



Malaysia and the Rome Statute of the International Criminal Court

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Abstract: *Through its founding treaty, the Rome Statute, the establishment of the International Criminal Court (ICC) has received support and opposition from many countries. Despite working toward universal ratification or accession to the Rome Statute, Signatories and State Parties to the Rome Statute have decided not to ratify and withdraw from being Member States due to, among other reasons, the issue of immunity and criminal responsibility of the Head of State, which are not in line with their respective Constitution, particularly by Malaysia. As such, this study analyzes the position of immunity of the Head of State as well as the criminal responsibility of a military commander under international law, particularly under the Rome Statute and the Malaysian Constitution. Based on doctrinal analysis, this study argues that the Yang di-Pertuan Agong, as the Malaysian Head of State and the Commander-in-Chief of the Malaysian Armed Forces, has immunity before the national court and, thus, will be highly exposed to ICC jurisdiction because the complementary principle under the Rome Statute cannot be implemented. This study concludes that being a part of the ICC Membership is untimely for Malaysia without the reconciliation of these contradictions.*

Keywords: *International Criminal Court, Rome Statute, YDPA, Head of State, Commander in Chief.*

I. Introduction

The Federation of Malaysia (hereafter, Malaysia) is a sovereign country¹ located in

Southeast Asia, which is a subregion in Asia located east of India, south of China, and

¹ Malaysia gained its independence on August 31, 1957 and became a United Nations Member on September 17, 1957 by the name of the Federation of Malaya. On September 16, 1963, its name was changed to Malaysia, following the

admission to the new federation of Singapore, Sabah (North Borneo) and Sarawak. See Charter of the United Nations (October 24, 1945) 1 UNTS XVI, art 3; "United Nations Member States," n.d.

north of Australia.² Malaysia consists of 13 States and 3 Federal Territories³ and practices parliamentary democracy with constitutional monarchy,⁴ where the King or the Yang di-Pertuan Agong (YDPA) is the Supreme Head of State of the Malaysian Federation.⁵ Malaysia has been a staunch supporter of the establishment of the International Criminal Court (ICC) through its founding treaty, the Rome Statute.⁶ This stance is evident when Malaysia actively participated in a debate⁷ to adopt the Rome Statute at the Rome Conference in 1998.⁸ Together with 119 countries, Malaysia voted⁹ in favor of adopting¹⁰ the Rome

Statute on July 17, 1998. However, when the Rome Statute was opened for signature,¹¹ Malaysia neither signed nor acceded to the Statute¹² after it came into force in July 2002.

As of January 2021, the Rome Statute has been ratified and acceded to by 123 States from all regions,¹³ with Kiribati acceding to it on November 26, 2019.¹⁴ The number of States that ratified and acceded to the Rome Statute has been increasing over the years since it came into force in 2002.¹⁵ However, not only did a number of Signatories to the Rome Statute decide not to ratify the Rome Statute,¹⁶ but also several states did

² Eunice Low, 'Southeast Asia' in Eunice Low (ed), *The George Hicks Collection* (Brill 2016) 47–49.

³ The Malaysian Federal Constitution (As at August 10, 2018) (Malaysia) art 1.

⁴ Andrew J Harding, "Monarchy and the Prerogative in Malaysia," *Malaya L Rev* 28, (1986): 352.

⁵ The Malaysian Federal Constitution (n 3) art 32(1).

⁶ Rome Statute of the International Criminal Court (adopted July 17, 1998, entered into force July 1, 2002) 2187 UNTS 3. Hereafter, Rome Statute.

⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, vol II (Rome, June, 15 - July 17, 1998) UN Doc A/CONF.183/13, [45]-[47] 109 and [49]-[50] 109. Hereafter, Rome Conference (Vol II).

⁸ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Final Documents: Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [With an Annex Containing the Resolutions Adopted by the Conference]*, vol I (Rome, June 15- July 17, 1998) UN Doc A/CONF.183/13.

⁹ Although it was not completely recorded in Rome Conference (Vol II) (n 7), the Former Malaysian Deputy Minister of Foreign Affairs II, Datuk Richard Riot Anak Jaem stated before the Parliament that Malaysia supported the establishment of the ICC by voting in favour of the adoption of the Final Act of the Rome Statute. See *Penyata Rasmi Parlimen Malaysia - Dewan*

Rakyat: Parlimen Kedua Belas, Penggal Ketiga, Mesyuarat Ketiga (November 1, 2010) Bil. 62, DR.01.11.2010, 153.

