

Migrant Smuggling as a Transnational Crime within an International Law Perspective

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<p>Keywords: <i>Human Rights International Law, Migrant Worker Smugglin, Transnational Organized Crime.</i></p> <p>DOI: 10.25041/lajil.v5i1.2917</p>	<p><i>The smuggling of migrant workers is recognized as a form of transnational organized crime that negatively impacts countries of origin, transit, and destination, particularly within Southeast Asia. Economic disparities drive workers from less affluent nations to seek employment in more economically developed countries, a process facilitated by inadequate regulations, border controls, and law enforcement mechanisms. This research delves into the international legal frameworks addressing the smuggling of migrant workers as an organized transnational crime, focusing on the legal responsibilities that countries implicated in such activities bear from an international legal standpoint. Adopting a case study and normative legal research methodology, this investigation utilizes primary, secondary, and tertiary legal materials to analyze and address the legal challenges posed by migrant worker smuggling. The research highlights the United Nations Convention Against Transnational Organized Crime (UNCATOC) as a key international legal instrument ratified by UN member states to combat this issue. One significant outcome of the research is emphasizing enhancing cooperation and capacity building along smuggling routes. This approach aims to refine data collection and analysis processes, offering a clearer understanding of the local, regional, and global smuggling dynamics. Through such cooperative efforts, the international community seeks to more effectively tackle the complex challenges posed by the smuggling of migrant workers.</i></p>

A. Introduction

The Southeast Asia mainland is densely populated, with around 668.61 million people by January 31, 2023, as reported by Worldometers.¹ Southeast Asia is now developing as a stopover and a hub for cross-border activities. Many people travel from their country of origin

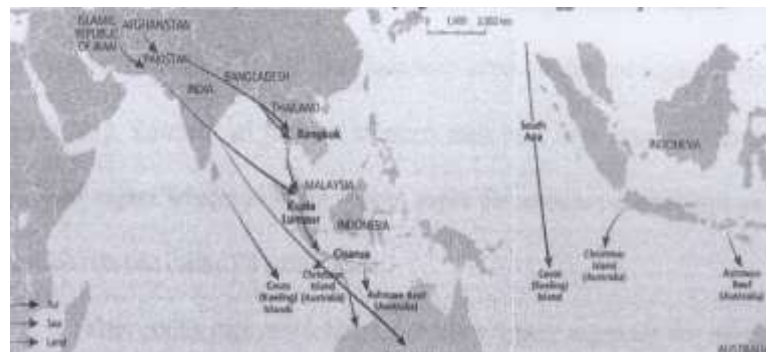
¹"South-Eastern Asia Population," Worldometer, 2023, <https://www.worldometers.info/world-population/south-eastern-asia-population/>. <https://www.worldometers.info/world-population/south-eastern-asia-population/> accessed on 29 March 2023.

and pass through transit countries before ultimately reaching the destination country. This situation allows migrants to enter a country illegally, which increases the transnational crime rate.

The number of illegal migrants or also referred to as irregular migrants in Southeast Asia is rising² for some reasons related to economic problems, conflicts in the country of origin, recreation or vacation, study, worship activities, marriage, natural disasters, etc. Irregular migrants receive help from smugglers' networks that facilitate their movement. Smugglers are paid to set the time, ship, and facilities for illegal immigrants. In some countries, poor border control is also a factor that contributes to this issue. People smuggling network involves intermediaries, illegal immigration senders, or expedition planners who are experienced in hacking the complex immigration process.³ People smuggling from Southeast Asia facilitates migrants leaving Vietnam for Europe to North America, especially Myanmar migrants who depart for southwestern South Asia.

