Rome Statute. On the other hand, it has hosted war crimes trials after the Second World War<sup>6</sup>—more recently, influential former politicians have established an organisation entitled the “Kuala Lumpur War Crimes Tribunal”, which indicted persons over the commencement of the Iraq War. The Malaysian government has also been supportive of ongoing discussions to prosecute persons for the attack upon a Malaysian Airlines aeroplane in the Ukraine in 2014, and Malaysian investigators are part of the team which is currently assisting prosecutors in the Netherlands on this case.<sup>7</sup> Indeed, the government has gone on to sponsor a draft resolution on this topic.<sup>8</sup> The Malaysian government had previously made claims that they are yet to ratify the Rome Statute due to an ongoing process of review.<sup>9</sup> The time taken to finally decide to ratify the Rome Statute was understandable considering the intricacies and inherent contradictions between State sovereignty and an international court. The decision to accede on the arrival of the new government in 2018 was seen by many as demonstrating that the review process had been completed, and that Malaysia was willing to accept more international law treaties and their consequent obligations.

The ICC was established in 2004 after its constitutive treaty, the Rome Statute, was adopted on 17 July 1998. It has jurisdiction over war crimes, crimes against humanity and genocide committed after the Rome Statute entered into force on 1 July 2002. From 17 July 2018, the Court also has jurisdiction over the crime of aggression.<sup>10</sup> In the years since its

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accede to. Since the new government of May 2018, Malaysia has also ratified a number of human rights treaties.

<sup>6</sup> Regulations for the Trial of War Criminals, Royal Warrant 0160/2498, A.O. 81/1945, 18 June 1945, available at: <http://www.legal-tools.org/doc/386f77/>.

<sup>7</sup> Australian Associated Press, “Russian-made missile downed MH17”, *SBS Australia*, 13 October 2015, available at: <http://www.sbs.com.au/news/article/2015/10/13/russian-made-missile-downed-mh17>; Toby Sterling, “Trials over downing of flight MH17 to be held in Netherlands,” *Reuters*, 13 October 2015, available at: <http://www.reuters.com/article/us-ukraine-crisis-mh-idUSKBN19Q0SQ>.

<sup>8</sup> United Nations Security Council, “Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims,” *United Nations*, 29 July 2015, available at: <https://www.un.org/press/en/2015/sc11990.doc.htm>.

<sup>9</sup> Report of the Working Group on the Universal Periodic Review: Malaysia, UN Doc. A/HRC/11/30, 5 October 2009 (hereinafter “UN Doc. A/HRC/11/30”).

<sup>10</sup> Rome Statute, above note 3, Art. 5; Depositary Notification of the Amendments to the Rome Statute of the International Criminal Court, Kampala and the Adoption of

establishment, it has heard eleven cases to conclusion, opened thirteen situations to investigate, and is also conducting preliminary investigations into another nine situations.<sup>11</sup> The overriding principle of jurisdiction of the ICC is that of complementarity. If a State is willing and able to investigate and prosecute a case in its national courts, the ICC will declare a case inadmissible before it and allow the national court to take precedence.<sup>12</sup> Moreover, if national courts have tried a person, that person cannot be brought for the same crime before the ICC.<sup>13</sup>

The Preamble provides that the international community adopted the Rome Statute:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,  
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,  
Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes...<sup>14</sup>

Given that Malaysia is a strong supporter of pursuing international justice, and understands the importance of State sovereignty, it is arguably an anomaly that it has not yet become a party to the Rome Statute. However, this is not so surprising in the regional context—as of 2019, there are 123

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Amendments on the Crime of Aggression, UN Doc. C.N.651.2010.TREATIES-8, 11 June 2010, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf); Activation of the Jurisdiction of the Court over the Crime of Aggression, Resolution ICC-ASP/16/Res.5, 14 December 2017, available at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res5-eng.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-eng.pdf).

<sup>11</sup> International Criminal Court (ICC), Preliminary Investigations, available at: <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx>.

<sup>12</sup> Rome Statute, above note 3, Arts. 1 and 17.

<sup>13</sup> Rome Statute, above note 3, Art. 20.

<sup>14</sup> Rome Statute, above note 3, Preamble, paras. 3-5.

States party to the Rome Statute, of which nineteen are from the Asia Pacific, and, of the ASEAN States, only Cambodia is a party.<sup>15</sup>

This article discusses some of the legal and political reasons behind Malaysia's decision not to become a party to the Rome Statute and the arguments that could be made to counter these positions to demonstrate that these are not the legal hurdles that the government has alleged. Starting with an overview of the history of Malaysia's engagement with ICL, the article considers how Malaysia has already included war crimes in its current law and what its existing legal obligations are to prosecute and punish those who have committed war crimes. The article addresses the key challenges for Malaysia in acceding to the Rome Statute before concluding with some arguments as to why Malaysia should become a party, and the next steps in the accession and implementation process should this come about. In so doing, it should give a comprehensive overview of ICL as it currently stands in Malaysia and the principles of justice which underpin the Rome Statute.

### **The Context**

The Rome Statute seeks to have complementary jurisdiction over the most serious crimes that affect the international community. It seeks to ensure that if war crimes, genocide or crimes against humanity occur, and the State responsible or in which they take place is unable or unwilling to prosecute those responsible, justice is not denied to the victims. ICL draws significantly from IHL. The four Geneva Conventions of 1949<sup>16</sup> (Geneva

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<sup>15</sup> ICC, States Parties to the Rome Statute, available at: [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx). The Philippines withdrew on 17 March 2018. The withdrawal took effect from 17 March 2019, available at: <https://www.icc-cpi.int/philippines>.

<sup>16</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (Geneva Conventions or GC I, GC II, GC III, GC IV).

Conventions), their Additional Protocols of 1977 and 2005<sup>17</sup> (Additional Protocols) and a host of treaties regulating weapons form the backbone of IHL. It is significant that all States in the world are a party to the Geneva Conventions. The adoption of the Rome Statute, considered a watershed development in ICL, describes war crimes by reference to the “grave breaches” under the Geneva Conventions and Additional Protocol I and other serious violations of the laws and customs of war.

“Grave breaches” of the Geneva Conventions are the most serious offences under IHL for which States undertake to provide effective penal sanctions and to either prosecute or extradite, regardless of their nationality, alleged offenders suspected of committing such grave breaches. They include: wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or civilian the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian and taking civilians as hostages (Articles 50/51/130/147 of GCI, GCII, GCIII, GCIV).

Grave breaches are part of the wider category of serious violations of IHL that States are exhorted to suppress in both international and non-international armed conflicts. The grave breaches are different from other war crimes in that they are an exhaustive list of offences in the Geneva Conventions and Additional Protocol I and only apply in international armed conflict. The grave breaches stand on the shoulders of war crimes elaborated by the Nuremberg and Tokyo tribunals. With the creation of international criminal tribunals<sup>18</sup> and the ICC in the 1990s which were empowered to prosecute war crimes, including grave breaches, the list of grave breaches and other violations of the Geneva Conventions has fuelled the development of a rich source of jurisprudence on the interpretation and prosecution of international crimes and has served to

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<sup>17</sup> Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (hereinafter “Additional Protocol I”).

<sup>18</sup> Such as the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and the Special Court for Sierra Leone.

entrench the status of grave breaches as crimes to be criminalized internationally and nationally.

The crimes are outlined in Article 8 of the Rome Statute. These include crimes from Common Article 3 of the Geneva Conventions (dealing with non-international armed conflicts) and from customary international law (dealing with both international and non-international armed conflict). These offences form part of a web of international crimes made up of serious violations of IHL and gross violations of human rights such as crimes against humanity and genocide. The link between IHL and ICL is thus unmistakable and symbiotic, where there is an armed conflict, both international and non-international.

While the majority of ASEAN States, including Malaysia, are yet to become a party to the Rome Statute, the region has not been immune from such war crimes, genocide and crimes against humanity in the past. South East Asia was badly affected by the Second World War and, as will be discussed below, a number of war crimes trials were held in Malaysia. There was also sporadic violence in Malaysia as it came out of colonialism and fought communism.

