

CRIMINALIZATION OF THE SMUGGLING OF MIGRANTS IN ACCORDANCE WITH THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR

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Abstract

Smuggling of Migrants is categorized into Transnational Organized Crime due to its nature that involves more than one actor and crossing state borders. To overcome this problem, United Nations creates United Nations Convention against Transnational Organized Crimes followed by the Protocol against the Smuggling of Migrants by Land, Sea, and Air. This essay discusses about the development of the migrants smuggling as a form of transnational organized crime, the implementation of the provision of the UN Convention against Transnational Organized Crime and Protocol against the Smuggling of Migrants by Land, Sea, and Air in Indonesia, UK, and Australia and the enforcement of these provision to several illegal migrants cases.

Penyelundupan migran dikategorikan sebagai salah satu tindak pidana transnasional yang terorganisir terkait dengan sifatnya yang meliputi lebih dari satu pelaku dan melintasi batas negara. Untuk menanggulangi permasalahan ini, Perserikatan Bangsa-Bangsa mengeluarkan United Nations Convention against Transnational Organized Crimes (Konvensi Menentang Tindak Pidana Transnasional yang Terorganisir) yang diikuti dengan pembentukan the Protocol against the Smuggling of Migrants by Land, Sea, and Air (Protokol Menanggulangi Penyelundupan Migran melalui Darat, Laut, dan Udara). Tulisan ini membahas mengenai perkembangan penyelundupan migran sebagai bentuk dari tindak pidana transnasional yang terorganisir, penerapan ketentuan Konvensi Perserikatan Bangsa-Bangsa menentang Tindak Pidana Transnasional yang Terorganisir dan Protokol Menanggulangi Penyelundupan Migran Melalui Darat, Laut, dan Udara di Indonesia, Inggris, dan Australia serta penegakan beberapa ketentuan hukum di dalam konvensi tersebut terhadap beberapa kasus migran ilegal.

Keywords: *Transnational Organized Crime, Smuggling of Migrants*

I. INTRODUCTION

Smuggling of Migrants is categorized as transnational crime due to its nature that involves more than one actor, however develops into organization that moves fast crossing state borders.² Transnational Or-

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² Romli Artasasmita, *Dampak Ratifikasi Konvensi Transnational Organized Crime*

ganized Crime and smuggling of migrants then become threat to the economy, security, and territorial integrity of sovereign states.³ Realizing such threat, states through the United Nations then creates the United Nations Convention against Transnational Organized Crimes followed by the Protocol against the Smuggling of Migrants by Land, Sea, and Air as international law instruments to cater the issue of Transnational Organized Crime and smuggling of migrants. One of the important obligations in the convention and the protocol is the obligation to criminalize smuggling of migrants as a repressive effort to eradicate smuggling of migrants. Indonesia, United Kingdom (UK), and Australia are parties to both instruments amongst more than a hundred state parties of the convention and the protocol.⁴

Through this paper the writer will try to answer three main issues to explain about the criminalization of the smuggling of migrants. Those questions are:

1. How is the development the smuggling of migrants as a form of transnational organized crime?
2. How do Indonesia, UK, and Australia implement the provision of criminalization of the smuggling of migrants under the UN Convention against Transnational Organized Crime and Protocol against the Smuggling of Migrants by Land, Sea, and Air?
3. How do Indonesia, UK, and Australia implement such provision in the smuggling of migrants cases?

(TOC), Badan Pembinaan Hukum Nasional Departemen Kehakiman dan Hak Asasi Manusia Republik Indonesia, 2004.

³ Raimo Väyrynen, "Illegal Immigration, Human Trafficking and Organized Crime," in *Discussion Paper No. 2003/ 72* presented in *United Nations University (UNU)/ World Institute for Development Economics Research (WIDER) Development Conference on Poverty, International Migration, and Asylum*, September 2002 in Helsinki, Finlandia.

⁴ [...], "Status of Ratification of the UN Convention against Transnational Organized Crime" available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en, accessed on 18 March 2013.

II. THE GROWTH OF THE SMUGGLING OF MIGRANTS AS A FORM OF TRANSNATIONAL ORGANIZED CRIME

A. GENERAL DEVELOPMENT OF SMUGGLING OF MIGRANTS

After the end of cold war, military threat towards states has shifted to transnational issues, including smuggling of migrants as one of the form of illegal migration.⁵ Along with the dense of globalization moves, smuggling of migrants happens more often.⁶ One of the globalization manifestations is the flow of goods, services, capital, and idea across the state border.⁷ This issue then affects demand on cheap human resources to produce low price goods and services. The demand over human resources then opens the chance to migrants smuggling, where those migrants mostly are underpaid.⁸ Smuggling of migrants which at first considered being a business then it shifted to a form of crime.⁹

Varied of efforts has been done to eradicate smuggling of migrants by states and Non-governmental Organizations (NGOs). One of them was mapping quantitative data towards migrants smuggling cases happening in national, regional, and global scope. However, numbers that are founded is actually only (guesstimates), because the actual amount of is actually bigger than that.¹⁰ This caused by the nature of smuggling of migrants as illegal phenomenon.¹¹

Another effort is tightening immigration regulation. However, such effort turns out worsening the situation. Smuggling of migrants method

⁵ Adirini Pujiati, "Penyelundupan Manusia dan Ancaman Keamanan di Era Globalisasi: Kasus Penyelundupan Manusia Ke Australia," in *Masalah Penyelundupan dan Perdagangan Orang di Indonesia*, Pusat Pengkajian dan Pengolahan Data dan Informasi (P3DI) Sekretariat Jenderal DPR RI, 2009.

⁶ *Ibid.*

⁷ S.n., "Report of the Global Commission on International Migration", *Population and Development Review* Vol. 3 1.

⁸ *Ibid.*

⁹ United Nations Office on Drugs and Crime (a), *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications*, 2011.

¹⁰ E. Goździak dan E. Collett, "Research on human trafficking in North America: A Review of Literature", *International Migration* vol. 43 no.1/2, 2005.