¹⁰ Rome Conference (Vol II) (n 7) 9th Plenary Meeting, 'Agenda Item 12: Adoption of a Convention and other Instruments deemed Appropriate and of the Final Act of the Conference', 121 [10]: 'The Statute was adopted by 120 votes to 7, with 21 abstentions'. However, the detail of the voting was not completely recorded. See, among others, Uruguay 122 [18], [19]; Belgium 123 [26]; Brazil 123 [32].

¹¹ Rome Statute, art 125(2).

¹² *ibid* art 125(3).

¹³ "The State Parties to the Rome Statute," International Criminal Court, accessed January 30, 2021, https://asp.icc-cpi.int/en_menus/asp/states_parties/Pages/the_states_parties_to_the_rome_statute.aspx.

¹⁴ United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of 17 July 1998 – Kiribati: Accession* (November 26, 2019) UN Doc C.N.595.2019.TREATIES-XVIII.10.

¹⁵ See Assembly of State Parties, *Report of the Bureau on the Plan of Action of the Assembly of States Parties for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court* (November 10, 2016) ASP Doc ICC-ASP-15/19 [9], [31].

¹⁶ The United States, Sudan, Israel and Russia being Signatories to the Rome Statute decided not to ratify the treaty. See United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 - United States of America: Communication* (May 6, 2002) UN Doc C.N.434.2002.TREATIES-21; United Nations, *Depositary Notification of the*

withdraw¹⁷ and did attempt to withdraw¹⁸ from being State Parties to the Rome Statute. These State Parties include Malaysia. Specifically, this country, a few months after it has deposited its notification of accession¹⁹ to the United Nations (UN) Secretary-General as the Depositary to the

Rome Statute of the International Criminal Court of July 17, 1998 - Sudan: Notification (August 27, 2008) UN Doc C.N.612.2008.TREATIES-6; United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 - Israel: Notification* (August 28, 2002) UN Doc C.N.894.2002.TREATIES-35; United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 - Russian Federation: Communication* (November 30, 2016) UN Doc C.N.886.2016.TREATIES-XVIII.10.

¹⁷ Currently, there are two countries which have withdrawn from the Rome Statute after being Member States to this treaty. See United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 – Philippines: Withdrawal* (March 17, 2018) UN Doc C.N.138.2018.TREATIES-XVIII.10; United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of 17 July 1998 - Burundi: Withdrawal* (October 28, 2016) UN Doc C.N.805.2016.TREATIES-XVIII.10. See also Law No. 1/011 of August 30, 2003 on Ratification by the Republic of Burundi of the Rome Statute of the International Criminal Court, adopted in Rome on July 17, 1998 (Burundi) / Loi No. 1/011 Du 30 Août 2003 Portant Ratification Par La République Du Burundi.

¹⁸ The Gambia and South Africa initially deposited their respective notification of withdrawal from the Rome Statute. However, they rescinded their withdrawal a few months after the notification of their withdrawal was made. See United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of 17 July 1998 - Gambia: Withdrawal of Notification of Withdrawal* (February 16, 2017) UN Doc C.N.62.2017.TREATIES-XVIII.10; United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 - South Africa: Withdrawal of Notification of Withdrawal* (March 7, 2017) C.N.121.2017.TREATIES-XVIII.10.

¹⁹ United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 – Malaysia: Accession* (March 4, 2019) UN Doc C.N.69.2019.TREATIES-XVIII.10. Hereafter, UN Depositary Notification – Malaysia: Accession.

Statute,²⁰ decided to withdraw its accession to this treaty²¹ before the Statute came into force on Malaysia.²²

Among the reasons for Malaysia's withdrawal is the contradictions between the Constitution of the Malaysia and the Rome Statute on the immunity of the YDPA before the national court.²³ By virtue of his positions as Head of State and as the Commander-in-Chief of the Malaysian Armed Forces,²⁴ the YDPA will be highly exposed to ICC prosecution in the case that crimes have been allegedly committed by its subordinates. Moreover, the Conference of Rulers (COR), which has been established in Part IV, Chapter 2 of the Constitution, has not been consulted and deliberated²⁵ prior to Malaysia making accession to the Rome Statute.

To address these issues, the remainder of the paper is structured as follows. Section II examines the position of Heads of State under international law, particularly under the Rome Statute. Section III elucidates the roles and powers of the YDPA as the Head of State of Malaysia and the Commander-in-Chief of its Armed Forces. Lastly, Section

²⁰ Rome Statute, art 125(3).

