

## Transnational Smuggling of Migrant Workers from International Law Perspective

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Article Info	Abstract
<p><b>Keywords:</b> <i>Human Right International Law, Migrant Worker Smugglin, Transnational Organized Crime.</i></p> <p><b>DOI:</b> <i>10.25041/lajil.v5i1.2917</i></p>	<p><i>Migrant worker smuggling is a transnational organized crime that harms countries of origin, transit, and destination countries. The smuggling of migrant workers in Southeast Asia, from Southeast Asia and heading to Southeast Asia is largely due to economic factors that cause the Immigration of workers to more economically advanced countries. Weak regulations and restrictions on border control and law enforcement also exacerbate this. The scope of this research regards international legal provisions related to migrant worker smuggling as an organized transnational crime and the legal obligations of each country, which becomes the object of migrant worker smuggling against smuggling based on an international legal perspective. This type of research uses a case approach and statutory normative legal research. Primary, secondary, and tertiary legal materials were used as legal material, then compiled for analysis to answer legal problems. The results of the research, which are findings related to the legal provisions of migrant worker smuggling as a transnational organized crime, are the United Nations conventions ratified by United Nations members, one of which is the United Nations Convention Against Transnational Organized Crime (UNCATOC). Migrant workers are carrying out cooperation capacity building along the smuggling route to sharpen data to obtain a more accurate picture of the situation at home, in the region, and globally.</i></p>

### A. Introduction

The Southeast Asia mainland is a densely populated area with around 668.61 million people as of January 31, 2023 based on the Worldometers report,<sup>1</sup> which has now developed as a stopover as well as a center for cross-border human activities related to massive human movement as well as mobility activities that start from the country of origin and then pass through the transit country, until finally arriving at the destination country. Afterward, in

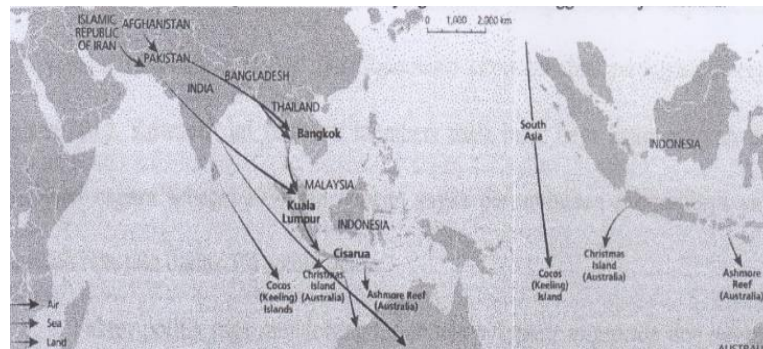
<sup>1</sup>"South-Eastern Asia Population," Worldometer, 2023, <https://www.worldometers.info/world-population/south-eastern-asia-population/>. <https://www.worldometers.info/world-population/south-eastern-asia-population/> accessed on 29 March 2023

terms of cross-country activities mentioned, irregular migrants have arisen due to the smuggling of migrant workers. This is a human rights issue whose crimes cross national borders (transnational crimes).

The rate of irregular migrants<sup>2</sup> in Southeast Asia is very high. This is due to the economy, avoiding conflict in the country of origin, recreation or vacation, studying, worshiping, being married, natural disasters, or for other purposes. The flow of irregular migrants is dynamic because a network of smugglers facilitates their movement. The smugglers work in various ways based on the money received by controlling the time, shipping, and facilities for illegal immigrants. In some countries, poor border controls mean that the flow of black immigrants continues to be easy in an age of globalization. People smugglers include intermediaries, illegal immigration senders, or expedition planners who deal with the internet and have a wealth of experience in mastering the complexities of Immigration.<sup>3</sup> It is reported that the smuggling of migrants from Southeast Asia facilitates migrants leaving Vietnam for Europe to North America, especially Myanmar migrants who depart for southwestern South Asia.

The existence of Indonesia, as a country in the Southeast Asian region, is also an important country for the transit of migrants smuggled by sea to Australia. The result of wars, bloody conflicts, and perhaps even genocide in some countries, such as Iraq, Iran, Afghanistan, Sri Lanka, Pakistan, and Myanmar, forced some people to seek protection in various countries, including Indonesia. They come to Indonesia as a transit country before then to Australia as a final country.<sup>4</sup> This situation seems to be exacerbated by the geographical conditions of Indonesia as an archipelagic country. Indonesia has approximately 3000 islands with such geographical conditions, which provides enough opportunities for smuggling to pass through Indonesia undetected.<sup>5</sup>

**Picture 1. Smuggling routes South Asia transiting Southeast Asia to Australia<sup>6</sup>**



Source: Global Study on Smuggling Migrants 2018

Migrant smuggling routes in the image below are widely documented, usually in Southeast Asia. Australia has been a key destination for irregular migrants and refugees from South Asia since the early 2000s.<sup>7</sup>

<sup>2</sup>There is no universally accepted definition of irregular migration. The International Organization for Migration (IOM) defines it as “movements that occur outside the regulatory norms of sending, transit and receiving countries” (IOM, 2011)

<sup>3</sup> Rahmah Daniah and Fajar Apriani, “Kebijakan Nasional Anti-Trafficking Dalam Migrasi Internasional,” *Jurnal Politika Dinamika Masalah Politik Dalam Negeri Dan Hubungan Internasional* 8, no. 2 (2018). DOI. [10.22212/jp.v8i2.1140](https://doi.org/10.22212/jp.v8i2.1140)

<sup>4</sup> Eva Johan, “Kebijakan Indonesia Terhadap Imigran Ilegal Dan Hubungannya Dengan Kedaulatan Negara,” *Yuridika* 28, no. 1 (2013): 1–12.