There are still a number of non-international armed conflicts in Southeast Asia today, most notably in Myanmar and the Philippines. The latter shares a sea border with Malaysia. Malaysia, Indonesia and the Philippines have agreed on measures at the highest level to prevent spill-over of the conflicts in Southern Philippines.<sup>19</sup> Malaysia has also increased its aid to Southern Philippines to help the humanitarian response to the conflict.<sup>20</sup> In relation to Myanmar, Malaysia is host to a number of refugees from the various conflicts, and indeed the former Malaysian prime minister, Dato' Sri Haji Mohammad Najib bin Tun Haji Abdul Razak, had called the situation in Rakhine State in 2017 a “genocide” and had urged Myanmar government and world action.<sup>21</sup> The rest of the

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<sup>19</sup> Kyodo News, “Indonesia, Malaysia, Philippines to discuss Marawi issue,” *ABS-CBN News*, 20 June 2017, available at: <http://news.abs-cbn.com/news/06/20/17/indonesia-malaysia-philippines-to-discuss-marawi-issue>.

<sup>20</sup> Melissa Goh, “Malaysia to send more aid to Philippines as Marawi standoff enters third month,” *Channel News Asia*, 25 July 2017, available at: <http://www.channelnewsasia.com/news/asiapacific/malaysia-to-send-more-aid-to-philippines-as-marawi-standoff-9061900>.

<sup>21</sup> Associated Press, “Malaysia PM urges world to act against 'genocide' of Myanmar's Rohingya,” *The Guardian*, 6 December 2016, available at: <https://www.theguardian.com>.

region is also not immune to pockets of sporadic violence which have arguably not necessarily met the threshold of an armed conflict including on another of Malaysia's borders in Southern Thailand.

In the past thirty years, Malaysia has sent peacekeepers (from the Malaysian Armed Forces and the Royal Malaysian Police) to thirty United Nations (UN)-mandated peacekeeping missions, beginning in 1960 when they sent a contingent of Special Forces to the Congo.<sup>22</sup> In Cambodia, where Malaysia had a substantial peacekeeping presence as part of the UN Transitional Authority, there was a genocide<sup>23</sup> and a UN hybrid court is still investigating and prosecuting those responsible for some of the atrocities (The Extraordinary Chambers in the Courts of Cambodia).<sup>24</sup> Peacekeepers are responsible for violations of IHL including for the commission of war crimes if they engage in hostilities.<sup>25</sup> Peacekeepers often have the mandate to support the government in its investigations and prosecutions for war crimes, crimes against humanity, genocide and other violations of IHL and human rights law (e.g., UN Security Council Resolution on the Renewal of the MONUSCO Mission, para 10, 2017).<sup>26</sup> Indeed, Malaysia is operating in the Democratic Republic of the Congo and Sudan, both of which are, as of 2019, subject to investigation by the ICC.<sup>27</sup>

The Malaysian government has stated that the “deployment of Malaysia’s military and police personnel in various UN Peacekeeping Operations is a manifestation of Malaysia’s strong commitment to shared responsibilities towards the early and peaceful resolution of conflicts.” In

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[com/world/2016/dec/04/malaysia-pm-urges-world-to-act-against-genocide-of-myanmar-rohingya](http://com/world/2016/dec/04/malaysia-pm-urges-world-to-act-against-genocide-of-myanmar-rohingya).

<sup>22</sup> “Strengthening the UN Peacekeeping Operations”, *Malaysia – United Nations Security Council*, available at: <http://malaysiaunsc.kln.gov.my/index.php/malaysia-at-the-unsc/malaysia-s-commitment/strengthening-the-un-peacekeeping-operations>.

<sup>23</sup> The Extraordinary Chambers of the Courts of Cambodia has convicted persons of genocide in Cambodia: ECCC, Case No. 002/02, *Prosecutor v. Nuon Chea and Khieu Samphan*.

<sup>24</sup> See <https://www.eccc.gov.kh/en>.

<sup>25</sup> UN Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999, Section 4, available at: <https://conduct.unmissions.org/sites/default/files/keydoc1.pdf>.

<sup>26</sup> UNSC Res. 2348, 31 March 2017, para. 10. Malaysia is subject to this resolution as a troop-contributing country.

<sup>27</sup> Preliminary Investigations, above note 12.

1998, Malaysia participated in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC in Rome.<sup>28</sup> Since then, Malaysia has participated in successive review conferences of the Rome Statute. In recent years, the Malaysian government has shown a willingness to consider ratification, looking into the appropriate implementing legislation to be put in place.<sup>29</sup> Malaysia clearly takes such responsibilities seriously, and indeed has made an increasing number of statements and launched a number of operations and investigations into regional areas of tension and conflict. This demonstrates a commitment to the rule of law, ending conflict and ensuring justice, which would be in line with Malaysia also committing to the Rome Statute and implementing its provisions into its domestic law, as is discussed further in this article.

### **Malaysia and its History with ICL**

Malaysia's history with ICL began just after the Second World War and before the country came into being as an independent State. After the Second World War, the British conducted 131 war crimes trials in Singapore and other parts of then Malaya, such as Jesselton (modern-day Kota Kinabalu), Alor Setar, Labuan and Johor Bahru.<sup>30</sup> They dealt with war crimes of the Second World War committed in Singapore, Indonesia, Cambodia, Thailand, Myanmar and the Andaman and Nicobar Islands. This included the area known as the Straits Settlements under the rule of the British in pre-independence Malaysia.<sup>31</sup> The accused were of different ranks and positions, and almost all were Japanese. Among the international crimes they were charged with were the mass killing of civilians, abuse and ill treatment of individuals, directly or indirectly causing the deaths of civilians and prisoners of war, the ill treatment and

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<sup>28</sup> UN Diplomatic Conference of Plenipotentiaries On The Establishment Of An International Criminal Court, Rome, U.N. Doc.A/CONF.183/10\*, Final Act, 17 July 1998, available at: <http://www.un.org/law/icc/index.html>.

<sup>29</sup> UN Doc. A/HRC/11/30, above note 10.

<sup>30</sup> Frances Tay, *Japanese War Crimes in British Malaya and British Borneo 1941-1945*, 2017, available at: <http://www.japanesewarcrimesmalayaborneo.com>.

<sup>31</sup> Regulations for the Trial of War Criminals, above note 7.

deaths of POWs and civilians forced to work on construction projects such as the Burma-Siam railway.<sup>32</sup>

During the Second World War, the United States of America (US), the United Kingdom (UK), the then Union of Soviet Socialist Republics and China declared at the 1943 Moscow Conference that “their united action, pledged for the prosecution of the war against their respective enemies, will be continued for organisation and maintenance of peace and security” and that “those of them at war with a common enemy will act together in all matters relating to the surrender and disarmament of that enemy.”<sup>33</sup> They established the UN War Crimes Commission (UNWCC) in 1943 to compile evidence on Axis war crimes and drew up lists of suspected war criminals for prosecution after the war. It was notable that even in the midst of war, the Allies decided to execute justice rather than having mass executions or trials *in absentia*. This was the foundation for the war crimes trials after the Second World War. They also adopted a “Statement on Atrocities”, signed by President Roosevelt, Prime Minister Churchill and Premier Stalin<sup>34</sup> where they declared that they would punish German and Nazi war criminals by returning the accused to jurisdictions where the crimes were alleged to have been committed, “that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein.”<sup>35</sup> Where crimes could not be geographically located, the Allies would jointly punish these crimes. Although only applying to war crimes committed by the Nazis, the Statement on Atrocities was subsequently applied by the Allies in prosecuting the crimes of the Second World War in the Far East as well.

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<sup>32</sup> Cheah Wui Ling and Ng Pei Yee, *The Singapore War Crimes Trials*, 2016, available at: <http://singaporewarcrimestrials.com/case-summaries>.

<sup>33</sup> The Moscow Conference, *Joint Four-Nation Declaration*, Arts. 1 and 2, October 1943, available at: <http://avalon.law.yale.edu/wwii/moscow.asp>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 280 (entered into force 8 August 1945), available at [https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2\\_Charter%20of%20IMT%201945.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf).