²¹ United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 – Malaysia: Withdrawal of the Instrument of Accession* (May 15, 2019) UN Doc C.N.185.2019.TREATIES-XVIII.10.

²² UN Depositary Notification – Malaysia: Accession (n 19) “[t]he Statute will enter into force for Malaysia on June 1, 2019 in accordance with its article 126(2) [of the Rome Statute]” (emphasis added).

²³ The Malaysian Federal Constitution (n 3) art 182; Ida Lim, “Rome Statute: What is it? Will Agong’s immunity be at risk?,” *Malay Mail* (March 25, 2019), accessed October 1, 2020, <https://www.malaymail.com/news/malaysia/2019/03/25/rome-statute-what-is-it-will-agongs-immunity-be-at-risk/1736067>.

²⁴ *ibid* arts 32(1) and 41.

²⁵ The Malaysian Federal Constitution (n 3) art 38(2).

IV summarizes the key arguments and findings on prior discussions.

II. Legal Materials and Methods

Based on doctrinal and comparative analyses, this study analyzes primary and secondary sources as legal and supporting materials. The primary sources referred to are based on but not limited to the relevant documents of the UN, numerous international conventions and agreements, historical legal records, relevant legislations, and the Federal Constitution of Malaysia, as well as decided cases from international and national courts. In addition, reviews of numerous academic publications of scholarly journal articles, books, and conference papers, as well as other sources from the Internet relevant to the discussion are also used to form part of secondary sources contributory to the analysis.

III. Results and Discussion

Heads of State and the Rome Statute

Since the outbreak of World Wars I and II, many leaders have been investigated and prosecuted before national and *ad hoc* international tribunals for international crimes²⁶ of genocide, crimes against humanity, war crimes, and the crime of aggression or the crime against peace. These scenarios are evident in the establishment of several *ad hoc* tribunals, such as the Turkish Military Tribunal,²⁷ trials before the courts

in Leipzig, Germany,²⁸ the Nuremberg Tribunal,²⁹ the Far East Tribunal,³⁰ and the Former Yugoslavian,³¹ Rwandan,³² and *ad hoc* hybrid tribunals established in East-Timor,³³ Sierra Leone,³⁴ and Cambodia, among others.³⁵

The ICC was established through its founding treaty, that is, the Rome Statute, with a jurisdiction similar to that of its

Military Tribunal,” *Int’l J Mid E Stud* 23 (1991): 549.

²⁸ William J Bosch, *Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials* (North Carolina UP, 1970), 6; Sheldon Glueck, “War Criminals - Their Prosecution and Punishment - The Record of History,” *Law Guild Rev* 5 (1945): 4.

²⁹ Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, (signed at London on August 8, 1945, with Charter of the International Military Tribunal, entered into force August 8, 1945). Hereafter, the IMT Charter.

³⁰ Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo (19 January 1946); Charter dated January 19, 1946; Amended Charter dated April 26, 1946 - Tribunal established January 19, 1946. Hereafter, the IMTFE Charter. See also Tony R. Mullis, “Douglas MacArthur,” in *Generals of the Army - Marshall, MacArthur, Eisenhower, Arnold, Bradley*, ed. James H. Willbanks (Kentucky UP, 2013), 63–104.

³¹ UNSC Res 827 (May 25, 1993) UN Doc S/RES/827.

³² UNSC Res 955 (November 8, 1994) UN Doc S/RES/955.

³³ UNTAET Reg No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offence (June 6, 2000) UN Doc UNTAET/REG/2000/15, art 1.

³⁴ Agreement between the Government of Sierra Leone and the UN pursuant to UNSC Res 1315 (August 14, 2000) UN Doc S/RES/1315.

³⁵ Arrangement between the UN General Assembly and the Cambodian Government pursuant to UNGA Res 57/228 (February 27, 2003) UN Doc A/RES/57/228.

²⁶ See William A Schabas, “International Crimes,” in *Routledge Handbook of International Law*, ed. David Armstrong (Routledge, 2009), 268–77.