<sup>5</sup> United Nations Office on Drugs and Crime (UNODC), “Migrant Smuggling in Asia and the Pacific: Current Trends and Challenges Volume II,” *United Nations Office on Drugs and Crime (UNODC) II*, no. July (2018): 69–93.

<sup>6</sup> United Nations Office on Drugs and Crime (UNODC), *Global Study on Smuggling of Migrants 2018*, *Global Study on Smuggling of Migrants 2018* (Austria: United Nations Publication, 2018), <https://doi.org/10.18356/c7955797-en>.

<sup>7</sup> Ibid

The irregular movement of people in Southeast Asia is increasing due to the facilitation of migrant smugglers. Migrant smuggling is the procurement to obtain, either directly or indirectly, financial or other material benefits by the illegal entry of a person into a country of which the person is not a citizen or permanent resident.<sup>8</sup> Migrant smuggling is a crime organized by crossing national borders or involving more than one country. Irregular migration is the impact of migrant smuggling, which then creates a very real dilemma for the country and sacrifices the migrants themselves to insecurity and vulnerability. The smuggling of migrants within the Southeast Asian region from Southeast Asia and heading to Southeast Asia is largely driven by economic factors such as poverty, debt, and lack of job opportunities, leading to labor immigration to more economically advanced countries. Human traffic activities in Southeast Asia have developed with the implementation of the ASEAN Economic Community and economic and trade liberalization since 2015. This region increasingly attracts migrants from various countries with an average annual economic growth rate above 5 %.

Political issues also encourage irregular migration and migrant smuggling. Migrant smuggling inside and from Southeast Asia is also associated with the costs and inefficiency of the Immigration work system, so migrant smuggling is chosen as a faster, cheaper, and more efficient way. For example, migrants from Cambodia have been charged US\$34 to US\$138 for smuggling from Cambodia to Thailand at a far lower cost than immigration institutions costing up to US\$700. Political factors, insecurity, and loss of citizenship further motivate smuggling from several countries. Southeast Asia, like many refugees who fled to other countries in the Southeast Asia Region, especially Malaysia, Thailand, and Indonesia, by boarding ships from Bangladesh and Myanmar. Most are ethnic Rohingya, a Muslim minority often the victim of oppression in Myanmar. The occurrence of shipwrecks and starvation were factors that caused the death of most of the refugees. It is not uncommon for refugees to experience torture or beatings onboard ships. The Rohingya refugees who travel to Malaysia and Thailand are shrouded by many possible threats. So many mass graves that number around 200 human graves seem to decorate the border area.<sup>9</sup> Many Rohingya have fled conflict and human rights abuses in Myanmar since 2015, with the majority going to Thailand, Malaysia, Indonesia, and Bangladesh by boat or on foot. From August 2017 to March 2018, almost 640,000 unauthorized Rohingya migrants crossed the border into Bangladesh.

The crime of smuggling migrant workers is an organized crime across national borders or transnational. The crime of smuggling Indonesian migrant workers has characteristics from other types of transnational organized crime, including involving many countries, both as countries of origin, transit countries, and destination countries, making it very difficult to mitigate broadly and the scope of these profit-oriented crimes. It has a complex nature that makes it easier for smugglers to manipulate and take advantage of the majority of immigrants who are willing to take big risks in seeking a better life in other ways if they cannot access legal migration routes.<sup>10</sup> This situation makes the crime of smuggling migrant workers unopposed by even powerful countries, the United Nations Convention on transnational organized crime the United Nations Convention Against Transnational Organized Crime

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<sup>8</sup> Nurul Miqat et al., "The Practice of People Smuggling in Indonesia: Draconian Laws for a Better Life," *International Journal of Global Community* 1, no. 2-July (2018): 97–108.

<sup>9</sup> Stephanie Höppner, "3 Jalur Utama Migrasi Ilegal Yang Penuh Marabahaya," DW, 2017, <https://www.dw.com/id/3-jalur-utama-migrasi-ilegal-yang-penuh-ancaman-dan-marabahaya/a-41813553>.  
<https://www.dw.com/id/3-jalur-utama-migrasi-ilegal-yang-penuh-ancaman-dan-marabahaya/a-41813553> accessed on 29 March 2023

<sup>10</sup> Transnational Crime Organised, "Smuggling of Migrants: The Harsh Search for a Better Life," UNODC (United Nations Office Drugs and Crime, n.d. <https://www.unodc.org/toc/en/crimes/migrant-smuggling.html>) accessed on 29 March 2023

(from now on referred to as UNCATOC) and its protocol, namely the protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime (from now on referred to as Migrant Smuggling Protocol) as a manifestation of the commitment to eradicate organized transnational crime through the framework of bilateral, regional or international cooperation. As well as protection against the smuggling of migrants by land, sea, and air, fulfilling the agreement of the United Nations against organized transnational crime.<sup>11</sup> However, this convention does not stipulate the definition of serious crimes committed in an organized manner by a group of criminal offenders, which is limited only in a sense: "A group of criminal offenders who commit the organized crime is a group formed in a period with three or more members more with the intent to commit an offense or a serious crime as defined under this convention, to seek financial or another material gain, either directly or indirectly."<sup>12</sup> In 23 Article 2 (c), UNCATOC provides that structured groups need not have formally assigned roles for their members, continuity of membership, or developed structures. Although hierarchical organized criminal groups appear narrow in scope so that they do not reflect the reality of contemporary organized crime, crimes carried out in an organized manner need to be interpreted as serious crimes that can threaten the political sovereignty of a country because the capacity of its activities can undermine the authority and legitimacy of government in a country.

The international legal arrangements regarding immigrant smuggling oblige the state to criminalize immigrant smuggling, and the focus of international legal arrangements is the perpetrators of these crimes. However, in prosecuting transnational organized crime perpetrators, the rights attached to the perpetrators must still be considered. One way is not to violate the human rights of the perpetrators of these crimes by considering the "inalienable" nature of human rights, even though their actions have violated the law.