Indonesia is located strategically, making it an ideal transit for migrants smuggled by sea to Australia. Wars, conflicts, and genocide that occur in some countries, such as Iraq, Iran, Afghanistan, Sri Lanka, Pakistan, and Myanmar, force their citizens to seek protection in other countries, including Indonesia. They usually come to transit in Indonesia before sailing to Australia as the last destination.⁴ Indonesia has approximately 3000 islands, and geographical conditions allow irregular migrants to pass through Indonesia undetected.⁵

Figure 1. Routes for People Smuggling across South Asia to Australia⁶



Source: Global Study on Smuggling Migrants 2018

Irregular migrants and refugees have used migrant smuggling routes presented in the figure above to come to Australia since the early 2000s.⁷

Migrant smuggling is a transnational crime that involves more than one country.⁸ Irregular migration issues remain unresolved. The smuggling of migrants from the Southeast Asian region 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. The implementation of the ASEAN Economic Community and economic and trade

²There 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)

³ 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

⁴ Eva Johan, "Kebijakan Indonesia Terhadap Imigran Ilegal Dan Hubungannya Dengan Kedaulatan Negara," *Yuridika* 28, no. 1 (2013):, pp. 1–12.

⁵ 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):, pp. 69–93.

⁶ 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>.

⁷ *Ibid.*

⁸ 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): pp. 97–108.

liberalization initiatives since 2015 has coincided with an increase in human trafficking in Southeast Asia. Southeast Asia attracts migrants from various countries as its annual economic growth rate exceeds 5 %.

Political issues also encourage irregular migration and migrant smuggling. Migrant smuggling to and from Southeast Asia is also associated with the costs and inefficiency of the Immigration work system. Illegal Immigration is still considered faster, cheaper, and more efficient. For instance, migrants from Cambodia have been charged a far lower cost of US\$34 to US\$138 by smugglers to come to Thailand compared to the legal immigration cost, which reaches US\$700. Political factors, insecurity, and loss of citizenship increase the rate of people smuggling. In Southeast Asia, many refugees, particularly from Bangladesh and Myanmar, have sought asylum in countries within the region, notably Malaysia, Thailand, and Indonesia, often making perilous journeys by sea. Among these refugees, the ethnic Rohingya, a Muslim minority subjected to widespread oppression in Myanmar, are predominant. Tragically, their voyages are fraught with dangers, including shipwrecks and starvation, leading to numerous fatalities.

Moreover, reports of torture and beatings aboard these vessels are not uncommon. The Rohingya refugees heading to Malaysia and Thailand face numerous threats, with the grim discovery of mass graves totaling around 200 human remains marking the border areas as sites of profound human suffering.⁹ Rohingya people have tried to escape their country due to conflict and human rights abuses in Myanmar since 2015. Many have come to Thailand, Malaysia, Indonesia, and Bangladesh by boat or on foot. From August 2017 to March 2018, almost 640,000 unauthorized Rohingya migrants have crossed the border into Bangladesh.

People smuggling is an organized transnational crime. Migrant smuggling in Indonesia is a challenging issue to resolve as it involves many countries as the countries of origin, transit countries, and destination countries. Smugglers are aware of the loophole that allows them to manipulate and take advantage of desperate immigrants who wish to live a better life but are unable to go with the legal migration procedure.¹⁰ This scenario underscores how the crime of smuggling migrant workers remains a challenge even for powerful nations, despite international legal frameworks such as the United Nations Convention Against Transnational Organized Crime (UNCATOC) and its accompanying Protocol, the Protocol Against the Smuggling of Migrants by Land, Sea, and Air (referred to as the Migrant Smuggling Protocol). These instruments represent a global commitment to combating organized transnational crime through bilateral, regional, or international cooperation. They aim not only to prevent the smuggling of migrants across land, sea, and air but also to fulfill the broader mandate of the United Nations in addressing organized transnational crime, offering a framework for protection and intervention against these illicit activities.¹¹ 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."¹² Chapter 23, Article 2(c) of UNCATOC specifies

⁹ 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

¹⁰ 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

¹¹ 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

¹² 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): pp. 39–60, <https://doi.org/10.1017/S2044251315000193>.

that structured groups are not required to have formally assigned roles for their members, continuity of membership, or developed structures. Organized crimes need to be regarded as serious crimes that threaten the political sovereignty of a country. People smuggling cases also undermine the authority and legitimacy of government in a country.