²⁷ See Gabrielle Simm, “Paris Peoples’ Tribunal and the Istanbul Trials: Archives of the Armenian Genocide,” *LJIL* 29, no. 1 (March 2016): 245–268, 254–57; Vahakn N Dadrian, “The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish

predecessor tribunals on genocide,³⁶ crimes against humanity,³⁷ war crimes,³⁸ and the crime of aggression or the crime against peace.³⁹ As customary international law,⁴⁰ immunity attached to Heads of State under national or international law will be set aside, where such immunity shall not bar the ICC from exercising its jurisdiction over such a persons, as stipulated under Article 27 of the Rome Statute. Moreover, the International Law Commission⁴¹ and the

International Court of Justice (ICJ), in cases entitled *Arrest Warrant*⁴² and *Mutual Assistance in Criminal Matters*,⁴³ decided that incumbent Heads of State, Heads of Government, and Ministers of Foreign Affairs as state high-ranking officials enjoy immunity *ratione personae*. However, this immunity only applies to immunity from foreign criminal jurisdiction but not from the jurisdiction of an international court, such as the ICC, if having allegedly committed international crimes.⁴⁴

Nevertheless, setting aside the immunity of Heads of State under the Rome Statute is subject to the cornerstone of the establishment of the ICC, namely, the complementarity principle.⁴⁵ This principle gives national authorities first-hand jurisdiction over alleged crimes committed under ICC jurisdiction to be firstly investigated or prosecuted locally, unless national authorities were unable⁴⁶

³⁶ Rome Statute, art 6; William A Schabas, *Genocide in International Law: The Crimes of Crimes* (2nd edn, CUP 2009) 460.

³⁷ *ibid* art 7; Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 AJIL 334, 352.

³⁸ *ibid* art 8; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th edn, CUP 2011) 247.

³⁹ *ibid* art 8 *bis*; Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (TMC Asser Press 2014) 253.

⁴⁰ IMT Charter, art 7; IMTFE Charter, art 6; UNGA Res 95(I) (December 11, 1946) UN Doc A/RES/95(I); ILC, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, With Commentaries*, vol II (UNYBILC 1950) Principle III; Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) 132; Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (OUP 2012) 12–13.

⁴¹ ILC, *Report of the International Law Commission on the Works of Its 65th Session* UN Doc A/68/10, 52 and 58; UNGA Res 68/112 UN Doc A/RES/68/112 [4], [7]; ILC, *Immunity of State Officials From Foreign Criminal Jurisdiction: Text of the Draft Articles Provisionally Adopted by the Drafting Committee at the Sixty-Seventh Session* (July 29, 2015) UN Doc A/CN.4/L.865, Draft arts 3 and 4. See also ILC, *Report of the ILC on the Work of its 63rd Session: Draft Resolution by the Sixth Committee* (November 8, 2011) (UN GAOR, 66th Session) UN Doc A/C.6/66/L.26, [8]. Special Rapporteur Roman Kolodkin submitted three reports on the topic. See Special Rapporteur Roman Kolodkin, *Third Report* (May 24, 2011) UN Doc A/CN.4/646; Special Rapporteur Roman Kolodkin, *Second Report* (June 10, 2010) UN Doc A/CN.4/631 and Special Rapporteur Roman Kolodkin,

Preliminary Report (May 29, 2008) UN Doc A/CN.4//601.

⁴² *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 [51].

⁴³ *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177 [170].

⁴⁴ *Arrest Warrant Case* (n 44) [61]; David S Koller, 'Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgement as It Pertains to the Security Council and the International Criminal Court' (2004) 20 Am U Int'l L Rev 7, 14, 17 and 19; Xiaodong Yang, 'Immunity for International Crimes: A Reaffirmation of Traditional Doctrine' (2002) 61 CLJ 242, 244.

⁴⁵ Rome Statute, preambles [4], [10] and arts 1 and 17; Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers 2008) 336; Julio Bacio Terracino, 'National Implementation of ICC Crimes Impact on National Jurisdictions and the ICC' (2007) 5 JICJ 421, 436.

⁴⁶ Rome Statute, art 17(3).

physically⁴⁷ or legally⁴⁸ or were unwilling⁴⁹ to do so.

Delegations have raised the issue of the insertion of Article 27 into the Rome Statute during its adoption at the Rome Conference in 1998.⁵⁰ A number of African Heads of State faced charges before the ICC prior to the implementation of the Rome Statute.⁵¹ Thus, Kenya proposed an amendment to Article 27 of the Rome Statute⁵² before the Assembly of State Parties (ASP) in 2014 to exempt incumbent Heads of State from ICC jurisdiction until they cease their office.⁵³ However, the ASP did not accept the proposal because it is akin to providing impunity, because Article 27 of the Statute is not only one of the cornerstones of the

establishment of the ICC⁵⁴ but also amendment of the provision would be contrary to customary international law.