¹¹ United Nations Office on Drugs and Crime (b), *Organized Crime Involvement in Trafficking in Persons and Smuggling of Migrants*, 2010.

grows even more systematic, so as the routes. Experts concluded that such systematic routes are created to reach countries with high income.¹²

B. SMUGGLING OF MIGRANTS AS TRANSNATIONAL ORGANIZED CRIME

Migrants Smuggling Protocol defines smuggling of migrants as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident.¹³ With the establishment of this definition, a general concept of smuggling of migrants is formed and accepted by states to be injected into their national legislation and became the basis of effective eradication smuggling of migrants,¹⁴ even though, such definition is still viewed as lack of details.¹⁵

This caused by the overlapping with human trafficking definition in practice. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines human trafficking as the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁶ It is important to distinguish smuggling of migrants and human trafficking in order to give the

¹² *Ibid.*

¹³ *Protocol Against Smuggling of Migrants by Land, Sea, and Air Supplementing the United Nations Convention Against Transnational Organized Crime* (open for signature 12-15 December 2000, entered into force on 29 September 2003).

¹⁴ Anne Gallagher, "Trafficking, Smuggling, and Human Rights: Tricks and Treaties," *Human Rights Quarterly* 23 (2001), pg. 26.

¹⁵ *Ibid.*

¹⁶ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* Art. 3 par. A (opened for signature 12-15 December 2000, entered into force 25 December 2003).

correct protection towards both victims, where victims of human trafficking need higher level of protection including jobs and psychological protection.¹⁷

Difficulties to identify victims of migrants smuggling and victims of human trafficking actually can be catered by noting several keywords in both definitions. Those three keywords are:¹⁸

1. Exploitation

Exploitation is one of important indicators to distinguish smuggling of migrants and human trafficking. Exploitation in this case related to the way of smugglers getting their profit. For human trafficking perpetrators, they gain their profit from exploitation of the victims, while in smuggling of migrants from the smuggling process itself. Smugglers usually do not exploit their victims therefore the relationship between them can be considered as mutualism.¹⁹

2. Illegal entry or residence

Smuggling of migrants always has transnational aspect during its process which at least happens in two countries. The objectives of smuggling of migrants are always to facilitate the coming and residing of a person illegally from a country to another, whereas in human trafficking, it does not always have transnational aspects during the process. This caused by in human trafficking is not always involving illegal entry during the process. The movement and resides of a trafficked person can happen legally. Aside than that, human trafficking does not always cross the border yet domestic only.

3. Victims

Smuggling of migrants does not always sacrifice the smuggled migrants. Smuggling of migrants generally involves consent from the smuggled migrants, which is different than human trafficking. Victim of human trafficking never agrees to the treatment given to them and even if they agree it must be obtain under threat or use of force.

¹⁷ Jacqueline Bhabha, "Trafficking, Smuggling, and Human Rights", *Migration Information Source*, available at: <http://www.migrationinformation.org/feature/display.cfm?ID=294#top>

¹⁸ *Ibid.*, hal. 10.

¹⁹ Erdward Kleemans, "Organized Crime, Transit Crime, and Racketeering," *Crime and Justice*, Vol. 35, 2007.

C. UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA, AND AIR AS INTERNATIONAL LAW INSTRUMENTS ON THE SMUGGLING OF MIGRANTS

1. United Nations Convention against Transnational Organized Crime

This convention consists of forty one articles regulating effort to eradicate Transnational Organized Crime through inter-state cooperation. The convention gives definition of Organized Crime Group as followed:

A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

While serious crime defined as:

Conduct of constituting an offence punishable by a maximum deprivation of liberty of at least four years or more serious penalty.²⁰

The convention also stipulates that offence is transnational in nature if:²¹

- a. It is committed in more than one State;
- b. It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- c. It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- d. It is committed in one State but has substantial effects in another State.

State parties to the convention are also obliged to criminalize four forms of crimes which comprises participation in an organized criminal group (Art. 5), laundering of proceeds of crime (Art. 6), corruption (Art. 8), and obstruction of justice (Art. 23).

Aside than such criminalization obligation, state parties are also obliged with other obligations by the convention. Such obligation comprises:

²⁰ *Ibid.*, Art. 2 par. a.

²¹ *Ibid.*, Art. 3 par. (2)

- a. Liability of legal persons;²²
- b. Prosecution, adjudication and sanctions;²³
- c. Confiscation and seizure;²⁴
- d. Jurisdiction;²⁵
- e. Extradition;²⁶
- f. Mutual Legal Assistance;²⁷
- g. Joint investigations;²⁸
- h. Special investigative techniques;²⁹
- i. Protection of witnesses;³⁰
- j. Assistance to and protection of victims;³¹
- k. Varied of states cooperation (Art. 26, 27, and 29)

2. Protocol Against The Smuggling of Migrants by Land, Sea, and Air

This part will generally explain about Protocol against the Smuggling of Migrants by Land, Sea, and Air. Amongst three protocols supplementing UNCTOC, this is the protocol which specifically addressed the issue of the smuggling of migrants and obligation to criminalize smuggling of migrants.

The establishment of this protocol is aimed to prevent and eradicate smuggling of migrants and to improve cooperation between state parties to achieve such aim, by also protecting the rights of smuggled migrants.³² This protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.³³

²² *Ibid.*, Art. 10.

²³ *Ibid.*, Art. 11.

²⁴ *Ibid.*, Art.12-13.

²⁵ *Ibid.*, Art. 15.

²⁶ *Ibid.*, Art. 16.

²⁷ *Ibid.*, Art. 18.

²⁸ *Ibid.*, Art. 19.

²⁹ *Ibid.*, Art.20.

³⁰ *Ibid.*, Art.24.

³¹ *Ibid.*, Art. 25.

³² *Ibid.*, Art.2.

³³ *Ibid.*, Art. 4.

In line with the convention, by ratifying this protocol, state parties are obliged to fulfill obligations as stipulated in the protocol, comprises:

1. Obligation to criminalize migrants smuggling;³⁴
2. Obligation to cooperate in order to prevent migrants smuggling through the sea, in accordance with the international law of the sea and take all measures pursuant to the protocol towards smuggling of migrants at the sea consistent with the provisions provided in the protocol;³⁵
3. Obligation to exchange information between state parties located on the routes of smuggling of migrants, consistent with their respective domestic legal and administrative systems;³⁶
4. Obligation to take measures in border area;³⁷
5. Obligation to security and control of the documents;³⁸
6. Obligation to legality and validity of documents;³⁹
7. Obligation to technical and training cooperation;⁴⁰
8. Obligation to protect the rights of the smuggled migrants.⁴¹

The issue of the smuggling of migrants as part of the Transnational Organized Crime becomes crucial issue in globalization era nowadays. This issue is not only about one country but it is more about a polemic in transnational relations. Varied of efforts has been accomplished by states, one of it through the establishment of international law instrument. However, the establishment of such instrument will not be able to solve the issue if it is not supported by the serious implementation from each state party.