International legal frameworks concerning the smuggling of immigrants mandate that states criminalize the act of immigrant smuggling, with a primary focus on targeting the perpetrators of these crimes. However, in prosecuting transnational organized crime perpetrators, the rights attached to the perpetrators must be respected. One approach involves ensuring that the human rights of the perpetrators of these crimes are not violated by recognizing the "inalienable" nature of human rights despite the illegal nature of their actions.

It is important to review the provisions of international law regarding migrant smuggling as a transnational organized crime. In addition, the legal obligations of each country affected by the smuggling must be discussed based on an international legal perspective. This research offers significant insights that will help understand the smuggling of migrants as a transnational organized crime based on international law and human rights principles that have not been regulated in the UNCATOC. If this situation arises, efforts can be made bilaterally between countries through related institutions outside the scope of UNCATOC, involving foreign agencies such as the Ministry of Foreign Affairs, Ministry of Manpower, and other relevant ministries.

As I Made Pasek Diantha explains, this normative legal research is the rule of law in which the object of research is the legal norm itself.¹³ Statutory regulation and case approaches were also employed in this research in analyzing various applicable norms regarding Immigration, smuggling, international conventions, and human rights from primary sources of legal materials: UNCATOC and Migrant Smuggling Protocols. This research also regarded secondary data in the forms of relevant studies, law books, scientific journals, news, and newspapers. Tertiary materials, including legal dictionaries and encyclopedias, were also used.

The novelty of this research lies in its analysis of transnational migrant smuggling as a grave crime that inflicts harm upon the migrant's country of origin, transit countries, and destination countries. This perspective frames the act of state smuggling as a transnational crime that contradicts the values and principles of universal human rights, offering a unique lens through which to examine the impacts and implications of such activities on a global scale. 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 based on the Migrant Smuggling Protocol and UNCATOC. With strong collaboration, every nation will be able to address migrant smuggling issues and catch the perpetrators of this organized transnational crime.

B. Discussion

1. Migrant Worker Smuggling as a Transnational Organized Crime

Organized crime is exclusively conducted by experienced perpetrators who communicate using secret codes. Jay S. Albanese states, "Organized crime is a rationally-created crime to achieve profit through secret operations, violence, bribes, threats and/or monopolies."¹⁴

Organized crime differs from other forms of crime in four aspects: (1) it is a long-term endeavor, (2) it is rationally planned, (3) it requires force, threats, monopoly, or corruption to escape punishment, and (4) it serves the demand for illegal goods and services. Due to major social, political, economic, and technological changes in the last twenty-five years, organized

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

¹⁴ Jay S. Albanese, *Kejahatan Terorganisasi (Organized Crime) Akar Dan Perkembangannya*, Edisi Keen Jakarta: Prenada Media Group, (2016). p. 424.

crime has become more complex and dangerous as the network grows broader, involving many countries in performing criminal conspiracy.¹⁵

Table 1. The Typology of Organized Crime¹⁶

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.

Organized crime are activities carried out illegally, such as supplying illegal goods and/or services and infiltrating legal businesses. Illegal services cater to demands that cannot be fulfilled within the constraints of a law-abiding society, including desires for gambling and unrestricted sexual services. The supply of illegal goods is considered an organized crime because these activities offer products supplied through illegal channels. Infiltration of legitimate businesses or governments falls into the third category of organized crime because it involves acts of extortion of workers who usually use threats or violence to get money to guarantee work or the safety of workers. Employers or workers are often threatened with work termination, violence, strikes, and destruction if they do not pay some money.¹⁷

Organized crime is categorized into five 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.¹⁸

Table. 1.2 The Characteristics of Organized Crime¹⁹

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.