Based on the background explanation above, it is important to review what are the provisions of international law regarding the smuggling of migrant workers as a transnational organized crime and it is important to know the legal obligations of each country that is part of the smuggling of migrant workers against smugglers based on an international legal perspective. This research is very important because it will reveal the smuggling of migrants from the point of view of the scope of transnational organized crime in terms of international law and human rights principles, where the material regarding the smuggling of migrant workers has not been regulated in the UNCATOC, so if this happens, efforts carried out bilaterally between countries with related institutions outside the scope of UNCATOC, such as foreign agencies (Ministry of Foreign Affairs, Ministry of Manpower, and other related Ministries)

This type of research is normative legal research which, according to I Made Pasek Diantha, examines the rule of law so that the object of research on normative law is the legal norm itself.<sup>13</sup> The author's approach in writing this scientific work is the statutory regulation approach and the case approach. This scientific paper is prepared with sources of applicable norms regarding Immigration, smuggling, international conventions, and human rights which are the primary sources of legal material, namely the UNCATOC and Migrant Smuggling Protocol. Previous research studies, law books, scientific journals, news on the internet, and

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<sup>11</sup> General Assembly resolution 55/25, "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime," *United Nations Human Rights Office of the High Commissioner*, 2000. <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> accessed on 29 March 2023

<sup>12</sup> Tom Obokata, "The Value of International Law in Combating Transnational Organized Crime in the Asia-Pacific," *Asian Journal of International Law* 7, no. 1 (2017): 39–60, <https://doi.org/10.1017/S2044251315000193>.

<sup>13</sup> I Made Pasek Diantha, *Metode Penelitian Hukum Normatif Dalam Yurisdiksi Teori Hukum* Jakarta: Prenada Media Group, (2017). p 33

newspapers that are relevant to the legal issues that the author raises as secondary legal material. Tertiary materials include legal dictionaries and encyclopedias.

The novelty of this research is to analyze the crime of transnational migrant smuggling is seen as a serious crime that can harm the original country of the migrant, the country of transit, and the country of the destination, so the crime of state smuggling is seen as a transnational crime which is contrary to the values and principles of universal human rights. Every country has the authority to fight against the smuggling of workers, oppose organized transnational crimes, and provide legal protection for the human rights of smuggled migrant workers so that the action that can be taken is to return to the mandate determined by the Migrant Smuggling Protocol and UNCATOC to increase the capacity of cooperation along the smuggling route to sharpen data to obtain a more accurate picture of the situation domestically, in the region, and globally which is the basis for doing so. Evidence-based treatment. By working together, we can overcome migrant smuggling and eradicate the havens for perpetrators of this organized transnational crime.

## B. Discussion

### 1. Migrant Worker Smuggling as a Form of Transnational Organized Crime

Organized crime is exclusive. It's the subject of all its actions for ideological or political reasons, needs expertise in the planning and/or exercising of particular activities or is subject to a secret code. Jay S. Albanese states, "Organized crime is a rationally-created crime to achieve profit through operations outside the law, to sustain the existence of crime by violence, government bribes, threats and/or monitoring of monopolies."<sup>14</sup>

Organized crime differs principally from other forms of crime in four respects: (1) it is a long-term endeavor, (2) it's rationally planned, (3) it requires force, threats, monopoly, or corruption to escape punishment, and (4) serving the public's need for illegal goods and services. Due to major social, political, economic, and technological changes in the last twenty-five years, organized crime has become more complex and dangerous, involving connections between individuals and groups worldwide. Therefore, a criminal organization consists of activities related to the above definition but involves two or more countries to complete a criminal conspiracy.<sup>15</sup>

**Table 1. Typology of Organized Crime<sup>16</sup>**

Type of Activities	Nature of Activities	Disadvantage
Provision of illegal goods, and/or Provision of illegal service	Gambling, debt/lending, sex, drugs, stolen goods	The activity is approved; Does not involve violence; Economically disadvantageous.
Legitimate business or government infiltration	Acts of violence committed with the intent to exploit that occur in a legal business or government representative	Usually not a permitted business; Involves threats, violence, or extortion; Economically disadvantageous.

<sup>14</sup> Jay S. Albanese, *Kejahatan Terorganisasi (Organized Crime) Akar Dan Perkembangannya*, Edisi Keen Jakarta: Prenada Media Group, (2016).

<sup>15</sup> Mangai Natarajan, *Kejahatan Dan Pengadilan Internasional Bandung*: Nusa Media, (2015). p 23

<sup>16</sup> Jay S. Albanese, Op, Cit.

The three categories presented are the model of crime that is said to be "organized criminal activity.". Activities categorized as organized crime are activities carried out illegally, such as the supply of illegal goods and/or services and the infiltration of legal businesses. The provision of illegal services is carried out to meet all needs that cannot be carried out by a law-abiding society, such as the need for gambling and free sex. The supply of illegal goods falls into the category of organized crime because these activities offer products obtained through illegal channels. Infiltration of legitimate businesses or governments falls into the third category of organized crime because in it, there is an act of extortion of workers who usually use threats or violence to get money to guarantee work or the safety of workers. This is usually done with threats to the employer or workers that if the money is not paid, there will be termination of employment for the workers or violence, strikes and/or destruction that will occur in the company.<sup>17</sup>

Organized crime can be divided into five categories of offenses according to the typology of crimes as presented in the table. 1.1, Conspiracy is the most important characteristic of organized crime because there is always a plan before committing a crime. This aspect of organized crime planning has set it apart from most street crimes.<sup>18</sup>

**Tabel. 1.2 Characteristics of Organized Crime<sup>19</sup>**

Types of Organized Crime	Violation Handling
Conspiracy	Prohibit criminal planning
Illegal goods: drugs and stolen goods	Prohibit the ownership and distribution of these goods under certain conditions
Illegal services: gambling, rent-seeking, and sex	Prohibit the marketing and distribution of this kind of service under certain conditions
Extortion	Prohibit the expropriation of property using future threats or danger
Illegal business involvement	Prohibit involvement in ongoing criminal conspiracies

The provision of illegal services as an act that violates the law is equivalent to the provision of illegal goods. This violation includes the provision of illegal products that the public needs. It is the public's need that allows for the existence of a target market for illicit services.<sup>20</sup> Organized crime has undergone various changes along with the emergence of new criminal opportunities.