³⁴ *Ibid.*, Art. 6.

³⁵ *Ibid.*, Art. 7-9.

³⁶ *Ibid.*, Art. 10.

³⁷ *Ibid.*, Art. 11.

³⁸ *Ibid.*, Art. 12.

³⁹ *Ibid.*, Art. 13.

⁴⁰ *Ibid.*, Art. 14.

⁴¹ *Ibid.*, Art. 16-17.

III. IMPLEMENTATION OF THE SMUGGLING OF MIGRANTS CRIMINALIZATION PROVISION AS STIPULATED IN THE UNITED NATIONS CONVENTION AGAINST TRANS- NATIONAL ORGANIZED CRIME AND THE PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA, AND AIR

A. THE RELATION BETWEEN THE UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND SEA AND AIR

The four international law instruments in Transnational Organized Crime are the United Nations against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Sea, and Air, and Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition were created as group with general provisions against transnational organized crime in the parent Convention and elements specific to the subject matter of the Protocols in each of the Protocols themselves.⁴² As the protocols are not intended to be independent treaties, to become a party to any of the Protocols a State is required to be a party to the parent convention. This ensures that, in any case that arises under a protocol to which the states concerned are parties; all of the general provisions of the convention will also be available and applicable.⁴³ Many specific provisions in the protocols were drafted on that basis.⁴⁴ The basic principles governing the relationship between the two instruments are established in Article 1 of the protocol and article 37 of the convention.

From those provisions, four elements that describe the relationship between UNCTOC and the Migrants Smuggling Protocol are provided below:⁴⁵

⁴² United Nations Office on Drugs and Crime (c), *Legislative Guides for the Implementation of the United Nations against Transnational Organized Crime and the Protocols Thereto* (New York: United Nations Office on Drugs and Crime, 2004), pg. 329.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, pg. 330.

1. No state can be a party to any of the protocols unless it is also a party to the convention. Simultaneous ratification or accession is permitted, but it is not possible for a state to be subject to any obligation arising from the protocol unless it is also subject to the obligations of the convention.
2. The convention and the protocol must be interpreted together. In interpreting the various instruments, all relevant instruments should be considered and provisions that use similar or parallel language should be given generally similar meaning. In interpreting one of the protocols, the purpose of that protocol must also be considered, which may modify the meaning applied to the convention in some cases.
3. The provisions of the convention apply, *mutatis mutandis*, to the protocol. The meaning of the phrase “*mutatis mutandis*” is clarified in the interpretative notes (A/55/383/Add.1, para. 62) as “with such modifications as circumstances require” or “with the necessary modifications”. This means that, in applying provisions of the convention to the protocol, minor modifications of interpretation or application can be made to take account of the circumstances that arise under the protocol, but modifications should not be made unless they are necessary and then only to the extent that is necessary.
4. Offences established in accordance with the protocol shall also be regarded as offences established in accordance with the convention. This principle, which is analogous to the *mutatis mutandis* requirement, is a critical link between the protocol and the convention. It ensures that any offence or offences established by each state in order to criminalize smuggling of migrants as required by Article 6 of the protocol will automatically be included within the scope of the basic provisions of the convention governing forms of international cooperation such as extradition and mutual legal assistance.

B. CRIMINALIZATION OF THE SMUGGLING OF MIGRANTS IN THE PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA, AND AIR

The previous part of this article has explained that one of the most significant elements in the Migrants Smuggling Protocol are the existence of

the obligation to criminalize the act of the smuggling of migrants. Migrants smuggling criminalization are regulated in Article 6 of Migrants Smuggling Protocol. Criminalization in Migrants Smuggling Protocol are not executed towards the smuggling of migrants victims, as set out in Article 5 Migrants Smuggling Protocol that Migrants shall not become liable to criminal prosecution under this Protocol.⁴⁶

Criminalization of the smuggling of migrants in Article 6 Migrants Smuggling Protocol are regulated in four paragraphs, however specifically such article obliges state parties to criminalize three matters, comprises: (i) criminalization towards the smuggling of migrants and other related conducts, (ii) criminalization towards the attempt, participation, and coordination in the smuggling of migrants and other related conducts, and (iii) criminalization towards the aggravating circumstances in the smuggling of migrants and other related conducts.

1. Criminalization of Smuggling of Migrants and Related Conduct in Protocol against the Smuggling of Migrants by Land, Sea, and Air

Criminalization of Smuggling of Migrants and Related Conduct such as documents fraud offence and enabling of illegal residence are regulated under Article 6 paragraph (1) Migrants Smuggling Protocol. This paragraph obliges state parties to take legislative measures to establish smuggling of migrants as criminal offence. However, Article 6, paragraph 1, limits the application of relevant offences to "intentional" offences.⁴⁷ Article 34, paragraph (3) UNCTOC, in conjunction with which the Smuggling of Migrants protocol must be read, however, provides that "each State party may adopt more strict or severe measures". States parties are thus free to create offences that require less onerous mental elements than "intention", such as recklessness or, perhaps, negligence.⁴⁸

Article 6 paragraph (1) subparagraph a obliges state parties to criminalize the smuggling of migrants as defined by Article 3 subparagraph

⁴⁶ United Nations (a), *op. cit.*, Art. 5. "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol."

⁴⁷ United Nations Office on Drugs and Crime (d), *Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants* (Vienna: UNODC, 2012), pg. 24.

⁴⁸ *Ibid.*

a which generally comprises three elements:⁴⁹

- a. procurement or enabling illegal entry of a person;
- b. into a State Party of which the person is not a national or a permanent resident;
- c. in order to obtain, directly or indirectly, a financial or other material benefit.

Illegal entry is an important element that has to be achieved in the smuggling of migrants. The drafters intended to criminalize the cases in which valid documents were used improperly and the entry was technically legal would be dealt with by the offence of enabling illegal residence.⁵⁰

The next element is “into a State Party of which the person is not a national or a permanent resident,” this element describes the transnational aspect of the smuggling of migrants. Therefore, an offence is regarded as the smuggling of migrants if the migrants smuggled are not citizen or permanent residence in a country where they are smuggled.