In addition to the irrelevance of the immunity of Heads of State before the ICC under Article 27 of the Rome Statute, Article 28(a) of the Statute provides criminal responsibility of a military commander. It states that “[a] military commander ... shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces.”⁵⁵

The Constitutions and legislations of the majority of countries, if not all, provides their respective Heads of State as the Commander-in-Chief of the Armed Forces with immunity before national courts.⁵⁶

⁴⁷ Ahmed Samir Hassanein, ‘Physical and Legal Inability under Article 17(3) of the Rome Statute’ (2015) 15 Int’l Crim LR 101, 103-112. *See also* Informal Expert Paper, *The Principle of Complementarity in Practice* (2003) ICC Doc ICC-01/05-01/08-721-Anx9, 15.

⁴⁸ *ibid* 112-122.

⁴⁹ Rome Statute, art 17(2).

⁵⁰ *See* Rome Conference (Vol II) (n 7) United States 195 [23]; Jordan 137 [72].

⁵¹ Abel S Knottnerus, ‘The AU, the ICC, and the Prosecution of African Presidents’ in Kamari M Clarke, Abel S Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2016) 154–55.

⁵² United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 - Kenya: Proposal of Amendments* (March 14, 2014) UN Doc C.N.1026.2013.TREATIES-XVIII.10, Annex [2].

⁵³ Assembly of the AU, *Decision on the Progress Report of the Commission on the Implementation of the Decision of the International Criminal Court (ICC)* AU Doc Assembly/AU/13(XXII) in Assembly of the AU, ‘Decisions and Declaration’ (22nd Ordinary Session, January 30-31, 2014) AU Doc Assembly/AU/Dec.493(XXII) [17(a)]; Assembly of State Parties, *Report of the Working Group on Amendments* (December 7, 2014) ASP Doc ICC-ASP/13/31 [12] Hereafter, ASP Report of the Working Group on Amendments 2014; Makau W Mutua, ‘Africans and the ICC: Hypocrisy, Impunity, and Perversion’ in Kamari M Clarke, Abel S Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2016) 55.

⁵⁴ ASP Report of the Working Group on Amendments 2014 (n 53) [12].

⁵⁵ Rome Statute, art 28(a) (emphasis added).

⁵⁶ *See, among others, The Constitution of the Republic of Korea* (As Amended October 29, 1987) (Republic of Korea) art 84; *The Constitution of the Hashemite Kingdom of Jordan* (As Amended 2011) (Jordan) art 30; *The Constitution of the Kingdom of Thailand B.E. 2550* (2007) (Thailand) arts 3, 8 and 10; *The Constitution of Brunei Darussalam - Constitutional Matter I - Constitution of Brunei Darussalam* (1984 Edition) (Brunei) arts 4(1) and 4(1B); *The Constitution of the Republic of the Union of Myanmar* (2008) (Myanmar) arts 16, 58, 200(a) and 201; *The Constitution of Lao PDR* (As Amended May 6, 2003) (Laos) arts 65 and 67(New)(7); *The Constitution of the Socialist Republic of Vietnam 1992* (As Amended November 28, 2013) (Vietnam) art 86; *The Constitution of the Republic of Singapore* (Chapter Const) (Original Enactments: S 1/63) Revised Edition 1999 (July 1, 1999) Consolidation - Version in Force from October 1, 2015 (Singapore) art 17(1); *The 1945 Constitution of the Republic of Indonesia* (As Amended by the First Amendment of 1999, the Second Amendment of 2000, the Third

Based on the words “[a] military commander” under Article 28(a) of the Rome Statute, the argument emerges that any military commander, including the Commander-in-Chief of the Armed Forces as the highest rank in the military, would face certain consequences should subordinates commit any crime under ICC jurisdiction.