The smuggling of migrant workers as a form of organized transnational crime is emphasized in Article 3 of the Migrant Smuggling Protocol, which states that migrant smuggling is an "act to obtain, either directly or indirectly, financial or other material benefits from the entry of a person illegally into the territory of a country in where he is neither a citizen nor a permanent resident of that country." In other words, migrant smuggling is an organized transnational crime in which the perpetrators facilitate other people's illegal border crossings for profit. Those who use smuggling services may be migrants, asylum seekers, and so on. Criminals, including cross-border terrorists, also often use the services of migrant smugglers. Migrants who are smuggled are not 'victims' of the crime of migrant smuggling, but it is possible that they can also become victims of other crimes during their journey, including serious crimes such as trafficking in persons, assault, and rape. Then the production,

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Ibid



procurement, provision, or possession of fake travel or identity documents to smuggle migrants regulated in article 6(1)(b) of the Migrant Smuggling Protocol, acts of assisting unauthorized individuals in residing illegally within the territory of a country, and carried out intentionally to gain financial or other material benefits regulated in article 6(1)(c) of the Migrant Smuggling Protocol, carrying out activities of organizing, directing, or being involved as an accomplice or trying to commit one of the violations described above is regulated in article 6 (2) the Migrant Smuggling Protocol shows that the act is a legal requirement to be able to carry out criminalization efforts against migrant smuggling following the UNCATOC and the Migrant Smuggling Protocol.

Even the Migrant Smuggling Protocol also obliges the State to adopt laws and other legal actions that are adapted to the legal system in force in that country to provide aggravating circumstances, bearing in mind that acts of migrant smuggling can endanger or have the possibility of endangering the lives or safety of migrants, as well as causing inhumane or degrading treatment, including exploitation is regulated in article 6(3) of the Migrant Smuggling Protocol.

The word 'transnational' was first popularized by a well-known international law expert named Philip C. Jessup. According to Jessup, there is another term besides international law, namely transnational law, which is a norm that contains rules regarding all legal actions and events. In the end, Jessup's understanding of transnational law was used in the Decision of the VIII UN Congress in 1990. It was used in the Vienna Convention on the Prevention and Eradication of Illegal Traffic in Narcotics and Psychotropics in 1988. UN Convention in 2000 was the last convention that used the term transnational law, which is defined as a crime with characteristics that include (1) more than two countries; (2) criminal actors or victims are foreigners; (3) exceeding the territorial boundaries of a country.<sup>21</sup>

International and transnational crimes are two sorts of violations of law that go beyond the interests of any nation State. International crime, according to Bassiouni (1983) and Malekian (1991), is an act that is prohibited by international criminal law based on the draft code of 1994, multilateral treaties, or customary practices by all countries. In contrast, Bossard (1990) defines transnational or transboundary crimes as occasionally violating the laws of several countries. Pass N more abstractly defines transboundary crime and takes legal standards into account. The term "transnational, transnational crime" refers to the "crime that is classed as a crime that threatens interests protected by law by the national competence of two or more nations or at least criminalized by one country."<sup>22</sup>

The United Nations (UN) introduced transnational crime in 1990 internationally as a crime crossing national borders.<sup>23</sup> Transnational is a series of actions involving an organized criminal group that begins with preparation, planning, direction, and supervision in several other countries and has a fairly serious impact. An organized criminal group's characteristics are that it consists of three or more people with a structured group structure, which is formed to obtain material benefits and commit various serious crimes and crimes as referred to in the convention.<sup>24</sup>

Organized crime is considered transnational when (a) the act occurs in two or more countries; (b) The action takes place in one country, but a series of other actions such as preparation, planning, or directing takes place in another country; (c) occurred in one country but other criminal acts were also committed in another country by an organized crime group; or (d) has a substantial effect on a country even if the action is carried out in another country,

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<sup>21</sup> Wangiman, *Terminologi Hukum Internasional*, Jakarta: Sinar Grafika, (2016). p. 21

<sup>22</sup> Nikos Passas, *Cross-Border Crime and the Interface between Legal and Illegal Actors*, *Security Journal*, vol. 16, 2003, <https://doi.org/10.1057/palgrave.sj.8340123>.

<sup>23</sup> Wangiman, *Op. Cit*

<sup>24</sup> Wangiman.

Madsen (2019) states another way of looking at transnational crime, namely "that in one of several ways involving two or more sovereign jurisdictions." Its criminal tendencies focus on violent or high-level violent crimes such as drug trafficking and human trafficking, and transnational crimes include parental disputes over child custody involving two countries. Crimes can also be organized and transnational but do not violate international law, such as smuggling untaxed tobacco products from one country to another.<sup>25</sup>

The extra-territorial jurisdiction of a country will be impacted by organized transnational crime. The geographic limits of a country traditionally provide the foundation for asserting jurisdiction. Territoriality, as established in the agreement of 1600 in Westphalia, is considered a determining element of international law, which conceptualize the ending of a country's authority at its territorial borders irrespective of economic and military differences. But many problems inevitably occur outside the country's borders that still impact the country, which makes the state involved and has power over these problems. According to Frederick Mann's observations, developments at the end of the 90s stated: "Normally no country may apply laws to foreigners according to conduct committed out by foreigners outside the dominion of the relevant sovereign state. It's a tenet of international law, according to which a sovereign state must respect the subjects and rights of all sovereign powers outside its area."<sup>26</sup> In the 19th century, every nation, like several other European countries, began to take jurisdiction over non-citizens' foreign behaviors, damaging public security when progress took place.<sup>27</sup>