The last element is the intention or objective element. The general standard of the Convention and Protocols for offences is that they must have been committed intentionally.⁵¹ Applied to the smuggling offence, this actually entails two requirements: there must have been some primary intention to procure illegal entry and there must have been a second intention, which of obtaining a financial or other material benefit.⁵² Intention to gain material benefit is an important element to criminalize the smuggling of migrants, because the protocol does not criminalize smuggling of migrants that is outside the financial benefit reason.⁵³ Therefore, such act of the smuggling of migrants are done for humanitarian reason or other non-profit objectives that usually done by families, religious groups, NGOs, then the criminal provision of the smuggling of migrants shall not prevail.⁵⁴

⁴⁹ United Nations Office on Drugs and Crime (e), *A Short Introduction to Migrants Smuggling*, pg. 4 see also United Nations (a), *op. cit.*, Art. 3.

⁵⁰ United Nations Office on Drugs and Crime (e), *op. cit.*, pg. 342.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ United Nations Office on Drugs and Crime (a), *op. cit.*, pg. 5.

⁵⁴ *Ibid.*

Article 6 paragraph (1) subparagraph b criminalizes the act of producing a fraudulent travel or identity document and procuring, providing or possessing such a document. Producing a fraudulent travel or identity document”and “procuring, providing or possessing such a document”should be criminalized, but only when it is intentionally committed for the purpose of the smuggling of migrants. The reference to “smuggling of migrants” means that the document offences must relate to the procurement of illegal entry into a State party where that person is not a national or a permanent resident.⁵⁵ There is also the requirement that the smuggling of migrants, and therefore the document offence, is committed for “financial or other material benefit.”⁵⁶

Article 6, paragraph 1, subparagraph (c) of the protocol creates the offence of enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means. This is primarily aimed at criminalizing the harboring and concealing of persons who have no legal status in the host country in order to avoid their apprehension by law enforcement and immigration authorities.⁵⁷ The “means mentioned in subparagraph (b)” refers to the document fraud offences in article 6, paragraph 1, subparagraph (b).⁵⁸ The conduct element of article 6, paragraph 1, subparagraph (c) is cast widely to also capture illegal residence for “any other illegal means” as defined under domestic law.⁵⁹ As with other offences in article 6, paragraph 1, there must be an “intention to commit whatever act is alleged as having enabled illegal residence and the further intent or purpose of obtaining some financial or other material benefit.”⁶⁰

2. Obligation to Criminalize the Attempt, Participation, and Coordination in the Smuggling of Migrants and other related conducts.

⁵⁵ United Nations Office on Drugs and Crime (f), *op. cit.*, pg. 25.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

This part will explain about obligation to criminalize the attempt, participation, and coordination in the smuggling of migrants and other related conducts. This obligation is regulated under Article 6 paragraph (2) *Migrants Smuggling Protocol* as follow:

It is important that the criminalization of the smuggling of migrants not be limited to completed offences and also extend to those who try to smuggle migrants but fail, and those who participate as aides or facilitators.⁶¹ More important still is the criminalization of organizers and directors who oversee one or more smuggling of migrants ventures but may not be involved in the physical commission of the crime.⁶²

It is for these reasons that, in addition to requiring States parties to criminalize the smuggling of migrants, the Smuggling of Migrants Protocol also requires them to criminalize the attempt to commit the crime, the participation as an accomplice in the crime and the organization or directing of other persons to commit the crime.⁶³ Articles 5 and 10 of the UNCTOC further extend criminal liability to include corporations (legal persons) and persons who participate in an organized criminal group.⁶⁴

Article 6 paragraph (2) subparagraph a of Migrants Smuggling Protocol obliges the state parties to widen the criminal responsibility for smuggling of migrants, acts relating to documents fraud, and acts which allow an individual to reside illegal one of which is when the actor is attempting to commit such acts.⁶⁵ Although Article 6 paragraph (2) subparagraph a obliges the state parties, this provision can be non-obligatory if looking onto the facts that not all legal system has the concept of attempt for crime.⁶⁶ This Article gives discretion for state parties to criminalize acts as intended in Article 6 paragraph (2) subparagraph b according to their respective legal system.

Article 6 paragraph (2) subparagraph c of Migrants Smuggling Protocol imposes obligations to state parties to take legislative measures or other measures considered as necessary to criminalize the organization

⁶¹ United Nations Office on Drugs and Crime (d), *loc. cit.*

⁶² *Ibid.*

⁶³ United Nations (a), *loc. cit.*

⁶⁴ United Nations (b), *op. cit.*, Art. 5 and Art. 10.

⁶⁵ United Nations Office on Drugs and Crime (c), *op. cit.*, pg. 28.

⁶⁶ *Ibid.*

or ordering of other individuals to commit acts as intended in Article 6 paragraph (1).⁶⁷In relation to that provision, Article 5 UNCTOC can also be applied in widening the scope of criminal responsibility, because Article 5 criminalizes acts to participate in organized criminal groups where smuggling of migrants is included. Article 5 paragraph (1) point a offers two different concepts to criminalize smuggling of migrants and the state parties are free to choose one. The first concept is as stipulated in Article 5 paragraph (1) subparagraph a (ii) which is based on conspirational acts widely applied in countries with common law system.⁶⁸Meanwhile, the concept in Article 5 paragraph (5) subparagraph a (ii) is adapted from concepts observed in civil law countries and focuses on the active participation within the organized criminal group.⁶⁹

Article 10 of UNCTOC can also apply to criminalize organization or any ordering to commit migrants smuggling in the event that such act is committed by a legal entities.⁷⁰This Article obliges state parties to widen the scope of criminal responsibility towards legal entities in their involvement in organized crime.⁷¹

3. The Obligation to Criminalize towards the Aggravating Circumstances in Migrants Smuggling and Other Related Acts

Aside from the obligation to criminalize migrants smuggling, other related acts as well as attempt, aid, abet, and coordination in such acts, the protocol also obliges state parties to criminalize, in this case to aggravate the punishment of migrants smugglers, which in practice committed acts as regulated in Article 6 paragraph (3) of the Migrants Smuggling Protocol, namely:

1. that endanger, or are likely to endanger, the lives or safety of the migrants concerned,
2. that entail inhuman or degrading treatment, including for exploitation, of such migrants.⁷²

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ United Nations Office on Drugs and Crime (d), *op. cit.*, pg. 29.

⁷¹ United Nations (b), *op. cit.*, Art. 10.