Similarly, the Constitution of Malaysia provides that the YDPA not only holds office as Head of State,⁵⁷ His Majesty the King is also the Supreme Commander of the Malaysian Armed Forces.⁵⁸ Pursuant to Articles 27 and 28(a) of the Rome Statute, the Malaysian Parliament raises the inconsistencies of these provisions with the Malaysian Constitution, whereby the former will affect the position and sovereignty of the King of Malaysia as Head of State, including nine other hereditary Malay Rulers,⁵⁹ and the Commander-in-Chief of the Malaysian Armed Forces.⁶⁰

Roles and Powers of the YDPA

Malaysia is a unique⁶¹ country because it has nine hereditary Rulers in the Malaysian

Federation who are Heads of their respective States⁶² within the federation, and any among them can be elected by the others to be the YDPA through the COR.⁶³ These rulers are the sovereigns of the States within the federation,⁶⁴ and the YDPA holds office as the Supreme Head of the Federation,⁶⁵ as provided under Article 32(1) of the Federal Constitution. Moreover, the executive authority of the Federation is vested in the YDPA and exercisable by him, the Cabinet, or any Minister authorized by the Cabinet or any other persons authorized by Parliament in accordance with Article 39 of the Federal Constitution. Although Malaysia adopts a parliamentary system modeled after the Westminster system, the Federal Constitution is supreme but not Parliament compared with that of the United Kingdom.⁶⁶ This position has been stipulated under Article 4(1) of the Federal Constitution and was upheld by several Malaysian jurisprudences.⁶⁷

Amendment of 2001 and the Fourth Amendment of 2002) (Indonesia) arts 9 and 10.

⁵⁷ The Malaysian Federal Constitution (n 3) art 32(1).

⁵⁸ *ibid* art 41.

⁵⁹ *ibid* art 181(1); *Penyata Rasmi Parlimen Malaysia - Dewan Rakyat: Parlimen Ketiga Belas, Penggal Keempat, Mesyuarat Ketiga* (November 9, 2016) Bil. 44, DR 9.11.2016, 5; *Penyata Rasmi Parlimen Malaysia - Dewan Rakyat: Parlimen Ketiga Belas, Penggal Keempat, Mesyuarat Ketiga* (November 8, 2016) Bil. 43, DR 8.11.2016, 217–218.

⁶⁰ *ibid* art 41; *Penyata Rasmi Parlimen Malaysia - Dewan Rakyat: Parlimen Kedua Belas, Penggal Kelima, Mesyuarat Khas* (July 23, 2014) Bil. 1, DR 23.07.2014, 65.

⁶¹ Anthony Milner, “Identity Monarchy”: Interrogating Heritage for a Divided Malaysia’ (2012) 1 *Southeast Asian Stud* 191, 193; Deborah A Johnson and Anthony Milner, ‘Westminster

Implanted: The Malaysian Experience’ in Haig Patapan, John Wanna and Patrick Moray Weller (eds), *Westminster Legacies: Democracy and Responsible Government in Asia and the Pacific* (UNSW Press 2005) 85–87.

⁶² The States of Kedah, Kelantan, Terengganu, Pahang, Johor, Selangor, Perak, Negeri Sembilan and Perlis. See Abdul Aziz Bari, “British Westminster System in Asia-The Malaysian Variation,” *US-China L Rev* 4 (2007): 2.

⁶³ The Malaysian Federal Constitution (n 3) arts 32(3), 38(2)(a) and 38(6)(a).

⁶⁴ *ibid* art 181.

⁶⁵ *ibid* art 32(1).

⁶⁶ *ibid* art 4(1); *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* [2015] 3 MLJ 513 (CA) [32]; Andrew J Harding, *Law, Government and the Constitution in Malaysia* (MLJ 1996) 105.

⁶⁷ See, among others, as per Suffian LP in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 (FC) 113 where it was held that “[t]he doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution’ (emphasis added); As per Hamid Sultan JCA in *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660 (COA) 708 [83]

As the Supreme Head of the State, the YDPA is also the Supreme Commander of the Armed Forces and the Armed Forces Council, which were established under Articles 41 and 137 of the Constitution, respectively, and would be responsible under the general authority of the YDPA, except on the operational use of the Armed Forces. Moreover, various provisions of the *Armed Forces Act 1972*⁶⁸ specifies various powers of the YDPA in relation to the Armed Forces.⁶⁹ Malaysia practices constitutional monarchy; thus, many scholars argued that constitutional monarchy denotes that the monarchy, such as the YDPA, in the exercise of his powers under the Constitution, shall act on the advice of the Cabinet or Prime Minister as stipulated under Article 40(1) of the Constitution⁷⁰ and holds office as a mere symbolic or a figurehead.⁷¹ However, no specification in the *Reid Commission Report*⁷² has stated as such. Instead, the Report mentioned that

that '[t]he common law position of parliamentary supremacy has limited relevance in our constitution which is founded on Constitutional Supremacy' (emphasis added).

⁶⁸ [Act 77].