¹⁵ Mangai Natarajan, *Kejahatan Dan Pengadilan Internasional* Bandung: Nusa Media, (2015). P. 23.

¹⁶ Jay S. Albanese, *Op. Cit.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Providing illegal services, as an act that violates the law, is comparable to the provision of illegal goods. This violation includes providing illegal products as demanded by certain markets for illicit services.²⁰ 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 include migrants, asylum seekers, etc. 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 they might be victims of other crimes during their journey, such as human trafficking, sexual assault, and rape. Article 6(1)(b) of the Migrant Smuggling Protocol specifically categorizes the creation, acquisition, supply, or possession of fraudulent travel or identification documents used to facilitate migrant smuggling as actions aimed at assisting unauthorized individuals to reside within a country's territory illegally. When performed deliberately for financial or other material benefit, these actions fall under the provisions of Article 6(1)(c). Furthermore, Article 6(2) addresses the involvement in organizing, directing, aiding, abetting, or attempting to commit any of the offenses mentioned earlier, underlining the legal framework required for criminalizing migrant smuggling activities following the UN Convention Against Transnational Organized Crime (UNCATOC) and the Migrant Smuggling Protocol.

The Migrant Smuggling Protocol also obliges the nations to adopt other laws and other legal actions into their legal systems since migrant smuggling can endanger the lives or safety of migrants, as well as cause inhumane or degrading treatment such as human exploitation as regulated in Article 6(3) of the Migrant Smuggling Protocol.

The term 'transnational' was first popularized by a well-known international law expert named Philip C. Jessup. According to Jessup, transnational law is a norm that contains rules regarding all legal actions and events. Jessup's definition of transnational law was used in the Decision of the VIII UN Congress in 1990 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, in which transnational crime is defined as a crime that (1) involves more than two countries; (2) criminal actors or victims are foreigners; (3) exceeds the territorial boundaries of a country.²¹

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. Bossard (1990) characterizes transnational or transboundary crimes as infractions that intermittently breach the legal statutes of multiple nations. Pass N provides rather an abstract definition of 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."²²

The United Nations (UN) introduced transnational crime in 1990 as a crime of crossing national borders.²³ Transnational is a series of actions involving an organized criminal group

²⁰ *Ibid.*

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

²² Nikos Passas, *Cross-Border Crime and the Interface between Legal and Illegal Actors*, *Security Journal*, vol. 16, 2003, pp. 19-37. <https://doi.org/10.1057/palgrave.sj.8340123>.

²³ Wangiman, *Loc.*, *Cit.*

that begins with preparation, planning, direction, and supervision in several other countries and has fairly serious impacts. An organized criminal group consists of three or more people with a structured group structure who commit serious crimes and crimes as referred to in the convention for money.²⁴

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, Madsen (2019) provides an alternative definition of transnational as "that in one of several ways involving two or more sovereign jurisdictions." Its criminal inclinations are centered on violent or significantly violent offenses, including drug trafficking and human trafficking. Additionally, transnational crimes encompass issues like international child custody disputes. While these crimes can be both organized and transnational, they might not necessarily breach international law, an example being the smuggling of untaxed tobacco products across borders.²⁵

The extraterritorial 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 that creates a country's border in terms of geographical area and economic and military boundaries. Frederick Mann said, "Normally, no country may apply laws to foreigners according to conduct committed out by foreigners outside the dominion of the relevant sovereign state. It is a tenet of international law, according to which a sovereign state must respect the subjects and rights of all sovereign powers outside its area."²⁶ In the 19th century, every nation followed some European countries to take jurisdiction over non-citizens' negative behaviors.²⁷

Extraterritorial jurisdiction fundamentally embodies a transnational characteristic. As Diane Orentlicher explains, it involves the "law of more than one state, generally concerning non-state actors" and, in certain instances, constitutes national law. Transnational law integrates domestic and international law elements to facilitate an understanding of various transnational crimes, thereby dissolving the traditional dichotomies between the two.²⁸ The legitimacy of applying extraterritorial jurisdiction hinges on adherence to key principles, including the territorial principle, the principle of nationality, the principle of universality, the principle of protection, and the principle of effect.²⁹

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

²⁴ *Ibid.*

²⁵ 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>.