On 26 July 1945, the Allies called for Japan's surrender by issuing the Potsdam Declaration.<sup>36</sup> It made clear that justice for the atrocities of the Japanese would be pursued while not intending “that the Japanese shall be enslaved as a race or destroyed as a nation.” Once Japan agreed to the terms of surrender under the Potsdam Declaration, war crimes investigations and trials were organised in various places in Asia. The Tokyo Trials charged high-ranking suspects from the military and the government while lower-ranking suspects were charged by national authorities of the Allies in various places in Asia. Therefore, in addition to the well-known joint trials of senior military and political leaders of the Axis at the Nuremberg Trial (19 November 1945-1 October 1946) and at the Tokyo Trial (3 May 1945-12 November 1945), the Allied Powers held national trials of Axis defendants in various locations, which is how they came to be held in then Malaya.

Among the national authorities that conducted such trials were China, the US, the Netherlands, the UK, Australia, the Philippines and France. It is important to note that these trials did not employ the national law of the place where the trials occurred but referred to the national laws of the Allied power conducting the prosecutions. This meant that these prosecutions presumed extra-territorial jurisdiction of the national laws of the various Allied countries.<sup>37</sup>

In Malaysia, the British conducted national war crimes trials and had travelling courts in certain areas with Singapore as the centre for British war crimes investigations and trials in South East Asia. Similar trials were held in Rangoon, Borneo and Hong Kong. The 1945 Royal Warrant combined with the Allied Land Forces South East Asia (ALFSEA) War Crimes Instructions No. 1: Investigation of War Crimes and Trials of War Criminals<sup>38</sup> authorized the establishment of military courts to prosecute “violations of the laws and usages of war” committed in armed conflict involving the British after 2 September 1939. Since these courts were considered as Courts-Martial, they referred to a combination

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<sup>36</sup> *Proclamation Defining Terms for Japanese Surrender (Potsdam Declaration)*, 26 July 1945, available at: <http://www.ndl.go.jp/constitution/e/etc/c06.html>.

<sup>37</sup> Suzannah Linton, “Rediscovering the War Crimes Trials in Hong Kong, 1946–48”, *Melbourne Journal of International Law*, Vol. 1, 2012, p. 14, available at: [http://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0006/1687254/Linton.pdf](http://law.unimelb.edu.au/_data/assets/pdf_file/0006/1687254/Linton.pdf).

<sup>38</sup> Regulations for the Trial of War Criminals, above note 7.

of international law, British Military law and English national criminal law in their trials.<sup>39</sup>

## **Malaysia's Implementation of IHL and ICL**

### *A. Geneva Conventions of 1949*

All States have agreed on the prosecution of “grave breaches” of the Geneva Conventions on the basis of universal jurisdiction due to the seriousness of these crimes. This includes ensuring that the relevant mechanisms are in place to implement such universal jurisdiction under the Geneva Conventions. Malaysia currently has existing obligations under the Geneva Conventions to prosecute those who commit grave breaches of the Geneva Conventions and any violations of Common Article 3. If Malaysia becomes party to the Rome Statute, these obligations will continue with the addition of the full list of crimes under the Rome Statute.

While Malaysia is already a party to the four Geneva Conventions it is yet to become party to their two Additional Protocols of 1977 and 2005. Nonetheless, as a party to the Geneva Conventions, Malaysia is obliged to implement a range of measures to fulfil its obligations “to respect and ensure respect” of the Conventions (Common Article 1, Geneva Conventions). These measures include instruction within the armed forces to disseminate the Geneva Conventions by inclusion in study programmes of the military, official translation of the Geneva Conventions, the enactment of domestic legislation for the suppression of grave breaches of the Geneva Conventions, adopting measures to prevent and stop abuses of the emblems of the Geneva Conventions, making legal advisers available to the armed forces, instruction to the civilian population and concluding agreements with particular groups to ensure respect for the rules of the Geneva Conventions.<sup>40</sup> The general duty to ensure respect is part of Malaysia's

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<sup>39</sup> Cheah Wui Ling, “An Overview of the Singapore War Crimes Trials (1946-1948): Prosecuting Lower-Level Accused”, *Singapore Law Review*, Vol. 34, 2016, p. 16, available at: <https://ssrn.com/abstract=2861802>.

<sup>40</sup> ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., ICRC, Geneva,

duty to ensure that its nationals abide by IHL in times of armed conflict. In addition to positive obligations, Malaysia has a negative obligation to refrain from encouraging, aiding or abetting the commission of violations of the Geneva Conventions.<sup>41</sup>

Malaysia's international legal obligations under the Geneva Conventions of 1949 have been implemented into domestic legislation through the Geneva Conventions Act of 1962, Act 512 of the Laws of Malaysia (GCA 1962). Section 3 of the GCA 1962 provides:

3. (1) Any person, whatever his citizenship or nationality, who, whether in or outside Malaysia, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions:
  - (a) article 50 of the convention set out in the First Schedule;
  - (b) article 51 of the convention set out in the Second Schedule;
  - (c) article 130 of the convention set out in the Third Schedule; or
  - (d) article 147 of the convention set out in the Fourth Schedule, shall be guilty of an offence and shall, on conviction,<sup>42</sup>
    - (i) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the convention in question, be sentenced to imprisonment for life;

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2016, paras. 146-149 and 181, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> (hereinafter "2016 Commentary to GCI").

<sup>41</sup> 2016 Commentary to GCI, above note 41, paras. 158-173.

<sup>42</sup> The articles list the various grave breaches of each of the four Geneva Conventions of 1949.

- (ii) in the case of any other such grave breach as aforesaid, be liable to imprisonment for a term not exceeding fourteen years.

These provisions refer directly to the relevant grave breaches provisions of the four Geneva Conventions and therefore make the grave breaches directly prosecutable under Malaysian law.

The Malaysian Penal Code does not refer to offences committed specifically in the context of an armed conflict, except those relating to Offences against the State in Chapter VI. Under Chapter VI of the Penal Code, “Offences Against the State” which can be committed in times of ‘war’, include waging war against the King under the Penal Code Act 574 of the Laws of Malaysia. Sections 121-123 and 125-130 list offences against the person or authority of the King, collecting arms, ‘...’, with the intention of waging war against the King, concealing with intent to facilitate a design to wage war, waging war against any power in alliance with the King, harbouring any person in Malaysia or person residing in a foreign State at war or in hostility against the King, committing depredation on the territories of any power at peace with the King, receiving property taken by war or depredation, a public servant voluntarily allowing a prisoner of State or war in his custody to escape, a public servant negligently causing suffering to a prisoner of State or war in his custody to escape, and aiding escape of, rescuing, or harbouring such a prisoner. Under the Penal Code, a “public servant” includes any commissioned officer in the Malaysian Armed Forces and “every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience.” This last category would include police officers.

From the above, clearly, grave breaches of the Geneva Conventions and/or offences against the State can be prosecuted in Malaysia. However, unlike offences against the State outlined in the Penal Code, grave breaches of the GCA 1962 are not listed in the Malaysian Penal Code and neither are they listed in the Schedule on Penalties of the Criminal Procedure Code which stipulates modes of arrest, bail and sentencing. Therefore, prosecutors would need to have specific knowledge of the existence of the GCA 1962 and a court would

need to rule on the relevant criminal procedure to apply to such crimes should anyone in Malaysia be charged with grave breaches. Nonetheless, prosecutions of grave breaches will likely mirror prosecutions of offences against the State. Persons accused of offences against the State can be arrested without a warrant. These are offences which are not subject to bail provisions and are subject to some of the heaviest penalties, such as the death penalty and imprisonment for life.<sup>43</sup>

Presently, only the grave breaches of the Geneva Conventions are criminalized in Malaysian law under GCA 1962. The additional grave breaches listed under the First Additional Protocol to the Geneva Conventions (Articles 11 and 85[2], [3] and [4]) should also be included in the GCA 1962 if Malaysia becomes party to the Rome Statute, or be considered when Malaysia contemplates ratification. Currently, a number of grave breaches of the First Additional Protocol are not criminalized in Malaysian law. Among them, making civilians the object of attack, making non-defended localities and demilitarized zones the object of attack, indiscriminate attacks affecting civilians committed “in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” (Article 85[3][b]) API (especially relevant if Malaysia is invaded by militants who target civilians or the civilian population), the non-repatriation of prisoners of war and the crime of starvation. Although the principles of distinction, proportionality and precautions, which are key to the application of IHL on the battlefield and derive from Additional Protocol I and customary international law,<sup>44</sup> are not stated in Malaysian law, these key principles of IHL are part of Malaysia’s military manuals and doctrine and would therefore inherently

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<sup>43</sup> Criminal Procedure Code, Act 593, First Schedule, 1935, available at: <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20593%20-%20Criminal%20Procedure%20Code.pdf>.