⁶⁹ Lt Kol Syed Ismail Bin Syed Omar, 'Military Law: Jurisprudence and Jurisdiction' (1997) 2 MLJ LVII, LXI- LXII.

⁷⁰ See, among others, Nurnazida Nazri, "The Discretionary Functions of the Yang Di-Pertuan Agong: A Conceptual Approach," *MLJ* 1, (2014): cxxvii. See also *Abdul Ghani Bin Ali @ Ahmad & Ors v Public Prosecutor* [2001] 3 MLJ 561 (FC) 587-588; *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 (Privy Council) 52.

⁷¹ See, among others, David Seth Jones, "Resolving the Constitutional Question of the Malaysian King and Rulers," *Asian Journal of Political Science* 3, no. 1 (June 1995): 13, 16 and 20.

⁷² Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957* (Her Majesty's Stationery Office 1957). This Report was prepared by the Commissioners appointed by Her Majesty the Queen to make recommendations for a form of Constitution for a fully self-governing and independent Federation of Malaya within the Commonwealth.

"[h]e [the YDPA] will be a symbol of the unity of the country,"⁷³ but not as a mere symbolic as contended,⁷⁴ compared with other monarchs within the region.⁷⁵

In addition, pointing out that Article 40(1) of the Constitution states that the YDPA "shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet." is crucial. Based on the theory of constitutional monarchy, the crown, as Head of State and Supreme Commander, is not a mere figurehead. In other words, the monarchy holds the right to be consulted, to encourage, and to warn.⁷⁶ Meanwhile, the *Reid Commission Report* very clearly stated that "... and he will be entitled to be kept informed with regard to important public affairs and to make his views known to the Prime Minister."⁷⁷ Thus, Article 40(1) of the Federal Constitution gives entitlement to the YDPA to request for information from the Cabinet during the exercise of his powers. If the YDPA is to act on advice and only as a mere symbolic or a figurehead, then the Constitution would not have provided him with such an entitlement.

In his dissenting judgment, Mohd Hishamudin JCA (Judicial Appointments Commission) in the case of *Armed Forces*

⁷³ Reid Commission Report (n 72) [58](i) (emphasis added); Dian AH Shah, 'Constitutionalising Multiple Pluralities in Malaysia. Pluralist Constitutions in Southeast Asia' in Jackyln L Neo and Bui Ngok Son (eds), *Constitutionalism in Asia: Pluralist Constitutions in Southeast Asia* (Hart Publishing 2019) 36.

⁷⁴ Nazrin Shah, *The Monarchy in Contemporary Malaysia* (Institute of Southeast Asian Studies, 2004), 5.

⁷⁵ The Cambodian monarch for instance, reigns but does not exercise any power. See the Constitution of the Kingdom of Cambodia (1993) As Amended 2008 (Cambodia) art 7.

⁷⁶ R. H. Hickling, "The Prerogative in Malaysia," *Malaya L Rev* 17 (1975): 219.

⁷⁷ Reid Commission Report (n 72) [58](i).

*Council, Malaysia & Anor v Major Fadzil bin Arshad*⁷⁸ mentioned that “[i]n my judgment ... [a]s the Supreme Commander of the Armed Forces, His Majesty’s role could not have been intended by the framers of our Constitution to be merely symbolic or just a figure head. Surely His Majesty is expected to play an effective and meaningful role as the Supreme Commander.”⁷⁹ Although this judgment is a dissenting one and has not been decided by the majority of the judges, the subsequent Court of Appeal or Federal Court has not overruled His Lordship’s dissenting judgment on such a principle thus far.⁸⁰

Moreover, in certain cases, a dissenting opinion has affected subsequent court practice by transforming into a majority opinion,⁸¹ which would be adopted in future judgments and become the basis for the future development of legal doctrine.⁸² This scenario is evident in a number of examples, such as in the Federal Court case of *Soon Singh a/l Bikar Singh v Pertubuhan*

Kebajikan Islam Malaysia Kedah & Anor,⁸³ whereby the Federal Court approved the decision of the trial judge of the High Court,⁸⁴ which relied on the minority view of the Supreme Court case in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Ors*.⁸⁵

The ICJ also allows its judges to deliver their respective dissenting or separate judgment,⁸⁶ such as in the case of *South West Africa Cases*,⁸⁷ where the ICJ Vice-President Wellington Koo,⁸⁸ Judge Koretsky,⁸⁹ Judge Tanaka,⁹⁰ Judge Jessup,⁹¹ Judge Padilla Nervo,⁹² Judge Forster,⁹³ and Judge Sir Louis Mbanefo⁹⁴ appended their respective dissenting opinions from the majority.⁹⁵ This judgment includes a number of dissenting opinions of ICC cases⁹⁶ as well as its predecessor tribunals.⁹⁷

⁷⁸ [2012] 1 MLJ 313 (CA).