Extra-territorial jurisdiction has a fundamental feature that is transnational. According to Diane Orentlicher, the "law of more than one state, generally non-state actors" is also, in certain cases, national law at least. Transnational law includes parts of domestic and international law to understand the kinds of transnational crimes and therefore the dissolution of old dichotomies between the two.<sup>28</sup> The legitimacy of the application of extra-territorial jurisdiction must include principles relating to matters such as the territorial principle, the principle of citizenship, the principle of universality, the principle of protection, and the principle of effect.<sup>29</sup>

The following definitions were developed by the United Nations Office on Drugs and Crime (UNODC) for use by countries participating in the Voluntary Reporting System on Migrant Smuggling-Related Conduct (VRS-MSRC) in the implementation of the Ball Process, i.e.:

- a. Irregular migrant: "A person who, owing to unauthorized entry, breach of a condition of entry, or the expiry of their visa, lacks legal status in a transit or host country. The definition covers, among other things, those persons who have entered a transit or host country lawfully but have stayed longer than authorized or subsequently taken up unauthorized employment (also called clandestine or undocumented migrant or migrant in an irregular situation). The definition also covers those persons who migrate to enter or stay in the envisaged destination country irregularly."
- b. Irregular migration: 'Unauthorized movement occurring outside the country of origin, transit or destination standards and procedures. Without the requisite authority or

<sup>25</sup> Philip Reichel and Jay S. Albanese, *Handbook of Transnational Crime and Justice, Handbook of Transnational Crime and Justice*, Second Edi (United States: Sage Publications, 2014), <https://doi.org/10.4135/9781452281995>.

<sup>26</sup> Aldo Ingo Sitepu, "Application of Extraterritorial Jurisdiction in European Convention on Human Rights (Case Study: Al-Skeini and Others V. Uk)," *Indonesian Journal of International Law* 13, no. 3 (2016): 353, <https://doi.org/10.17304/ijil.vol13.3.655>.

<sup>27</sup> Danielle Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct and The Abuse of Rights Doctrine," *Utrecht Law Review* 9, no. 4 (2013): 68–89, <https://doi.org/10.18352/ulr.243>.

<sup>28</sup> Diane F Orentlicher, "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles," *Georgetown Law Journal* 92, no. 2 (2004): 1067.

<sup>29</sup> John De Pue, "Fundamental Principles Governing Extraterritorial Prosecutions–Jurisdiction and Venue," *United States Attorneys' Bulletin* 55, no. 2 (2007): 1–12.



documentation required by the immigration requirements, the country of destination is entered, stayed or work in the country of destination."<sup>30</sup>

Different terminology and concepts are used in the relevant literature on social sciences for those engaging in "illegal" migration. Therefore, the persons who enter a country without permission, exceed the stay limit of their visa, stay in a country without a proper residence permit, and/or violate immigration regulations in other ways that make them liable for expulsion with the designation: irregular/ illegal/ unauthorized/ illegitimate/ clandestine migrants, or also '*sans papiers*' (France), '*clandestine*' (Italy), '*clandestinos*' (Spain), '*lathrometanastes*' (Greece).<sup>31</sup>

**Tabel. 1.3 Definition of Irregular Migration<sup>32</sup>**

Five Categories of Irregular Migration	
1	Migrants entering the nation illegally often physically avoid or produce fraudulent documentation for formal immigration checkpoints.
2	Migrants who enter the nation lawfully for a term that has ended do not renew their permit to live and consequently remain over the legal limit.
3	Migrants are allowed to stay in a nation but violate some visa terms, for instance, by working more than their status as migrants permitted.
4	Asylum seekers who enter the nation lawfully to request refugee status remain but continue to exercise their rights despite the final ruling rejecting them.
5	Children born as irregular migrants in a nation

The phrase "irregular" migration and "irregular" migrants are used in this report. The adjective "irregular" is preferable to the term "illegal." The usage word "illegal" is reported since it implies crime because most irregular migrants are not criminals, stresses the UN Special Representative on the Rights of Non-Citizens, who recommended in his report that: "immigrants...even those who are in a country illegally and whose claims are deemed invalid by the authorities, should not be treated as criminals" (E/ CN. 4/Sub. 2/2003/23 Para 29). It can also be regarded as rejecting the humanity of those who are "illegal" if the immigrant is a man who has fundamental rights without regard to status. For immigrants who are "illegal" seekers and are themselves in an "irregular" State, their asylum claim will continue to be jeopardized.<sup>33</sup>

The illegal migration of people across international boundaries entails human trafficking. The smuggling of migrants is an illegal form of Immigration. Migrant smuggling occurs when fundamental conditions are fulfilled, namely that people who are engaged (or attracted) in international migration are contacted by or are contacted by one of the persons that regulate migrant movement for economic and other reasons which do not have a legal migration procedure.

<sup>30</sup> United Nations Office on Drugs and Crime (UNODC), *Migrant Smuggling in Asia*, vol. 2 (Bangkok: Regional Office for Southeast Asia and the Pacific, 2015).

<sup>31</sup> Anna Triandafyllidou and Thanos Maroukis, *Migrant Smuggling: Irregular Migration from Asia and Africa to Europe* London: Palgrave Macmillan, (2012).

<sup>32</sup> Marie McAuliffe and Khalid Koser, *A Long Way To Go Irregular Migration Patterns, Processes, Drivers and Decision-Making*, vol. 7 (Australia: ANU Press, 2017), <https://doi.org/10.7748/ns.30.22.26.s25>.

<sup>33</sup> Khalid Koser, "Irregular Migration, State Security and Human Security," *A Paper Prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, Geneva*, no. September (2005): 33.