²⁶ 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): p. 353, <https://doi.org/10.17304/ijil.vol13.3.655>.

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

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

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

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 documentation required by the immigration requirements, the country of destination is entered, stayed or work in the country of destination.'³⁰

Different terminology and concepts are used in the 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 are labeled as irregular/ illegal/ unauthorized/ illegitimate/ clandestine migrants, or also '*sans papiers*' (France), '*clandestine*' (Italy), '*clandestinos*' (Spain), '*lathrometanastes*' (Greece).³¹

Table. 1.3 Definition of Irregular Migration³²

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 phrases "illegal" migration and "irregular" migrants are used in this report. The adjective "irregular" is preferable to "illegal" because it implies crime, while most irregular migrants are not criminals. UN Special Representative on the Rights of Non-Citizens stated 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 undocumented job seekers and find themselves in an "irregular" situation within a state risk their rights to claim asylum.

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

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

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

³² 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>.

international migration are contacted by or are contacted by one of the persons that regulate migrant movement for economic and other reasons that do not have a legal migration procedure.

A combination of push drives migration and pull factors, largely influenced by the socio-economic disparities between migrants' countries of origin and destination countries. For example, drivers include lack of education or possibilities for employment, poverty, and loss of traditional livelihoods. 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. Migration is often challenging due to stringent regulations. Nations meticulously manage the admission and departure of individuals to and from their territories, exerting careful control over these processes. Without a legal migration procedure, an individual will be lured by unlawful means to move.³³

2. The Obligation to Criminalize Migrant Worker Smugglers of Each Country

One of the main elements of state status is control over a territorial area, within which territory the state law applies. The concept of territorial sovereignty by a country indicates that a country is independent or not subject to the power of other countries. The limitations toward sovereignty are national law and international law.³⁴ 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 that determines where government agencies, free from interference/ influence and the principles of international law, carry out certain actions.³⁵ A sovereign country is a country that can regulate and manage its own domestic and foreign interests.³⁶

The movement of people from one country to another without following the legal regulations is called illegal Immigration. Illegal Immigration has implications for the higher rate of transnational crime.³⁷ Transnational crime then develops into organized crime, such as migrant smuggling and human trafficking. As a sovereign nation, Indonesia aims to maintain its order and security, one aspect of which involves regulating the movement of people and goods from other countries into its own. This is achieved through the implementation and enforcement of immigration laws. Standard migration laws in national laws only regulate illegal entry or exit from a country. Existing laws have proven insufficient in effectively criminalizing migrant smuggling, as this form of crime often involves multiple countries, necessitating that states regulate smuggling offenses more comprehensively. Migrant smuggling activities frequently include legal departure from the country of origin and transit through another country before illegal entry into the destination country, highlighting the involvement of transit countries in many smuggling operations. This complexity demonstrates why general migration laws fail to address the intricacies of organized migrant smuggling networks, whose operations are increasingly sophisticated.

For instance, the Law of the Republic of Indonesia Number 9 of 1992 on Immigration, which has been repealed and replaced by Law Number 6 of 2011, now addresses migrant

³³ 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): p. 198.

³⁴ I Wayan Parthiana, "Pengantar Hukum Internasional" Mandar Maju, (1990). p. 294.

³⁵ 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): p. 423.

³⁶ Ria Tri Vinata, "Prinsip-Prinsip Penentuan Laut Teritorial Republik Indonesia Berdasarkan Konvensi Hukum Laut 1982," *Perspektif* 15, no. 3 (2010): p. 207–25.