⁷⁹ *ibid* 328-329 [38] (emphasis added).

⁸⁰ Hamid Sultan JCA also, in his dissenting judgments reiterated a similar position as with Mohd Hishamudin JCA in the cases of *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and Other Appeals* [2016] 4 MLJ 455 (CA) [102] 497 and [113] 501-502; *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 (COA) [122] 194 and *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660 (COA) 708, 733-734 and 735.

⁸¹ A similar situation has been taken by New Zealand; a commonwealth and a common law country as with Malaysia. See *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243 (CA) where the dissenting opinion in this case was subsequently affirmed by another panel of the Court of Appeal in *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA).

⁸² See Ashgar Ali Ali Mohamed, “Dissenting Opinion: The Voice of the Future,” *MLJ* 4 (July 2016): lxxxiv.

⁸³ [1999] 1 MLJ 489 (FC).

⁸⁴ *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 1 MLJ 690 (HC).

⁸⁵ [1992] 1 MLJ 1 (Supreme Court).

⁸⁶ See, the Statute of the International Court of Justice (ICJ Statute) arts 57.

⁸⁷ (*Ethiopia v South Africa; Liberia v South Africa*) (Second Phase, Judgment) [1966] ICJ Rep 6.

⁸⁸ *ibid* (Dissenting Opinion of Vice-President Wellington Koo) [1966] ICJ Rep 216-238.

⁸⁹ *ibid* (Dissenting Opinion of Judge Koretsky) [1966] ICJ Rep 239-249.

⁹⁰ *ibid* (Dissenting Opinion of Judge Tanaka) [1966] ICJ Rep 250-324.

⁹¹ *ibid* (Dissenting Opinion of Judge Jessup) [1966] ICJ Rep 325-442.

⁹² *ibid* (Dissenting Opinion of Judge Padilla Nervo) [1966] ICJ Rep 443-473.

⁹³ *ibid* (Dissenting Opinion of Judge Forster) [1966] ICJ Rep 474-483.

⁹⁴ *ibid* (Dissenting Opinion of Judge Sir Louis Mbanefo) [1966] ICJ Rep 484-505.

⁹⁵ ICJ Statute, art 3(1) “The Court shall consist of fifteen members”.

⁹⁶ See, among others, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Dissenting Opinion of Judge Anita Usacka on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013) ICC-01/11-01/11-547-Anx2 (May 21, 2014); Dissenting Opinion of Judge Hans-Peter Kaul in *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the

Thus, dissenting judgment, whether it is a national⁹⁸ or international⁹⁹ case, is not only persuasive but may also be highly influential¹⁰⁰ and should not be regarded as insignificant, underestimated, or overlooked, given that the judgment by judges has been properly addressed, complete, and thorough.¹⁰¹ The reason is that dissenting judgment may assist the Legislature in future law-making, amendment, and revision of the existing laws.

IV. Conclusion and Suggestion

States play an important role toward universal ratification and accession to the Rome Statute; thus, this commitment can only be achieved if domestic legal issues, such as contradictions between the Rome

Statute and Constitution of the State, are firstly settled. State Parties to the Rome Statute will be bound by these provisions because ICC can set aside the immunity of the Head of State under Article 27 of the Rome Statute with the criminal responsibility of a military commander under Article 28(a). As a unique country, Malaysia's commitment toward upholding and implementing international law at the domestic level is undeniable. However, given that the status quo of the Malaysian Constitution is not parallel with the Rome Statute, Malaysian authorities will be considered legally unable to investigate or prosecute the most wanted individuals, including the Head of State and the Commander-in-Chief of the Armed Forces held by the YDPA. As such, becoming a State Party to the Rome Statute is untimely for this country until resolved.

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- ⁹⁸ Speech by YA Datuk Wira Low Hop Bing, Judge of Court of Appeal, Malaysia, 'Time Effective Grounds of Judgment' (2012) 2 MLJ clxxii, clxxv.
- ⁹⁹ R P Anand, "The Role of Individual and Dissenting Opinions in International Adjudication," *Int'l & Comp LQ* 14, no. 3 (July 1965): 788.
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