<sup>44</sup> Examples include the Principle of Distinction between Civilians and Combatants and between Civilian objects and Military Objectives, the Prohibition of Indiscriminate Attacks, the Principle of Proportionality in Attack, the Principle of Precautions in Attack: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1, Cambridge University Press, Cambridge, 2005, Rules 1, 14 and 15 (hereinafter “ICRC’s Customary Law Study”).

be part of any justification or defence of military personnel charged with grave breaches under Malaysian law.<sup>45</sup>

### *B. Universal Jurisdiction*

While States have been ready to adopt legislation to criminalize grave breaches domestically, there has been no corresponding enthusiasm to prosecute or extradite perpetrators of the grave breaches. This is despite the fact that under the grave breaches provisions of the Geneva Conventions, universal jurisdiction is required. Universal jurisdiction means that a State should be prepared to prosecute and punish anyone who commits a grave breach of the Geneva Conventions anywhere in the world, regardless of their nationality, and connection to the prosecuting State. States are ready to embrace universal jurisdiction in theory but find it politically challenging to implement. An example of the exercise of universal jurisdiction are the national prosecutions of grave breaches that occurred related to the former Yugoslavia which took place in Germany, Denmark and Switzerland after the break-up of the former Yugoslavia.<sup>46</sup> The International Court of Justice (ICJ) has also considered Belgium's exercise of universal jurisdiction in relation to crimes committed in the Democratic Republic of the Congo.<sup>47</sup>

Malaysia is one of the few States to provide for universal jurisdiction in its laws, although such jurisdiction has never been formally exercised. Universal jurisdiction in respect of the prosecution of grave breaches is provided by Section 3(2) of the GCA 1962. In terms of prosecutions, the GCA 1962 provides that the Magistrates' Court will not have jurisdiction to try offences under the GCA 1962 (Section 3[3]). Similar to offences against the State, grave breaches under the GCA 1962 are likely to be tried at the level of the High Court, while other serious violations of IHL are subject to possibly being charged at the level of the Sessions Court. However, in respect of international criminal

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<sup>45</sup> These Military Manuals are protected by the Official Secrets Act 1972 but Malaysia's practice in relation to IHL can be summarized from the State practice contained in ICRC's Customary Law Study, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_my](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_my).

<sup>46</sup> 2016 Commentary to GCI, above note 41, para. 2909.

<sup>47</sup> International Court of Justice (ICJ), *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement, 14 February 2002, *ICJ Reports 2002*, p. 3.

prosecutions, it is likely that the Malaysian legal system will adopt similar procedures to those used for the prosecution of serious crimes under the Penal Code such as offences against the State and terrorist offences. This primarily means prosecutions at the level of the High Court. Where Malaysian courts would have universal jurisdiction for grave breaches, the decision to prosecute is placed squarely in the hands of the public prosecutor (Section 3[4] GCA 1962) and the accused is allowed legal representation (Section 5).

### *C. Other Rome Statute Crimes*

While criminalizing the various grave breaches and other serious violations of IHL, under Malaysian law, there is no reference to the criminalization of the crime of genocide nor to crimes against humanity. In relation to genocide, when Malaysia became party to the Genocide Convention in 1994, it made a reservation.<sup>48</sup> Before a dispute can be submitted to the jurisdiction of the ICJ, the specific consent of Malaysia is required in each case. The government further registered an understanding that the pledge to grant extradition in accordance with a State's laws and treaties in force extends only to acts which are criminal under the law of both the requesting and the requested State. The effect the government would seek to promote of both the reservation and the understanding is that Malaysia can refuse the jurisdiction of the ICJ in relation to genocide prosecutions. This is debatable given the compulsory nature of Article IX and the general principle that reservations should not be made that are contrary to the object and purpose of a treaty.<sup>49</sup> Nonetheless, Malaysia need not comply with an extradition request for the crime of genocide, as even where the act is criminal under the law of the State requesting extradition, it is currently not a crime in Malaysia, which is consistent with general principles of extradition law. If Malaysia were to fully implement the Rome Statute, it would need to ensure that

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<sup>48</sup> Convention on the Punishment and Prevention of the Crime of Genocide, 78 UNTS 277, 9 December 1948 (entered into force 12 January 1951), Reservation and Understanding, Malaysia, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=4378A9A5467C779AC125642F0038EB7D>.

<sup>49</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force on 27 January 1980), Art. 19(d).

genocide was listed as a crime under the relevant Rome Statute law or revision of the Penal Code.

Guidance on implementing legislation for Malaysia in relation to international crimes of the Rome Statute can be found in the Commonwealth Model Law to Implement the Rome Statute of the ICC and the accompanying revised Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the ICC.<sup>50</sup> The model details a number of examples on how Commonwealth States have dealt with the issue of sovereign immunity.

#### *D. Compatibility with Syariah Law*

Although Islam is the official religion of Malaysia, Malaysia does not apply Islamic law in relation to criminal matters (it is applied to select family and religious matters). Presently, the federal government is vested with legislative authority to enact laws for the administration of justice, including criminal law (Section 74 and 77, Item 4, Federal List, Federal Constitution of Malaysia, 1957). In Malaysia, criminal law is enacted by the Federal government as regulated by Item 4 of the Federal List. Therefore, the Federal Government is responsible for enacting legislation criminalizing international crimes. Despite previous controversy related to the incorporation of Syariah law into criminal law,<sup>51</sup> the principles of IHL and Islamic law (and therefore the prosecution of war crimes) remain compatible. In an article on the Geneva Conventions, the late Professor Ahmad Ibrahim described the links between Islam and IHL:

Perhaps it would help in the appreciation and acceptance of the Geneva Convention to know that its principles are certainly in accord with the teachings of Islam and those of the other major religions practised in the Federation.<sup>52</sup>

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<sup>50</sup> Office of Civil and Criminal Justice Reform, *Model Law – Rome Statute of the International Criminal Court*, Commonwealth Secretariat, 2017, available at: [http://thecommonwealth.org/sites/default/files/key\\_reform\\_pdfs/P15370\\_ROL\\_\\_Model\\_Rome\\_Statute.pdf/](http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_ROL__Model_Rome_Statute.pdf/).

<sup>51</sup> Malik Imtiaz Sarwar and Surendra Ananth, “Confronting the Constitutionality of Hudud”, *Malayan Law Journal*, Vol. 4, No. XII, 2016.

<sup>52</sup> Ahmad Ibrahim, “Traditional Asian Approaches: A Malaysian View”, *Australian Yearbook of International Law*, 1980, available at: <http://austlii.edu.au/au/journals/AUYrBkIntLaw/1980/46.pdf>.

He compared Islamic tenets on armed conflict with similar principles found in the Geneva Conventions, reaffirming that the principles of IHL are compatible with the principles of Syariah law.<sup>53</sup> Both IHL and Syariah law provide for specific judicial and procedural guarantees to be observed in prosecutions for violations.