³⁷ Abdurrachman Mattalitti, "Kerjasama ASEAN Dalam Menanggulangi Kejahatan Lintas Negara," *Direktorat Jenderal Kerjasama ASEAN Departmen Luar Negeri Republik Indonesia, Jakarta*, 2001..

smuggling. However, to effectively combat migrant smuggling, it is essential to adopt and implement international conventions like the UN Convention Against Transnational Organized Crime (UNCATOC) and its supplementing Migrant Smuggling Protocol. These international frameworks provide a legal basis for criminalizing acts of migrant smuggling and impose international obligations on states to fight against this crime.

The principle of legality, encapsulated in the maxim "*nullum crimen sine lege*" (no crime without law), underscores the necessity for laws to define the offense and its corresponding penalties precisely. This clarity ensures that individuals are aware or can reasonably determine which actions or omissions could render them criminally liable.³⁸

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, to 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.³⁹ It is necessary to determine the international law that imposes obligations on states to criminalize migrants smuggled by sea.

UNCATOC has 190 state parties⁴⁰ 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. 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 cannot be proven.⁴¹

³⁸ NeilBoster, *An Introduction to Transnational Criminal Law*, Second Edi United Kingdom: Oxford University Press, (2018). p. 45.

³⁹ *Ibid.*

⁴⁰ "United Nations Office on Drugs and Crime, Status of Ratification United Nations Convention against Transnational Crime and Its Protocols," n.d.

⁴¹ "Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, Pan Three, Chap. I, Paragraph 20," n.d.

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."⁴²

Humans must obtain guarantees for their 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.⁴³ 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 viewed humans as having fundamental rights solely because of their nature. John Locke saw that the government must protect this fundamental right.⁴⁴ The fundamental rights include the freedom to migrate from the place of origin to the destination. This has given everyone the freedom to leave their country, including returning to their country of origin.⁴⁵ 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 creates a loophole for human smuggling. Human smuggling is generally understood as an attempt to gain financial or material benefits directly or indirectly. People who smuggle consciously follow the smuggling process and know all the consequences.⁴⁶

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 from abuses and severe psychological and/or physical trauma. Migrant smuggling activities are fraught with grave risks, including loss of life through drowning, suffocation, dehydration, and fatalities resulting from smugglers' violence. Such dangerous conditions indicate that individuals who are smuggled not only endanger their lives and health but also become susceptible to becoming victims of human trafficking or subject to various other violations. Principally, these activities are recognized by the international community as constituting a form of transnational crime. When organized, they may be classified under crimes against humanity, especially when motivated by the smuggling of migrants. This categorization underscores the necessity for extraterritorial jurisdiction.⁴⁷

In addition to universally acknowledged human rights, local human rights within a country are also recognized under non-interventional extraterritorial jurisdiction. This concept of non-intervention prohibits states from interfering in the sovereign affairs of other nations. This principle was articulated by the Swiss jurist Emmerich de Vattel in 1757, who stated, "Foreign States do not have the power to intervene in the governance of another." The sovereignty of a state embodies its right to self-governance, free from external interference by any other state,

⁴² D Florea, "Sovereign State The Classic Basic Subject of Public International Law," *Annalis of Economics and Public Administration University of Sueclava* 12, no. Th USV (2012): p. 1.

⁴³ 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.

⁴⁴ 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).

⁴⁵ United Nation, "International Migration Report 2002", *Department of Economic Social Affairs*, Population Division, ST/ESA/SER.A/220, New York, 2002.

⁴⁶ 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.

⁴⁷ Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct and The Abuse of Rights Doctrine."

unless explicitly authorized by the sovereign state itself to allow such interference in its affairs.⁴⁸

Smuggling operations typically involve the consent of the migrants, a factor that distinguishes this activity from trafficking. Despite this consent, the universally agreed definition of smuggling does not explicitly mention the term, leading to a perspective where migrants involved in smuggling scenarios are not readily acknowledged as victims of crimes or human rights violations, in contrast to trafficked individuals. 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 are the basis for recognizing and protecting the people being 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.