⁷² *Ibid.*, Art. 6 par. 3.

The application of the provision concerning the aggravating circumstances shall be associated with the act of human smuggling, identity and travel document fraud, and acts which allow an individual to reside illegally.⁷³ There are few ways to apply this provision, one of which is to stipulate an article regarding migrants smuggling with aggravating circumstances or to legislate a regulation which obliges the court to aggravate the punishment when aggravating circumstances exist.⁷⁴

No stipulation in this protocol that prevents a state party to take measure towards an individual whose act is considered as crime under his national law.

The purpose of this provision is to ensure that there will be no provisions in this protocol which hinders the state parties to take measures towards an individual which is considered to have committed crime according to the state parties' national law.

IV. THE APPLICATION OF CRIMINALIZATION REGULATION OF MIGRANTS SMUGGLING IN UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME DAN PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA, AND AIR

In the previous part the various obligations of state parties in criminalization of migrants smuggling as prescribed in UNCTOC and Migrants Smuggling Protocol was discussed. Therefore, this section will discuss on how three state parties, namely Indonesia, Australia and UK apply the criminalization provision within the sphere of national law of each respective country.

A. INDONESIA THROUGH LAW NO. 6 OF 2011 OF IMMIGRATION

Indonesia has ratified UNCTOC and Migrants Smuggling Protocol since 2009 through Law No. 5 of 2009 and Law No. 14 of 2009. Since

⁷³ *Ibid.*

⁷⁴ United Nations Office on Drugs and Crime (d), *op. cit.*, pg. 349.

then, obligations for Indonesia in eradication Transnational Organized Crime and migrants smuggling arose. One of the fields in eradicating migrants smuggling is criminalization of migrants smuggling and other related acts. The old Indonesia Immigration Law, namely Law No. 9 of 1992, was considered as having too many flaws in supporting the obligation to criminalize migrants smuggling.⁷⁵ However since 2011, the law was revoked and replaced with the new Immigration Law namely Law No. 6 of 2011. Aside from being pushed from the obligations enshrined in the protocol, the stipulation of Article regarding criminalization in the new Immigration Law was also driven by Indonesia's geopolitical situation influenced by Human Rights and Indonesia Constitution of 1945.⁷⁶

Indonesia, in executing the obligation to criminalize migrants smuggling, has completely applied the elements contained in the article of migrants smuggling criminalization the Migrants Smuggling Protocol. Aside from that, this can be seen from Article 120 of the Law No. 6 of 2011 which adopts the elements of Article 6 of Migrants Smuggling Protocol. Indonesia also explicitly incorporates the provision of non-criminalization towards the migrants themselves through Article 136 of Law No. 6 of 2011.

However there are some obligations to criminalize migrants smuggling that have not been incorporated in Law No. 6 of 2011 of Immigration. This shall not be deemed as legal vacuum. In this regard, the Criminal Code can still complement such flaws.⁷⁷ Those obligations are:

⁷⁵ Novianti, "Analisis terhadap Protokol Menentang Penyelundupan Migran melalui Darat, Laut, dan Udara dari Perspektif Hukum Internasional," in *Masalah Penyelundupan dan Perdagangan Orang di Indonesia*, Pusat Pengkajian Pengolahan Data dan Informasi Sekretariat Jenderal DPR RI, 2009.

⁷⁶ As prescribed in Article 28 I that "Everyone has the right to be free from discriminative treatment on whatever basis and has the right to protection from the concerned discriminative treatment." This what gives basis to selective non-discriminatory principle which does not automatically punish the actor of the wrongdoing but observing the background of the act as well as considering Human Rights aspects. See Muhammad Indra, "Perspektif Penegakan Hukum dalam Hukum Keimigrasian Indonesia," (Disertasi Doktor Universitas Padjajaran, Bandung, 2010), pg. 265.

⁷⁷ There are few articles in the Indonesian Criminal Code which can be associated with migrants smuggling activity. Taking into account the basis of migrants smuggling cases are within the category of *mala prohibita* (crimes which require logical

- a) Criminalization of acts of accomplice in migrants smuggling and documents fraud (Article 6 paragraph (2) subparagraph b) by applying provision in Article 56 of the Criminal Code⁷⁸ regarding criminalization for those who aid the criminal act committed with the punishment as stipulated in Article 57 of the Criminal Code.
- b) Criminalization for coordinating or direction others to perpetrate migrants smuggling or document forgery (Article 6 paragraph (2) point c.) by applying Article 55 of the Indonesian Criminal Code regarding ordering to perpetrate and participate in the crime, promising or provoking.
- c) Criminalization of aggravating circumstances in migrants smuggling. With such breadth of definition of aggravating circumstances, this results in the wide application of such provisions in the Criminal Code, for example Article 351 (maltreatment), Article 352 (light maltreatment), Article 359 (death caused by negligence), and others.

B. AUSTRALIA THROUGH AUSTRALIAN MIGRATION ACT 1958 AND CRIMINAL CODE 1995

As a state party to UNCTOC and Migrants Smuggling Protocol, Australia is also imposed by obligations to criminalize migrants smuggling. Since the issuance of Anti-people Smuggling and Other Acts No. 50 of 2010, Australia has added legal provisions regarding migrants smuggling both materially and formally. However the ones which are directly related to criminalization of migrants smuggling are Migrants Act 1958 and Criminal Code 1995.

Australia through Migration Act 1958 and Criminal Code 1995 differentiates criminalization of migrants smuggling to two types. First, as enshrined in Article 233A of Migration Act 1958, it criminalizes migrants smuggling generally meanwhile Article 233C of Migration Act 1958 criminalizes smuggling of a group of migrants which consists at

and legal construction in order to deem an act as a crime and subsequently can be processed in criminally), therefore such process lies in the authority of the police force. See Meliala, *Pemantapan Legalitas dan Kebijakan Menyangkut Penyelundupan Manusia* (Jakarta: Fakultas Ilmu Sosial dan Ilmu Politik Universitas Indonesia, 2011), pg. 34.

⁷⁸ *Kitab Undang-Undang Hukum Pidana [Wetboek van Strafrecht]*, translated by Moeljatno (Jakarta: Bumi Aksara, 2005), Art. 56.

least of five migrants.