## Challenges for Malaysia to Accede to the Rome Statute

### A. State Sovereignty

As has been mentioned, there is a general ASEAN sentiment of non-interference in domestic concerns (Article 2[2][a], ASEAN Charter 2007) which underpins the majority of interactions between States in the region and indeed influences the treaties to which they are likely to become a party, particularly in the human rights and humanitarian law domain. At the 50<sup>th</sup> anniversary celebrations of ASEAN, the then Malaysian prime minister said that “the ‘ASEAN Way’ is a series of principles that were adopted when ASEAN was formed in 1967, which places extreme emphasis on national sovereignty and the commitment to non-intervention in the affairs of member countries.”<sup>54</sup> Indeed, it has been suggested that Malaysia maintains these concerns over sovereignty in its consideration of accession to the Rome Statute.<sup>55</sup>

The principle of State sovereignty comes from the Westphalian concept that States exist independently under their own ruler or sovereign who can make decisions for the interests and well-being of the State. In the *Lotus Case*, the Permanent Court of International Justice held that States may exercise their jurisdiction in their country with a wide measure of discretion; “In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon

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<sup>53</sup> Ahmed Al-Dawoody, “IHL and Islam: An Overview”, *ICRC Humanitarian Law & Policy Blog*, 14 March 2017, available at: <http://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/>.

<sup>54</sup> Karen Arukesamy, “‘ASEAN way’ brings stability, prosperity to region: Najib,” *The Sun Daily*, 14 August 2017, available at: <http://www.thesundaily.my/news/2017/08/14/asean-way-brings-stability-prosperity-region-najib-updated>.

<sup>55</sup> Free Malaysia Today Reporters, “Kula: Speed up International Criminal Court membership move”, *Free Malaysia Today News*, 9 November 2016, available at: <http://www.freemalaysiatoday.com/category/nation/2016/11/09/kula-speed-up-international-criminal-court-membership-move/>.

its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”<sup>56</sup> Therefore, a State has the capacity under this principle to enact most laws and prosecute most people without the censorship or limitation by other States or the international community, as long as it abides by international law which it itself has accepted through ratification or accession to a treaty.

Currently, Malaysia has not ratified or acceded to the Rome Statute and therefore has no inherent international law obligation to cooperate with the ICC. It can exercise its State sovereignty through the prosecution of anyone it chooses, within the limits of its existing obligations under IHL and international human rights law. Nonetheless, the contention of the authors of this article is that, in acceding to the Rome Statute, Malaysia would not relinquish this right to prosecute whomever it wishes.

The ICC is specifically established so as not to breach state sovereignty. As one commentator noted on the drafting of the Rome Statute, “The concept of sovereignty still has a great impact on international law and international relations; States are not yet ready to give up these privileges.”<sup>57</sup> As has been stated above, the ICC shall declare a case inadmissible where “[th]e case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution” (Article 17, Rome Statute). This implies that the State’s sovereignty remains paramount over any investigation and prosecution of serious international crimes. Indeed, Lüder has suggested that the ICC’s jurisdiction will always be subsidiary to a State’s jurisdiction, unlike other international criminal tribunals which have been established on an *ad hoc* basis.<sup>58</sup> Solera confirms, “States continue to play the central role. But if they fail or find

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<sup>56</sup> Permanent Court of International Justice, *The Case of the SS Lotus (France v. Turkey)*, Judgement, 7 September 1927, 1927 P.C.I.J. (ser. A) No. 10, para. 47, available at: [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm).

<sup>57</sup> Oscar Solera, “Complementary jurisdiction and international criminal justice”, *International Review of the Red Cross*, Vol. 84, No. 845, 145, 2002, p. 170.

<sup>58</sup> Sasch Rolf Lüder, “The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice,” *International Review of the Red Cross*, Vol. 84, No. 845, 2002, p. 90.

it impossible to assume that role, or show disinterest or bad faith, the ICC will step in to ensure that justice is done.”<sup>59</sup>

This approach is in line with historical concerns over State sovereignty in achieving international prosecutions for IHL violations. Gaeta, writing a commentary to the Geneva Conventions of 1949, has suggested that “After the Second World War the victorious [S]tates were mainly keen to maintain unfettered their sovereignty over the punishment of enemy war criminals”<sup>60</sup> so “they considered that the most appropriate forum to deal with this form of criminality was the one of the victim [S]tate”<sup>61</sup> when drafting the grave breaches and penal sanctions provisions of the Geneva Conventions. States are required to implement the grave breaches into their national legislation, but the choice of jurisdiction and penalties remain the choice of each individual State (ICRC updated Commentary of the First Geneva Convention).<sup>62</sup> Indeed, implementation of the grave breaches and other serious violations of IHL can be guided by the Rome Statute, but it remains up to each State how to undertake such implementation.<sup>63</sup>

As of 2016 more than 125 out of the 196 States party to the Geneva Conventions had some form of implementing legislation for grave breaches and the International Committee of the Red Cross’ updated commentary on Geneva Convention I suggests that “States Parties have largely complied with the obligation contained in Article 49(1) to enact implementing legislation. However, they have not often followed through on the obligation to either prosecute or extradite perpetrators of the grave breaches listed in Article 50.”<sup>64</sup> Kapur, writing in relation to the ICC, has noted that the “core” human rights relating to freedom from torture, cruel, inhuman or degrading treatment and indeed even the right to a fair trial have been recognized as part of Asian values and should be respected.<sup>65</sup>

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<sup>59</sup> O. Solera, above note 58, p. 148.

<sup>60</sup> Paola Gaeta, “Grave Breaches of the Geneva Conventions”, in Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 617.

<sup>61</sup> *Ibid.*

<sup>62</sup> 2016 Commentary to GCI, above note 41, para. 2844.

<sup>63</sup> 2016 Commentary to GCI, above note 41, para. 2858.

<sup>64</sup> 2016 Commentary to GCI, above note 41, para. 2908.

<sup>65</sup> Amrita Kapur, “Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court,” *Journal of International Criminal*

She also notes that many IHL principles are also already accepted and must be implemented in Asia.<sup>66</sup> As has been mentioned, Malaysia has incorporated some war crimes into its national legislation. Indeed, it is this obligation under Malaysia's existing obligations under the Geneva Conventions to enact legislation to penalize war crimes which would negate concerns about losing sovereignty to the ICC.

Outside the specific realm of international criminal jurisdiction, commentators have suggested that there is an interconnectivity to Asia which has surpassed much of the rest of the world which will require Asia, including Malaysia, to "re-think their traditional assumptions about regional and international cooperation."<sup>67</sup> Thakur has suggested, "In today's seamless world, political frontiers have become less salient both for international organizations, whose rights and duties can extend beyond borders, and for member States, whose responsibilities within borders can be held to international scrutiny. The gradual erosion of the once sacrosanct principle of national sovereignty is rooted today in the reality of global interdependence: no country is an island unto itself anymore."<sup>68</sup> Indeed, one of the aims of ASEAN is to have greater connectivity in terms of economy and security. In the context of international crimes, ASEAN has made arms smuggling a key issue regionally when the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) was established as the highest Sectoral Body in ASEAN with one of its pillars to address arms smuggling. Therefore, ASEAN recognizes the need for States to coordinate on this international issue,<sup>69</sup> which could also imply that ASEAN is expanding its engagement on international issues and require States to relinquish some of their sovereignty for the international good, under which Malaysia will follow suit.

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*Justice*, Vol. 11, Issue 5, 2013, p. 1068, available at: <https://doi.org/10.1093/jicj/mqt067>.

<sup>66</sup> A. Kapur, above note 66, p.1069.

<sup>67</sup> David P. Fidler, "The Asian Century: Implications for International Law", *Singapore Yearbook of International Law*, Vol. 9, 2005, pp. 30 and 33, available at: <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1397&context=facpub>.

<sup>68</sup> Ramesh Thakur, "Global norms and international humanitarian law: an Asian perspective", *International Review of the Red Cross*, Vol. 841, 2001, p. 8.