Both push and pull considerations are the reasons for migration. These criteria are mostly linked to comparing migrant nations of origin and destination countries with various socio-economic circumstances. For example, drivers include lack of education or possibilities for employment, poverty, and loss of traditional livelihoods. For instance, pull factors include greater wages and better work possibilities in the country of destination or already organized migration methods. Pull factors also include the opportunity for migrants to merge ethnic groups and communities in the destination country. You can relocate if the push and pull factor is tempting enough. Migration is difficult, however, in most circumstances. National countries manage the admission and exit of persons to or from their territory carefully and control it. Although migration may be helpful and bad, the basic composition of governments and nations can be disrupted. If there are no legal ways of migration, an individual will be lured by unlawful means to move.<sup>34</sup>

## 2. The Obligation to Criminalize Migrant Worker Smugglers by Each Country

One of the main elements of state status is control over a territorial area, within which territory the state law applies. In this area, there is the highest authority in the country. So that the concept of territorial sovereignty appears, sovereignty owned by a country indicates that a country is independent or not subject to the power of other countries. But this cannot be interpreted that there is no limiting sovereignty. The limitation itself is law, both national law and international law.<sup>35</sup> The territorial authority of a country must stipulate legal provisions that regulate and supervise the traffic of people entering and leaving the country's territory based on the concept of sovereignty. Shaw stated that jurisdiction is always related to state sovereignty, equality, and non-interference. National Jurisdiction is a statement to determine the area where the high level of actions carried out by government agencies, free from interference/ influence and the principles of international law.<sup>36</sup> Observing the sovereignty described above, it can be said that a sovereign country is a country that can regulate and manage its own domestic and foreign interests.<sup>37</sup>

The movement of people from one country to another in a way that is not following the legal regulations made by a country is called illegal Immigration. This illegal Immigration has implications for the continued development of transnational crime or what is known as transnational crime,<sup>38</sup> which then develops into organized crime, such as migrant smuggling and human trafficking. The State of Indonesia, as a sovereign country seeks to regulate the order of the country, one of which needs to be regulated is regarding the flow of traffic of people and goods from other countries to their country by regulating Immigration.

Standard migration laws in national laws generally only regulate illegal entry or exit from a country. It is not enough to criminalize migrant smuggling because it sees a form of crime that does not only involve more than one country, so the state also needs to separately regulate smuggling offenses comprehensively migrants targeting smuggling activities that occur abroad because it could happen when smugglers arrange for migrants to leave the country of origin and transit country legally which then aims to enter illegally into the final destination country, so it can be seen that some efforts smuggling of migrants, many involving transit

<sup>34</sup> Natalia Ollus, "The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel," *United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI)*, no. 62 (2004): 198.

<sup>35</sup> I Wayan Parthiana, "Pengantar Hukum Internasional" Mandar Maju, (1990). p. 294.

<sup>36</sup> Markus P Beham, "Malcolm N. Shaw, International Law. Cambridge University Press, Cambridge et Al., 2014, ISBN 9781107612495, Lxxxv+ 981 Pp., \$74.99," *Austrian Review of International and European Law Online* 19, no. 1 (2017): 423.

<sup>37</sup> Ria Tri Vinata, "Prinsip-Prinsip Penentuan Laut Teritorial Republik Indonesia Berdasarkan Konvensi Hukum Laut 1982," *Perspektif* 15, no. 3 (2010): 207–25.

<sup>38</sup> Abdurrachman Mattalitti, "Kerjasama ASEAN Dalam Menanggulangi Kejahatan Lintas Negara," *Direktorat Jenderal Kerjasama ASEAN Departemen Luar Negeri Republik Indonesia, Jakarta*, 2001..

countries. This is why common migration laws are not sufficient to target organized migrant smuggling operations whose operations are growing, such as Law of Republic Indonesia Number 9 of 1992 concerning Immigration which has now been repealed and replaced with Law of Republic Indonesia Number 6 of 2011, which currently includes regulates the smuggling of migrants. Combating the crime of migrant smuggling needs to adopt an international convention, UNCATOC, and Migrant Smuggling Protocol in determining the legal basis for criminalizing acts of migrant smuggling, which then creates international obligations imposed on the state in terms of combating and suppressing the crime of migrant smuggling. Adhering to the legality principle that there is no crime without law (*nullum crimen sine lege*) implies that the law must clearly define the offense and its punishment, placing individuals in a position where they know or are reasonably capable of discovering which act or omission which would make them criminally liable.<sup>39</sup>

This principle has become a fundamental right affirmed by the Declaration of Human Rights (in the future referred to as UDHR) contained in Article 11 paragraph (2). Adhering to this principle, the law must precisely define social action as a crime and determine its punishment to avoid arbitrariness and enable citizens to regulate their behavior.

The rule of law principle requires states that suppress certain transnational crimes, such as the crime of migrant smuggling, must prohibit such actions as appropriate by providing clear warnings about these prohibitions. The obligation of cooperating states to commit the same offense fulfills the requirement of legality because it allows for a fair warning, especially in crimes against humanity, as a crime under customary international law or general principles of law.<sup>40</sup> Concerning criminalization, it is necessary to determine the sources of international law that impose obligations on states in criminalizing migrants smuggled by sea.