Subsequently, regarding documents fraud prescribed in Article 234, Article 234A and Article 236 of Migration Act 1958 and Article 73 paragraph (6) to paragraph (12) of Criminal Code 1995. The regulation of criminalization of travel document fraud in the said Articles are more detailed, not only regarding general document fraud, but also incorporation of specific matters, such as providing false information, owning or destroying travel documents or identity of others,⁷⁹ etc. Aside from the said document fraud, Australia also considers that document fraud for a group of migrants consisting of at least five migrants as aggravating circumstances causing the punishment of that crime exacerbated.⁸⁰

Article 233D paragraph (1) of Migration and Article 73 paragraph (3A) of Criminal Code 1995 regulate criminalization on attempt, aid and order and organization of migrants smuggling. Meanwhile for provisions regulating the organization of migrants smuggling are not regulated in the said Articles since it has been regulated previously in migrants smuggling main crime in Article 233A. Migration Act 1958 and Article 73 paragraph 1 of Criminal Code 1995. The ones which are not regulated is the act of order to commit migrants smuggling, although Migrants Smuggling Protocol obliges the criminalization of such act.

If observed in accordance with the criminalization elements in Migrants Smuggling Protocol, Australia applies a stricter regulation in criminalizing migrants smuggling by eliminating the element of "purpose of financial benefit", since the smugglers who hide under religious groups, families as well as non-governmental organizations who commit migrants smuggling for humanity reason can be charged for the above crime, although Migrants Smuggling Protocol does not allow such thing. However, since Australia has its own justification for its act by orienting to provisions in UNCTOC that the provisions regulated therein are those with minimum standard and as such enabling countries to tighten the regulation in their own countries.⁸¹

⁷⁹ Australia (a), *Migration Act 1995*, Art. 234.

⁸⁰ Australia (a), *op. cit.*, Art. 233C.

⁸¹ United Nations Office on Drugs and Crime (c), *op. cit.*, pg. 342.

C. UK THROUGH IMMIGRATION ACT 1971

Unlike Indonesia and Australia, UK has different views in criminalization of migrants smuggling. Although UK ratified Migrants Smuggling Protocol in 2006,⁸² UK does not observe the same definition regarding migrants smuggling. UK defines migrants smuggling as “the facilitation of entry to the UK either secretly or by deception (whether for profit or otherwise)”.⁸³

Under UK law, no part of Immigration Act that specifically regulates criminalization of migrants smuggling. However, it does not necessarily mean that there is legal vacuum exists if cases of migrants smuggling occur. To charge the smugglers, UK has regulations which can be used to charge the smugglers, namely Article 25 and Article 25A. Article 25 criminalizes the aid for any illegal immigration to UK. The said article does not contain elements of criminalization of migrants smuggling contained in Migrants Smuggling Protocol. The crime in that article is defined broadly so as to cover two crimes namely the facilitating to enter illegally (including migrants smuggling by document forgery or by sea) and facilitating to reside in UK by fraud (for example through evasion of marriage law).⁸⁴ Similar with Migration Act of Australia, this provision eventually criminalizes all kinds of migrants smuggling, although Migrants Smuggling Protocol exempts migrants smuggling that does not have any purpose of financial benefit. This is surely not in accordance with the main idea of the protocol.

Then Article 25 A of Immigration Act 1971 regulates about criminalization of facilitating for asylum seekers to obtain benefit. This article is not applicable for those who act on behalf of organizations who do not have any purpose to gain benefit meaning does not obtain payment

⁸² [...], “Status of Ratification of the UN Convention against Transnational Organized Crime”, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en, accessed on 18 Maret 2013. See also “Status of Ratification of the Protocol against Smuggling of Migrants by Land, Sea, and Air,” http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-b&chapter=18&lang=en, accessed on 18 Maret 2013.

⁸³ [...], “Human Trafficking and Smuggling”, available at: http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a05, accessed on 26 Mei 2013.

⁸⁴ “Human Trafficking,” *loc. cit.*

for service in bringing the concerned asylum seekers.⁸⁵ This Article is in accordance with the purpose stipulated in the protocol which does not criminalize migrants smuggling for non-profit purpose, therefore the existence of this Article covers the flaw of Article 25 paragraph (1).

In relation to the flaw within Immigration Act 1071, if compared to Indonesia and Australia, therefore the legislation regarding migrants smuggling according to writer is still lacking, although UK is one of the destination countries for migrants smuggling.⁸⁶ Criminalization of migrants smuggling is still equated with regular immigration violation, as applied in Article 25 paragraph (1).

V. THE PRACTICE OF APPLICATION OF MIGRANTS SMUGGLING CRIMINALIZATION REGULATION PRESCRIBED IN UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA, AND AIR ASSOCIATED WITH MIGRANTS SMUGGLING CASES.

In the previous section, the application of regulation regarding criminalization of migrants smuggling according to United Nations Convention against Transnational Organized Crime (UNCTOC) and Protocol against the Smuggling of Migrants by Land, Sea, and Air (Migrants Smuggling Protocol) by three countries namely Indonesia, Australia and UK has been discussed. Therefore this section will discuss the application of the said regulation regarding criminalization of migrants smuggling in resolving cases of migrants smuggling in those three countries. This is important to be conducted considering through such discussion, the background of the adoption of such regulation according to national laws of Indonesia, Australia and UK can be discovered.

A. AGUS DIANTO CASE (NO. 116/ PID.SUS/2012/PN-PCT) IN DISTRICT COURT OF PACITAN IN INDONESIA

This case is started by the capture of the convict, Agus Dianto in

⁸⁵ "Human Trafficking and Smuggling," *loc. cit.*

⁸⁶ "Britain is Second Most Popular Destination for Migrants, OECD Says," *loc. cit.*

Tamperan Beach, Pacitan, Indonesia while bringing seven illegal immigrants from Jakarta to Tamperan so that the immigrants can go across to Australia. This case, both by the Prosecutor and the Judge, was being charged with Article 120 Law No. 6 of 2011 for human smuggling crime. There are few things that can be analyzed from the application of Article 120 No. 6 of 2011 namely the proving of the elements of the Article, the verdict as well as the view of the judge towards the Law No. 6 of 2011.

During the court proceeding, there was no issues regarding the application of the whole elements of Article 120 of Law No. 6 of 2011. The four elements are:

1. every individual
2. act which aims to gain benefit, both directly or indirectly, for oneself or for others.
3. to bring an individual or groups of individuals, both organized or non-organized, or to order others to bring an individual or groups of individuals both organized or non-organized.
4. without authority to enter the territory of Indonesia or to exit the territory of Indonesia and/ or to enter the territory of other countries, without authority, both by legitimate document or forged document or without travel document, both through immigration process or not.