<sup>69</sup> ASEAN Security Outlook, ASEAN Secretariat, Jakarta, 2015, pp. 7 and 56, available at: <http://www.asean.org/storage/2015/12/ASEAN-SECURITY-OUTLOOK-2015.pdf/>

Furthermore, Malaysia has accepted the jurisdiction of several international bodies and courts to resolve its disputes with other nations. For example, Malaysia brought a case against Singapore before the ICJ over sovereignty of an island between the two States in 2008.<sup>70</sup> Malaysia has recently asked the Court to assist further in relation to the dispute.<sup>71</sup> Malaysia has also engaged in trade disputes at the World Trade Organisation.<sup>72</sup> Both examples demonstrate that when it comes to its national interests, Malaysia is prepared to rely on an international body to determine its rights and obligations under the treaties to which it is a party.

Therefore, Malaysia, in considering whether to become a party to the Rome Statute, can adopt its own legislation to ensure that it maintains the sovereignty to prosecute its own nationals or those who commit any violations on its territory without the involvement of the ICC. For example, a number of States have made declarations when ratifying the Rome Statute that their legislation requires their attorney-general or relevant minister for justice to make a full investigation to determine if they can prosecute or not before the ICC will have jurisdiction, which seeks to adhere to the requirement of admissibility under Article 17 of the ICC Statute.<sup>73</sup> It will still be the role of the ICC judges to determine the applicability of that declaration if a case were ever to reach the ICC. The Rome Statute indeed represents a guidance for national legislation rather than requiring the jurisdiction of an international tribunal over Malaysia if Malaysia were able and willing to prosecute its nationals should they have allegedly committed war crimes or other serious crimes. Becoming a

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<sup>70</sup> ICJ, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *ICJ Reports 2008*, p. 12, available at: <http://www.icj-cij.org/files/case-related/130/130-20080523-JUD-01-00-EN.pdf>.

<sup>71</sup> ICJ, “Malaysia requests an interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) – negotiations on the judgment have reached an impasse,” 30 June 2017, available at: <http://www.icj-cij.org/files/case-related/170/170-20170630-PRE-01-00-EN.pdf>.

<sup>72</sup> “India etc versus US: shrimp-turtle”, *World Trade Organization (WTO)*, available at: [https://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm); “Malaysia—Prohibition of Imports of Polyethylene and Polypropylene”, *WTO*, available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds1_e.htm).

<sup>73</sup> “Rome Statute State Signatories”, *UN Treaty Collection*, available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en).

party to the Rome Statute would also not interfere with Malaysia's sovereign right to try its own nationals, but rather its capacity to do so would be enhanced.

### *B. Immunity of the King*

Should Malaysia become party to the Rome Statute, the sovereign immunity of Malaysia's king or "Yang di-Pertuan Agong" will have to be considered because the king is constitutionally, the commander-in-chief of the military as the defender of the State. This has been the real sticking point in the recent discussions over accession. In Malaysia, the king is nominated by the nine rulers of the Council of Rulers on a rotation basis for a term of five years (Article 38[4], Federal Constitution).<sup>74</sup> The king is a constitutional monarch and acts in accordance with the advice of the Cabinet or of a minister acting under the authority of the Cabinet (Article 40, Federal Constitution). Article 40(1A) entrenches this further by providing that the King "shall accept and act in accordance with such advice." In certain cases, he acts specifically on the advice of the prime minister in particular on the appointment of judicial commissioners, judges and the attorney-general (Articles 122 and 145, Federal Constitution). He is the supreme head of the Federation and is immune from all proceedings except under a special court established under the Constitution (Article 32(1), Federal Constitution). With regard to possible ICC prosecutions for international crimes alleged to have been committed by the king in his personal capacity, while in office as king, he enjoys head of State immunity in relation to foreign criminal jurisdiction under Malaysian law.<sup>75</sup>

Until 1993, both the traditional Malay rulers and the king also enjoyed immunity from civil and criminal prosecution in Malaysian courts in their personal capacity. However, under amendments to the Federal Constitution in 1993, proceedings by or against the Yang di-Pertuan Agong or the ruler of a State in his personal capacity, are brought

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<sup>74</sup> "No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers."

<sup>75</sup> Asad G. Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity", *Chinese Journal of International Law*, Vol. 12, No. 3, 2013, p. 467, available at: <https://doi.org/10.1093/chinesejil/jmt035>.

to a special court (Article 182[2], Federal Constitution). Under Section 183 of the Federal Constitution, the prosecutorial discretion lies with the attorney general:

No action, *civil or criminal*, shall be instituted against the Yang di-Pertuan Agong or the Ruler of a State in respect of *anything done or omitted* to be done by him in his personal capacity *except with the consent of the Attorney General personally*. (*emphasis added*)

In *Faridah Begum v. Sultan Ahmad Shah*, the Federal Court of Malaya held that:

[T]he new Article 182 not only has taken away the legal indemnity enjoyed by HRH from being sued, but also abolished his rights to sue in the ordinary courts. HRH's capacity to sue or be sued, cannot now be recognized by the ordinary Court. As far as the ordinary Courts under Part IX of the Constitution are concerned, they continued as before to have no jurisdiction to hear any civil case against HRH, and in addition they also cease to have jurisdiction to hear all civil cases by HRH. The jurisdiction over these matters, even if the immunity is waived, has now been conferred exclusively on this Special Court.<sup>76</sup>

Thus, civil and criminal legal proceedings could be instituted against the sovereign for his personal actions but only in the special court and at the discretion of the attorney-general.

As mentioned, the king is the commander-in-chief of the Armed Forces under Article 41 of the Federal Constitution, making him theoretically responsible for any war crimes, genocide or crimes against humanity committed by members of the Malaysian Armed Forces. Under Malaysian law, these commands would be given in his official capacity,

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<sup>76</sup> Malaysia Special Court, *Faridah Begum Bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah*, 1 MLJ 617, p. 629.

and therefore not subject to prosecution. Article 27 of the Rome Statute clearly refers to the irrelevance of official capacity in exempting a person from responsibility for international crimes, which has caused some concern in the Malaysian government. Could the king therefore be required to face the ICC in the case that Malaysian forces commit violations of IHL or ICL? One approach is that because his “commands” are given on the advice of the prime minister, who would also receive advice from the minister of defence and the chief of the Defence Forces, it can be argued that the king would not be responsible for the actions of the armed forces and therefore not subject to prosecution. Moreover, if the king were to take steps to prosecute and punish those directly responsible for the violations, he would have satisfied the requirements of the charge of superior responsibility and would not be responsible for such violations (Article 27, Rome Statute; Article 86[2] Additional Protocol I; Prosecutor v. Jean-Pierre Bemba Gombo).<sup>77</sup>

Additionally, a way to stave off a request to surrender a person accused of an ICC crime (including the king), is to use the principle of complementarity. Prosecutions before the ICC will only proceed if Malaysia is shown to be unable or unwilling to handle these prosecutions domestically. The first step to demonstrate Malaysia’s ability to prosecute international crimes would be to criminalize the ICC crimes in the Malaysian Penal Code. Paragraph 163 of the Report of the Commonwealth Expert Group on the ICC advises that “each State will need to adopt the appropriate language for a domestic context.”<sup>78</sup> For States that provide unlimited constitutional immunities for persons in office, a number of approaches are available. Firstly, if there is an option to override or waive these immunities, then this would suffice. Secondly, the Constitution can be amended to stipulate that the immunities cannot “impede the State’s obligations under the Rome Statute.”<sup>79</sup> Lastly, States could consider that the likelihood of their head of State committing an international crime is so remote that no amendment to the Constitution is needed. This latter approach could be the most practical approach. And while the Rome Statute does not allow for reservations, Malaysia could

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<sup>77</sup> ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision (Pre-Trial Chamber II), 15 June 2009, paras. 432-433.

<sup>78</sup> Office of Civil and Criminal Justice Reform, above note 51, para. 163.

<sup>79</sup> Office of Civil and Criminal Justice Reform, above note 51, para. 166.

make a declaration that it exempts the king from prosecution for international crimes on the basis that he is in a ceremonial position.