UNCATOC has 190 state parties<sup>41</sup> and the convention's purpose is stated in Article 1 of UNCATOC: "To promote international cooperation to prevent and combat transnational organized crime more effectively." Article 37 I of UNCATOC and Article 1 of the Migrant Smuggling Protocol explain the relationship between these legal instruments. The main objective of UNCATOC and its Protocols is to effectively combat transnational organized crime, including by strengthening international cooperation. Therefore, UNCATOC focuses on activities that benefit organized criminal groups. Nonetheless, crimes committed following UNCATOC and its Protocols are still punishable if committed without the involvement of an organized criminal group, such as an act orchestrated by a person without connection to a larger operation who may not constitute an organized criminal group, as defined in Article 34 paragraph (2) UNCATOC namely "... The offenses established following articles 5, 6, 8, and 23 of this convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group..." and the protocol complements the convention whose provisions must be interpreted together. All relevant terms, including the definition of violation as "transnational in nature," shall be defined following the convention, the applicable provisions, *mutatis mutandis*, of the protocol unless otherwise stated. There is no provision equivalent to Article 34 (2) UNCATOC found in the protocol, but because the provisions of the convention apply, *mutatis mutandis*, to the protocol unless otherwise stated, and because of the violation established following the convention then Article 34 (2) of the Convention applies *mutatis mutandis* to the protocol.

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<sup>39</sup> NeilBoster, *An Introduction to Transnational Criminal Law*, Second Edi United Kingdom: Oxford University Press, (2018). p. 45.

<sup>40</sup> Ibid

<sup>41</sup> "United Nations Office on Drugs and Crime, Status of Ratification United Nations Convention against Transnational Crime and Its Protocols," n.d.

Therefore, violations of national laws must be applicable in situations of migrant trafficking, even if transnationality or its involvement of organized criminals does not exist or can't be proven.<sup>42</sup>

Indirectly related to the above, the United Nations Charter, in Article 2 paragraph (4), confirms that: "all member countries in their international relations must refrain from threatening or using the political independence of the state or power over the territorial integrity of any country. Whereas territorial integrity demands equal external and exclusive internal sovereignty, territorial protection, sovereignty, and policy independence."<sup>43</sup>

The breadth of the scope of human rights as a fundamental human right clearly states that humans must obtain guarantees for human rights, apart from the status and identity attached to them. On the other hand, they are obliged to respect the human rights of other human beings.<sup>44</sup> Human rights can also be understood as a set of rights that are inherent in the essence of every human being who is a creature of God Almighty and is His gift that must be respected, upheld, and protected by the state, law, government, and everyone for the honor and protection of dignity and human dignity. John Locke saw that humans have fundamental rights solely because of their nature as humans. John Locke saw that the government must protect this fundamental right.<sup>45</sup> The fundamental rights of people, one of which is to migrate from the place of origin to the destination, are ethically defended and useful in completing the human right to emigrate. The harmony with the UN Human Rights principles has given everyone the freedom to leave their country, including returning to their country of origin.<sup>46</sup> This can serve as a stimulus to outline a more just, moral, and cultured migration policy and have implications for migrants and border control or surveillance. However, this condition is used to carry out human smuggling, which is included in the category of transnational crimes, synonymous with human smuggling and migrant workers. Human smuggling is generally understood as an attempt to gain financial or material benefits directly or indirectly. The victim who is to be smuggled consciously follows the smuggling process, including all the consequences.<sup>47</sup>

Smuggled migrants will be vulnerable to other violations due to the migrant smuggling process or its implications. In a report issued by the UNODC (United Nations Office on Drugs and Crime), smuggled migrants sometimes suffer abuse and severe psychological and/or physical trauma during smuggling trips. Loss of life due to drowning, suffocation, dehydration, and reports of death resulting from smugglers' violence. Thus, it can be said that these migrant smuggling activities have the potential to seriously endanger the lives and health of those who are smuggled so that these smuggled migrants have the potential to become victims of human trafficking or are vulnerable to other violations, which in principle are universally recognized by civilized countries that one of them is a transnational crime. Organized is included in the qualification of crime against humanity with the motive of smuggling migrants, which certainly involves extra-territorial jurisdiction. This has become a commitment to the principle of universality.<sup>48</sup>

<sup>42</sup> "Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, Part Three, Chap. I, Paragraph 20," n.d.

<sup>43</sup> D Florea, "Sovereign State The Classic Basic Subject of Public International Law," *Annalis of Economics and Public Administration University of Suceclava* 12, no. Th USV (2012): 1.

<sup>44</sup> Carla Ferstman, Mariana Goetz, and Alan Stephens, "Reparations for Victims of Genocide," *War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Koninklijke Brill NV, Leiden, 2009.

<sup>45</sup> Aulia Rosa Nasution, "Urgensi Pendidikan Kewarganegaraan Sebagai Pendidikan Karakter Bangsa Indonesia Melalui Demokrasi, HAM Dan Masyarakat Madani," *Jupii: Jurnal Pendidikan Ilmu-Ilmu Sosial* 8, no. 2 (2016).

<sup>46</sup> United Nation, "International Migration Report 2002", *Department of Economic Social Affairs*, Population Division, ST/ESA/SER.A/220, New York, 2002.

<sup>47</sup> International Organization of Migration (IOM), "Perbedaan Perdagangan Orang dan Penyelundupan Manusia", Pedoman Penegakkan Hukum dan Perlindungan Korban dalam Penanganan Tindak Pidana Perdagangan Orang, 2012, 12.

<sup>48</sup> Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct and The Abuse of Rights Doctrine."

Besides that, universal human rights are known, and local human rights in a country are also recognized as a form of non-interventional extra-territorial jurisdiction. The non-intervention concept forbids state interference in other countries' sovereign affairs. The notion was established according to Emmerich de Vattel in 1757 by Swiss experts as "Foreign States do not have the power to intervene in foreign governance." The independence of a sovereign state is a property of self-governance that cannot be interfered with by any other state unless that state grants it the right to interfere in its affairs.<sup>49</sup>

Smuggling activities do occur involving the consent of the migrants themselves, even though in the agreed definition of this crime, there is no mention of the word consent, which then provides the view that migrants in smuggling situations are not seen as victims of crimes or human rights violations, as well as trafficked persons. As a result, their assistance and protection needs are reduced. However, the State, as the primary party to the international human rights treaties and customary law, must ensure that migrants' rights are fulfilled, respected, and protected to prevent crimes and human rights violations of migrants who are victims of the smuggling of migrants or other crimes which influence smuggling activities. Respecting, protecting, and fulfilling migrants' human rights is the basis for recognizing and protecting persons smuggled and access to justice, including the right to recovery. State and non-state actors need replies and protections based on the rights applicable under certain protocols and human rights laws.