However, in terms of the verdict, if observed based on Law No. 6 of 2011 of Immigration especially based on the the charged article, therefore such verdict is not suitable, since supposedly, the minimum punishment given is at least five years of imprisonment and maximum of fifteen years of imprisonment,⁸⁷ and minimum fine of Rp 500.000.000,0 and maximum of Rp 1.500.000.000,-. Meanwhile the verdict given was just two years of imprisonment and a fine of Rp 500.000.000,-. The consideration of the judge at when giving the verdict is that in deciding a case, judges do not act as tunnel of law but rather as the messenger of God who requires conscience in making judgments.

⁸⁷ Indonesia, *Immigration Law*, UU No. 6 of 2011, LN No. 52 of 2011, TLN No. 5216, Art. 120.

From the philosophical side, law basically has two functions to serve as a norm namely to give certainty and balance.⁸⁸ Certainty is derived from laws and regulations meanwhile balance is derived from feelings and conscience.⁸⁹ Therefore, it would only be normal if collision happens to both.⁹⁰

Conscience shall play a role when deciding a dispute since judges does not act as tunnel of law but as the messenger of God as well. If seeing from the reality that the convict is an uneducated jobless resulting him in having no knowledge towards the risk bore for his actions. Then he was being offered a job with considerable amount of pay; he did that however arrested and had no chance to enjoy his wage since he is being convicted with minimum of five years of imprisonment. If conscience does not play any role in making judgments, no balance between the act and the punishment received would be achieved. This logic that actually based the judge in deciding the verdict.

Indonesia has fulfilled the legislative obligation to criminalize migrants smuggling by revising its laws and regulations. Migrants smuggling is charged with heavy punishment of minimum five years of imprisonment. This is carried out to give deterrent effect for the migrants smugglers. The judges in deciding a case do have discretion to impose verdict below the minimum punishment. Such discretion is given to achieve justice in the judgment but it is not always good since it can result to other consequences such as no deterrent effect is achieved as the regulations suppose to do, which is what happened in this case.

B. CASE OF PJ V. THE QUEEN [2012] VSCA 146 IN VICTORIA STATE COURT OF APPEALS, AUSTRALIA

This case begins with the capture of Jeky Payara, an Indonesian citizen, 20 years old and originated from Maluku, in the water of Chrismast Island where he was bringing 49 illegal migrants. In the first instance court where he was charged with Article 233 C regarding the Aggra-

⁸⁸ Purnadi Purbacaraka dan Soejono Soekanto, *Perihal Kaedah Hukum* (Bandung: Citra Aditya Bakti, 1993), pg. 50-51.

⁸⁹ *Ibid.*, pg. 51.

⁹⁰ *Ibid.*

vated Offence on People Smuggling with the minimum punishment of 10 years of imprisonment. In the said court, Payara is declared guilty, however he submitted an appeal to the Victoria State Court of Appeal.

This case is one of the landmark cases in the application of criminalization of migrants smuggling provisions in Migrants Act 1958.⁹¹ As known in the regulation of criminalization of migrants smuggling released by Australia in 2010 through Anti-people Smuggling and Other Acts, Law No. 50 Year 2010 just few months before Payara case is revealed and because of that the application of such provisions in this case would influence the next other migrants smuggling cases in Australia.⁹² This case is also a test case whether the court really comprehends the provisions of criminalization of migrants smuggling regulated by the Parliament.⁹³

The debate in this case is essentially based on the issue of interpretation of the articles and does not really discuss the specific fact of the case. Payara, as known was charged with Article 233 C of the Migration Act 1958 regarding the Aggravated Offence on People Smuggling which in this case was the smuggling of a group of migrants consisting at least of five people. There are three elements in Article 233 C, however the center of the dispute before the court is only the first and third elements, namely:

1. The concerned individual organizes or facilitates the bringing or coming to Australia, or the entrance or the plan to enter a group of people which consist of at least five people to Australia.

There are two views in terms of interpreting this article. The first view is that there is no need to prove that the defendant is an individual who has an intention to organize and facilitate the transport of persons to Australia. What needs to be proven is whether that individual has

⁹¹ "Landmark Legal Case Could Affect Australia Immigration Law", available at: http://www.globalvisas.com/news/landmark_legal_case_could_affect_australia_immigration_laws3309.html, accessed on 10 June 2013.

⁹² *Ibid.*

⁹³ "People Smuggling Charges Dropped", available at: <http://www.smh.com.au/opinion/political-news/peoplesmuggling-charges-dropped-20120903-25ajy.html>, accessed on 10 June 2013.

the intention to organize or facilitate the transport of those people to a destination point which is a part of Australian territory, regardless of whether that individual has the intention to arrive in Australia.

The second view is the view of the Applicant which was agreed by the judges saying that the fulfillment of this element requires the proving of two things: first whether that individual had the intention to facilitate or organize the transport of the people and the intention to bring those people to Australia. Through the case of JS and He Kaw Teh, the judges confirm the interpretation submitted by the Applicant.

If associated with the element of international law, in this matter namely migrants smuggling as organized crime, the accepted interpretation by the judges is in accordance with the purpose of both instruments namely to oppress the activity of organized crime groups (including migrants smuggling) which aims in gaining benefit.⁹⁴ According to the facts of the case, Payara did not work within the group, where he was only a homeless youngster offered a job by strangers with very limited information and as such he is not a member of the organized crime group as targeted by the convention and protocol.⁹⁵

2. The concerned individual is without rights entering Australia

In order to fulfill this element, there are two elements needs to be proven, namely the element of "without rights entering Australia", and the element of "recklessness". The element that sparked debate during the court proceeding is the element of recklessness contained in this Article.

The element of wrongdoing in this element is closely associated with the first element which was a debate, since both are interlinked

⁹⁴ Andreas Schloenhardt, Freya Douglas dan Joseph Lelliott, "Stop The Planes!? Documents Fraud and Migrants Smuggling by Air in Australia," *The University of Queensland Migrants Smuggling Working Group Research Paper* (Oktober 2012), p. 13. See also United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions; Addendum: Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 (3 Nov 2000).