### *C. The Position of the US*

Some States have indicated concerns about the position of the US on the ICC.<sup>80</sup> The US has not become a party to the Rome Statute. In the early 2000s, it indicated a strong opposition to the Rome Statute and the ICC, even enacting legislation to ensure that the ICC could not try US nationals (American Service Members Protection Act 2002). The US entered into over 100 bilateral immunity agreements with States around the world, including in the Asian region in the early 2000s.<sup>81</sup> The effect of such agreements is that a State subject to such an agreement will submit a US citizen wanted by the ICC to the US rather than to the ICC. These are Article 98 Agreements. Article 98 of the Rome Statute requires States not to surrender persons to the ICC, if it would be in breach of existing international obligations under an agreement with another State. Few of these agreements have been formally executed by the Parliaments in the States that have signed them, and none have been implemented to date.<sup>82</sup> The US has also withdrawn its legislation on sanctions against any State that does not implement or accept such an agreement.<sup>83</sup>

Currently, as a non-State party to the Rome Statute, Malaysia has no obligations to surrender anyone to the ICC or to cooperate in any way with the ICC. If Malaysia were to become a party to the Rome Statute, the bilateral immunity agreement issue would not affect Malaysia. Malaysia has not signed such an agreement with the US and is able to surrender a national of the US to the ICC, if such a person were on Malaysian territory and Malaysia receives a request from the ICC. If the

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<sup>80</sup> “Coalition for the International Criminal Court intensifies efforts on Malaysia to ratify the Rome Statute,” *The Malaysian Bar*, 11 May 2007, available at: [http://www.malaysianbar.org.my/human\\_rights/coalition\\_for\\_the\\_international\\_criminal\\_court\\_intensifies\\_efforts\\_on\\_malaysia\\_to\\_ratify\\_the\\_rome\\_statute\\_.html](http://www.malaysianbar.org.my/human_rights/coalition_for_the_international_criminal_court_intensifies_efforts_on_malaysia_to_ratify_the_rome_statute_.html).

<sup>81</sup> ASEAN States that have signed a Bilateral Immunity Agreement with the US include Thailand, Singapore, Laos, Philippines and Cambodia; “Bilateral Immunity Agreements”, *Coalition for the International Criminal Court*, available at: [www.iccnw.org](http://www.iccnw.org).

<sup>82</sup> “Bilateral Immunity Agreements”, *American NGO Coalition for the International Criminal Court*, available at: <https://www.amicc.org/bilateral-immunity-agreements-1>.

<sup>83</sup> *Ibid.*

US could demonstrate they were willing and able to prosecute the individual in Malaysia or in the US, Malaysia would only be obliged to surrender the US national back to the US according to the usual extradition laws under the terms of the Rome Statute.

One other concern the Malaysian government has raised is that the US is a permanent member of the UN Security Council which has the power to refer a situation to the ICC, even when the usual forms of nationality and territorial jurisdiction do not apply (Article 13[b], Rome Statute). The UN Security Council can also ask the ICC not to investigate a matter (Article 16, Rome Statute). The Security Council has referred two cases to the ICC so far: Darfur, Sudan<sup>84</sup> and Libya.<sup>85</sup> The concern of Malaysia and similar-minded States is that although the US (and indeed Russia and China as non-States party to the Rome Statute) does not accept the jurisdiction of the ICC, it can refer other States to the ICC through the Security Council. This is seen as a hypocritical position.

Nonetheless, this ability of the UN Security Council to refer situations to the ICC is part of its mandate under the UN Charter to respond to threats to peace and security. Resolutions adopted under Chapter VII of the UN Charter in response to such threats are binding on all member States (Article 25, UN Charter). The Security Council has formed the two *ad hoc* tribunals for the former Yugoslavia and for Rwanda<sup>86</sup> in response to “widespread and flagrant violations” of IHL.<sup>87</sup> It has been suggested that in fact the Security Council is “the obvious body for ensuring compliance with fundamental humanitarian rules during extreme situations.”<sup>88</sup>

If any decisions of the Security Council are contradictory to other international obligations that a State may owe, the decisions of the Security Council will prevail (Article 103, UN Charter). Therefore, the US as well as other non-States party to the Rome Statute, in referring a situation to the ICC, is in fact recognizing and giving legitimacy to the ICC, however much they may generally not wish to cooperate with the

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<sup>84</sup> UNSC Res. 1593, 31 March 2005.

<sup>85</sup> UNSC Res. 1970, 26 February 2011.

<sup>86</sup> UNSC Res. 827, 25 May 1993; UNSC Res. 955, 8 November 1994.

<sup>87</sup> UNSC Res. 827, above note 87.

<sup>88</sup> Aurélio Viotti, “In Search of Symbiosis: The Security Council in the Humanitarian Domain,” *International Review of the Red Cross*, Vol. 89, No. 865, 2007, p. 143.

ICC or not have any obligation to do so under existing treaty law. Malaysia and other States have relied on the Security Council resolutions under Chapter VII for peacekeeping mandates and other responses to threats to international peace and security, and it is unlikely that Malaysia or the US would object to a decision which would ensure the upholding of IHL and act as a peaceful response to a threat to peace and security. Moreover, Malaysia has been a member of the Security Council four times<sup>89</sup> and has the opportunity to influence such decisions both as a member and as an observer, whether or not it is a party to the Rome Statute.

### **Why Should Malaysia Become a Party to the Rome Statute?**

One of the core principles of the Rome Statute is to achieve accountability for the most serious violations of international law and end impunity for such crimes.<sup>90</sup> States have also indicated that they do not want to become safe havens for war criminals (another form of ending impunity)<sup>91</sup> and that they want to prevent violations of IHL (a form of deterrence).<sup>92</sup>

Ensuring accountability for violations of IHL and ending impunity for those responsible, whether at the domestic or international level, are goals which victims of current conflicts adhere to,<sup>93</sup> as well as

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<sup>89</sup> “Strengthening the UN Peacekeeping Operations”, above note 23.

<sup>90</sup> “Statement by EU High Representative Catherine Ashton on the ratification of the Rome Statute of the ICC by Côte d’Ivoire,” *European Council*, February 2013, available at: [https://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/135585.pdf](https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/135585.pdf); “Accession of Tunisia to the Rome Statute of the ICC – Statement by H.E. Ambassador Christian Wenaweser, President of the Assembly of States Parties to the Rome Statute of the International Criminal Court,” *Coalition for the International Criminal Court*, 24 June 2011, available at: <http://iccnow.org/documents/PASP-TUN-24062011-ENG.pdf>.

<sup>91</sup> Kelisiana Thynne, “The Universality of IHL – Surmounting the Last Bastion of the Pacific”, *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, p. 135.

<sup>92</sup> Chris Jenks and Guido Acquaviva, “Debate: The role of international criminal justice in fostering compliance with international humanitarian law,” *International Review of the Red Cross*, Vol. 96, 2014, p. 788.

<sup>93</sup> Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, *A Step towards Justice: Current accountability options for crimes under international law committed in Syria*, CEASEFIRE Centre for Civilian Rights, Syria Justice and Accountability Centre, 2015, pp. 9-10; Annika Jones, “Seeking International Criminal Justice in Syria”, *US Naval War College Journal of International Law Studies*, Vol. 89, p. 803; Stanley Ibe, “Addressing Impunity for

governments coming out of conflicts.<sup>94</sup> As one commentator in relation to the conflict in Sri Lanka has said, “making the perpetrators accountable for IHL and IHRL violations is vital for many reasons: to ensure such blatant violations are not repeated, to prevent collective retribution, ... for punishment as well as to deter future criminals.”<sup>95</sup> The UN Panel of Experts on Accountability in Sri Lanka has suggested: “achieving accountability for crimes under international law involves the right to truth, the right to justice and the right to reparations.”<sup>96</sup> They went on to say that “Accountability for serious violations of international humanitarian or human rights law is not a matter of choice or policy; it is a duty under domestic and international law.”<sup>97</sup> This statement accords with the general obligation under the Geneva Conventions to investigate and prosecute those who have committed serious violations of IHL.

The Preamble to the Rome Statute states:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,  
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes

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Serious Crimes: The Imperative for Domesticating the Rome Statute of the ICC in Nigeria,” *African Journal of International Criminal Justice*, Vol. 1, Issue 2, 2016, p. 190.