Criminalization on the foundation of migration could result in additional human rights abuses, including discrimination, arbitrary detention, separation of families, and incapacity to access essential health care, education, or other rights. This approach enhances migrants to work and live inside the shade of society and raises their vulnerability to state and private actors' exploitation and abuse.<sup>50</sup> Using smuggling services can create a huge path to security for the person in touch with such armed conflict. Suppose individuals look at efforts focused on preventing and fighting migration smuggling. In that case, this can violate human rights. Namely, everyone's right to leave any country and the right to seek asylum, including their own country.<sup>51</sup> Although irregular entrance is a violation of administrative but non-regular admission and residence of migrant's national borders and the legislation on Immigration, the fact that crossing borders or staying irregularly on land is not a crime against individuals, goods, or national security should not be considered to be criminal.<sup>52</sup> In addition, Article 5 of the Migrant Smuggling Protocol calls on governments not to punish migrants for using smuggling services. Migrants should not be regarded as criminals in bizarre circumstances or as a national or public security threats.<sup>53</sup>

Article 9 of the Universal Declaration of Human Rights (UDHR) and the ICCPR stipulate that freedom and personal security are rights that are owned by everyone so that arrests or detentions aimed at someone cannot be carried out arbitrarily or arbitrarily. In Article 9(1) of the ICCPR, which requires any action that imposes limits of that right "must be justified as reasonable, necessary and proportionate in light of the circumstances," the Human Rights Committee has interpreted the right to freedom and prohibition of arbitrary arrest/detention; Accordingly, the legal base for any detention in the national legislation should identify the acceptable reasons of detention and custody, in bizarre circumstances, of asylum seekers,

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<sup>49</sup> David J Gerber, "Beyond Balancing: International Law Restraints on the Reach of National Laws," *Yale Journal of International Law* 10, no. 1957 (1984): 210.

<sup>50</sup> "The Office of the High Commissioner for Human Rights (OHCHR), *The Criminalization of Irregular Migration*," n.d.

<sup>51</sup> Global Alliance Against Traffic in Women (GAATW), "Facilitating Migration and Fulfilling Rights – To Reduce Smuggling of Migrants and Prevent Trafficking in Persons" (Vienna, 2017).

<sup>52</sup> "Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau," vol. A/HRC/20/2, 2012.

<sup>53</sup> A/HRC/10/21, "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right To Development," *Episodes*, vol. A/HRC/10/2, December .

migrants, and refugees, as last-resort measure and review their application in each case. Thus, asylum seekers might be held for a short time to document admission, register their claims and identify others or risk crimes against national security.<sup>54</sup> The restriction on arbitrary detention is a standard that cannot be eliminated from international customary laws. In addition, it is not a viable rationale to use immigration detention to criminalize irregular movement, often resulting in arbitrary detention. The arrest of children in respect of Immigration shall not be allowed and the procedure for ensuring that national laws do not allow the arrest of children in cases in which adult migrants are detained should also be provided to ensure the effects on their mental health of the arrest procedure of each state party. Any necessary detention must be carried out in appropriate facilities, sanitary, non-punitive, and must not occur in prisons.<sup>55</sup>

In its capacity for organizing, prosecuting, and punishing those who organize, perform or engage in this crime, the International Criminal Court (ICS), as an organization of international institutions of justice, offers the opportunity and duties of imposing sanctions upon the jurisdiction of drug trafficking crimes, migrants' smuggling and trafficking in persons and the like. The ICC provides efficiency in international law enforcement and accommodates other forms of prosecution than those established at the national level.<sup>56</sup>

### C. Conclusion

Migrant smuggling is a human security and national security issue that affects citizens, society & the state. Migrant smuggling networks exist within and outside the region, but there has been no strong and agile law enforcement response to counterbalance them. Although International Law has regulated various legal bases concerning transnational organized crime, both universal rules through UN conventions where UN members participate in ratifying these conventions. The national laws of each country also regulate organized transnational crimes, but they must not interfere in the affairs of other countries. Each country implements and adheres to the sovereignty of their respective jurisdictions, but each country can also apply its extra-territorial jurisdiction with restrictions regarding violations of territorial jurisdiction outside the country's borders for certain actions that are recognized according to the basic agreement of the state.

### D. Suggestion

As a suggestion, the UNCATOC should regulate the smuggling of migrant workers and their settlement if a case occurs bilaterally or across countries. Besides that, it is also necessary to regulate the protection of human rights and international relations with migrant workers. Furthermore, the UNCATOC should also include arrangements for all types of criminal acts classified as transnational crimes. The next suggestion is that in fulfilling the legal obligations of each country which is the Object of Smuggling of Migrant Workers Against Smugglers Based on an International Legal Perspective, an International Institution should be established whose task is to oversee the implementation of capacity building for joint work along smuggling routes so that this joint work can be carried out consistently.

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<sup>54</sup> CCPR/C/GC/35, "International Covenant on Civil and Political Rights, General Comment No.35 Paragraf 18," *Human Rights Monitoring*, 2014.

<sup>55</sup> Hisana Amani Husellin, "Peran Peran United Nations International Children's Emergency Fund (UNICEF) Dalam Melindungi Anak-Anak Korban Perang Dalam Prespektif Hukum Internasional" (Universitas Islam Riau, 2019).

<sup>56</sup> Andreas Schloenhardt, "Transnational Organized Crime and The International Criminal Court Developments and Debates," *University of Queensland Law Journal* 24, no. 1 (2005): 4.



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