Criminalizing migration can lead to further human rights violations, such as discrimination, random arrests, family separation, and the inability to access crucial services like healthcare and education. This situation forces migrants to exist in the shadows, making them more susceptible to exploitation and abuse by both government and private entities. Engaging smugglers to escape conflict increases a person's vulnerability.⁴⁹ Efforts to combat migration smuggling, if not carefully managed, can infringe upon human rights, specifically the right to leave any country, including one's own, and the right to seek asylum. While irregular entry and residence may breach immigration laws, it is important to remember that such acts are not crimes against individuals, property, or national security.⁵⁰ The Migrant Smuggling Protocol's Article 5 urges states not to penalize migrants for turning to smugglers.⁵¹ Migrants, under extraordinary conditions, should not be treated as criminals or seen as threats to national or public security.⁵²

Article 9 of the Universal Declaration of Human Rights (UDHR) and the ICCPR stipulate that freedom and personal security are rights that everyone owns; thereby, arrests or detentions aimed at someone cannot be carried out 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, migrants, and refugees, as last-resort measure and review their application in each case.

Thus, asylum seekers might be held briefly to document admission, register their claims, and identify others or risk crimes against national security.⁵³ The restriction on arbitrary detention is a standard procedure. 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, they should also be assisted with their mental

⁴⁸ David J Gerber, "Beyond Balancing: International Law Restraints on the Reach of National Laws," *Yale Journal of International Law* 10, no. 1957 (1984): p. 210.

⁴⁹ "The Office of the High Commissioner for Human Rights (OHCHR), The Criminalization of Irregular Migration," n.d.

⁵⁰ Global Alliance Against Traffic in Women (GAATW), "Facilitating Migration and Fulfilling Rights – To Reduce Smuggling of Migrants and Prevent Trafficking in Persons" (Vienna, 2017).

⁵¹ "Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau," vol. A/HRC/20/2, 2012.

⁵² 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 .

⁵³ CCPR/C/GC/35, "International Covenant on Civil and Political Rights, General Comment No.35 Paragraf 18," *Human Rights Monitoring*, 2014.

health. Any necessary detention must be carried out properly with proper facilities, be sanitary, and be non-punitive, and must not occur in prisons.⁵⁴

The International Criminal Court (ICC) plays a crucial role in coordinating, prosecuting, and penalizing individuals involved in organizing, executing, or participating in crimes such as drug trafficking, migrant smuggling, and human trafficking. As a key institution in the international justice system, the ICC has the authority and responsibility to impose sanctions on those guilty of these offenses. It enhances the effectiveness of international law enforcement and offers alternative prosecutorial methods beyond those available within national legal frameworks.⁵⁵

C. Conclusion

Migrant smuggling is a human security and national security issue that affects citizens, society & the state. Migrant smuggling networks operate both within and beyond regional boundaries, yet there has been a lack of a robust and swift law enforcement response to counter them effectively. International Law has established a variety of legal frameworks concerning transnational organized crime, including universal principles through UN conventions, which are ratified by UN member states. The national laws of each country also tap into these 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 extraterritorial jurisdiction with restrictions regarding violations of territorial jurisdiction outside the country's borders for certain actions recognized according to the basic agreement of the state.

D. Suggestion

UNCATOC is recommended to regulate the smuggling of migrant workers and their settlement if the case involves two or more than two countries. It is also considered 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. To meet the legal obligations of countries affected by the smuggling of migrant workers, there should be the establishment of an international institution tasked with overseeing capacity building for collaborative efforts along smuggling routes. This would ensure such cooperation is executed consistently from an international legal perspective.

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⁵⁴ Hisana Amani Husellin, “Peran Peran United Nations International Children’s Emergency Fund (UNICEF) Dalam Melindungi Anak-Anak Korban Perang Dalam Perspektif Hukum Internasional” (Universitas Islam Riau, 2019).

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