<sup>94</sup> Suzannah Linton, “New approaches to international justice in Cambodia and East Timor”, *International Review of the Red Cross*, Vol. 84, No. 845, 2002, p. 93; Jamie A. Williamson, “An overview of the international criminal jurisdictions operating in Africa”, *International Review of the Red Cross*, Vol. 88, No. 861, 2006, p. 131.

<sup>95</sup> Wasantha Seneviratne, “Challenges for Ensuring Accountability for International Humanitarian Law and Human Rights Law Violations in Post-War Situations: A Critical Appraisal with Reference to Sri Lanka”, *Sri Lanka Journal of International Law*, Vol. 2, No. 2, 2010, p. 165.

<sup>96</sup> “Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka,” *UN*, 31 March 2011, p. ii, available at: [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

<sup>97</sup> *Ibid.*

Broomhall, has said that greater accountability can lead to a greater affirmation of the “dignity of the victims”, “social healing” and “historical rectification” in the context of the ICC.<sup>98</sup> Cassese has said that the purpose of international trials is “not so much retribution as stigmatization of deviant behaviour.”<sup>99</sup>

This stigmatization of behaviour does not necessarily sit well with a State, such as Malaysia, which resolves international concerns through consensus and is conscious not to “name and shame”. However, the ICC’s jurisdiction is on individuals who have committed crimes, and the ICC does not consider the attribution of actions to States, except to the extent that this would elevate a non-international armed conflict into an international armed conflict through the “effective control” test.<sup>100</sup> At the Preparatory Commission for the Rome Statute, it was said that an international court was necessary to avoid impunity, and “that this was so, notwithstanding the awareness that the Court (ICC) should intervene only in those cases where the solution would not be satisfactory at the domestic level.”<sup>101</sup>

The legal theorist, Rawls, has argued that individuals will establish just institutions in the interest of creating justice.<sup>102</sup> Indeed, Malaysia has recognised that international justice must be served by international investigations and prosecutions, where national alternatives do not exist. It is worth noting that Malaysia’s legal system is based on common law and therefore on the Rawlsian theory of justice against individuals committing breaches of the law. While Malaysia is currently not directly involved in an armed conflict, it would be in Malaysia’s interests to have legislation in place, as well as an international framework under which to hold nationals accountable for war crimes and other serious crimes under the jurisdiction of the ICC, which they may have

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<sup>98</sup> Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, Oxford, 2003, p. 55.

<sup>99</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, p. 440.

<sup>100</sup> Shane Darcy, “Assistance, direction and control: Untangling international judicial opinion on individual and State responsibility for war crimes by non-State actors,” *International Review of the Red Cross*, Vol. 96, No. 893, 2014, p. 260.

<sup>101</sup> O. Solera, above note 58, p. 150.

<sup>102</sup> John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, 1971, p. 474.

committed overseas. Becoming a party to the Rome Statute can assist in this process.

### **Conclusion: Next Steps**

As mentioned above, Malaysia's legislation covers international crimes such as grave breaches under the Geneva Conventions of 1949. However, other breaches of the Geneva Conventions, violations of the laws and customs of war in international and non-international armed conflicts, crimes against humanity and genocide are not criminalized under Malaysian Law. Nevertheless, Malaysia has adopted the position that States remain obliged "to cooperate with relevant international courts and tribunals, in ensuring accountability for war crimes and other serious violations of IHL, in accordance with their international commitments."<sup>103</sup> In this regard, Malaysia has made several statements in support of accountability for international crimes, and despite recent setbacks, it has said that it will become party to the Rome Statute in due course. Possible stumbling blocks related to sovereign immunity, State sovereignty and the position of the US have been addressed in this article. The conclusions reached are that these are not impediments to Malaysia eventually becoming a party to the Rome Statute. Moreover, there are strong arguments that Malaysia's adherence to the rule of law and justice would lead naturally to Malaysia becoming a party to the Rome Statute.

In relation to sovereign immunity, the challenges can be mitigated by engaging the traditional Malay rulers and the king in an open and transparent manner. Opposition to ratification by Malaysian royalty may be stemmed if juxtaposed against Malaysia's strong and vocal statements in relation to the situation of Palestine<sup>104</sup> (Statement by Malaysia to the

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<sup>103</sup> "Statement by Deputy Permanent Representative Of Malaysia To The United Nations, Madam Siti Hajjar Adnin, UNSC Draft Resolution On Healthcare And Armed Conflict, New York," *Malaysia – United Nations Security Council*, 3 May 2016, available at: <http://malaysiaunsc.kln.gov.my/index.php/news-documents/malaysiastatements/item/408-3-may-2016-statement-by-mdm-siti-hajjar-adnin-deputy-permanent-representative-of-malaysia-to-the-united-nations-unsc-draft-resolution-on-healthcare-and-armed-conflict-new-york>.

<sup>104</sup> "Statement by Permanent Representative of Malaysia To The UN, H.E. Ambassador Ramlan Ibrahim, UNSC Meeting On Situation in the Middle East (Including The Palestinian Question)," *Malaysia – United Nations Security Council*, 19 October 2016, available at: <http://malaysiaunsc.kln.gov.my/index.php/news-documents/malaysia>

UN on the Situation in the Middle East, 2016), and the downing of the Malaysian Airlines aircraft in the Ukraine.<sup>105</sup> Additionally, a number of approaches used by other States to address the issue of sovereign immunity, and as proposed by the Commonwealth Secretariat, may be employed.

As a State which upholds the rule of law and seeks to end impunity for serious crimes, Malaysia has been vocal on international matters through its engagement in the UN Security Council and in UN peacekeeping missions. Malaysia's support for the ICC and the implementation of the provisions of the Rome Statute into domestic law would enhance its existing legal framework and international legal policy, rather than diminish it.

Ultimately, the decision on whether to become a party to the Rome Statute is a question of policy. However, given the current political fallout attached to accession, a mid-point step could be the criminalization of international crimes in Malaysian law. As this article has outlined, Malaysia already has certain war crimes criminalized in its national laws through the GCA 1962. However, to cover the range of the Rome Statute, Malaysia would need to implement the criminal provisions of the Geneva Conventions of 1949, the First Additional Protocol, the crime of genocide and crimes against humanity, into Malaysian penal law. This would leave the policy question of whether Malaysia becomes a party to the Rome Statute to politicians, while lawmakers, enforcement authorities, the judiciary and related government machinery can put in place those procedures and regulations necessary to enable Malaysia to prosecute international crimes domestically.

In 2009 during their Universal Period Review hearing, the Malaysian government said that:

Malaysia has undertaken a detailed study and held consultations to study the legal implications arising from the provisions of the Rome Statute. Despite several

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statements/item/527-19-october-2016-statement-by-he-amb-ramlan-ibrahim-perm-rep-of-malaysia-to-the-un-unsc-meeting-on-situation-in-the-middle-east-including-the-palestinian-question-new-york.

<sup>105</sup> Australian Associated Press, above note 8.

concerns, Malaysia is fully committed to the principles and the establishment of the ICC and their integrity.<sup>106</sup>

However, the issue was not raised in the next UPR process in 2013, despite being exhorted to become a party to the Rome Statute by many States.<sup>107</sup>

The government has demonstrated that it is willing to become a party to the Rome Statute and has taken more direct steps than any previous government in Malaysia. This article attempts to reconcile various contradicting positions on ICL for Malaysia. Implementation of the crimes under the Rome Statute and accession itself, should not be difficult. Like other States, Malaysia can become party to the Rome Statute without compromising its sovereignty; as this article has shown, there should indeed be no concerns in this regard. Existing Malaysian criminal law can begin by including the crimes of the Rome Statute in Malaysian law, thus giving Malaysian courts, judges and lawyers the ability to prosecute international crimes. This may encourage policy makers to eventually take the momentous step of becoming party to the Rome Statute.

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<sup>106</sup> UN Doc. A/HRC/11/30, above note 10.

<sup>107</sup> Report of the Working Group on the Universal Periodic Review: Malaysia, Human Rights Council Twenty-fifth Session Agenda item 6, UN Doc. A/HRC/25/10, 4 December 2013.