⁹⁵ "Another People Smuggling Case Falls Over, as Government Changes Approach", available at: <http://www.abc.net.au/worldtoday/content/2012/s3581534.htm>, accessed on 11 June 2013.

with the definition of "Australia." In order to fulfill the element of recklessness, what shall be proven are:⁹⁶

- a) The concerned individual is aware about the risks of the circumstances or the future circumstances; and
- b) Considering the known circumstances, it is wrong to take such risks.

In this regard, what needs to be proven is that whether Payara is aware of such risks in the circumstances where those 49 persons do not have any rights to come to Australia. It also needs to be proven whether he has considered such risks and was in the knowledge that taking such risks is a wrongdoing. The fact is that Payara was not aware that the ocean he entered is considered as Australian territory which means that he was not in the knowledge of risks in bringing those people and by that virtue the element of recklessness in this element is not fulfilled.⁹⁷

If seen closely, both of the cases in Indonesia and Australia, the captured individuals are less educated people which committed crime without any awareness since they only sought for financial gain. Both of these cases are not examples of migrants smuggling committed by organized crime groups since the actors are not affiliated to syndicates rather only accepting free offers.

C. THE CASE OF KAPOOR V. THE CROWN [2012] EWCA CRIM 435 IN ISLEWORTH COURT OF APPEAL IN UK

Applicant: Saran Singh Kapoor
 Nermon Singh
 Davindar Singh Chawla
 Subir Singh Sarna

Defendant: The Crown

This case begins with the capture of the Applicants who aided the entrance of few illegal migrants from Afghanistan to UK through air by using fraudulent passport and travel document where the Applicant

⁹⁶ Australia (c), *Criminal Code 1995*, Art. 5 par. 4 sub-par. 1.

⁹⁷ "Another People Smuggling Case Falls Over, as Government Changes Approach," *loc. cit.*

played a role in acquiring boarding pass for the illegal migrants so they could fly from Bangkok to London. This case is processed in Crown Court Isleworth, UK. In Crown Court, the five convicts were punished with five to six years of imprisonment.

Regarding the application of human smuggling provisions; in the first instance court, the five applicants were punished with varied verdict for each of individuals from five to six years of imprisonment. Such punishment is a result from the application of Article 25 regarding the acts of facilitating immigration law violation⁹⁸ by non-citizen of the European Union. This Article is used to criminalize migrants smuggling.⁹⁹ During the appeal of the application of Article 25, the judges only considered the first element as a basic element from this article, therefore by the non-fulfillment of that element there is no further need to prove other elements. The said element is "committing an act which facilitates the violation of immigration law by non-citizen of European Union."

Firstly, to apply the whole element of this article, there must be an appointment of which immigration law being violated.¹⁰⁰ In this case, in the first instance court, the defendant (previously the applicant), did not appoint of which immigration law being violated.¹⁰¹ Rather, the defendant directly appointed one of the definitions of immigration law as enshrined in Article 25 paragraph (2) namely the law which influences a state party and regulate, in few matters or all people who are the citizens of the state parties, a right to enter the territory of the state parties. In other words, the immigration law determines whether someone enters the UK legally or not.¹⁰² In this case, as interpreted by the judges through Article 11 of Immigration Act 1971, it was explained that asylum seekers who encounter immigration officials in the airports and in the process of asylum claim cannot be categorized as enter illegally. By that virtue, it

⁹⁸ Immigration Law is a law which influences a state party and regulates certain matter over non-citizens of state parties, a right to enter, transit or remain in the territory of the state parties. See United Kingdom, *Immigration Act 1971*, Art. 25 par. 2.

⁹⁹ Sue Conlan, "Human Smuggling, Migration, and Human Rights: A UK Perspective", *The International Council for Human Rights Review Meeting on Migration: Human Rights Protection of Smuggled Person* (Geneva, 2005), pg. 7.

¹⁰⁰ "Human Trafficking and Smuggling," http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/, accessed on 9 Juni 2013.

¹⁰¹ Kapoor & Ors v. The Crown, [2012] EWCA Crim 435, par. 7.

¹⁰² "Human Trafficking and Smuggling," *loc. cit.*

is correct when the judges declare that this element is not fulfilled.

From the above analysis, it can be seen that UK differentiates the application of criminalization of migrants smuggling article according political interest. In case of migrants smuggling, there are two articles that can be used namely Article 25 regarding the facilitation to illegal migration or more well-known as general offence and Article 25 A regarding the facilitation to asylum seeker.¹⁰³ However, these articles are not based on criminalization of migrants smuggling in Migrants Smuggling Protocol, rather based on other international law instrument as previously stipulated in Schengen Convention, European Union Directives, serta Refugee Convention.¹⁰⁴

Referring to the three analysis of the cases above, it can be seen that the implementation of criminalization of migrants smuggling provisions as obliged by the Migrants Smuggling Protocol is not yet effective. From the provisions themselves, there have been some verbal compliance except by UK which is more focused on refugee issues. However from the application within the cases there are still some difficulties in interpreting certain provisions in few countries. This has blurred the purpose of migrants smuggling criminalization itself, regarding who are supposed to be punished and the ones who are not.

VI. CONCLUSION

- a. States started to tighten their immigration policy causing the rise of fee to acquire permit to reside or work in other countries. This is later used by groups of organized crimes to gain benefit from such situation. Those groups then determine the routes as well as types to smuggle those migrants. The trend of migrants smuggling practice committed by the organized crime groups raises the international community's awareness regarding the importance of international law instrument to combat any kinds of Transnational Organized, one of which is migrants smuggling.
Through United Nations Convention against Transnational Organized Crime and the three other protocols, one of which is Protocol against

¹⁰³ *Ibid.*, par. 38.

¹⁰⁴ "Human Trafficking," *loc. cit.*

the Smuggling of Migrants by Land, Sea, and Air, which contain the obligations to state parties to combat Transnational Organized Crime as well as migrants smuggling through various kinds of international cooperation and criminalization.

- b. The obligation to criminalize is one of the most important points in UNCTOC and Migrants Smuggling Protocol. In accordance with the purpose of combating Transnational Organized Crime, states are obliged to criminalize every kinds of Transnational Organized Crime, one of which is through repressive measures namely criminalizing the concerned acts. Transnational Organized Crimes which are ought to be criminalized by UNCTOC namely criminalization for participation in Transnational Organized Crime groups, criminalization for laundering of the proceeds of the crime, criminalization for corruption and criminalization for disruption of court proceeding.

Aside from criminalization which is obliged by the convention and every complimentary protocol, UNCTOC also obliges criminalization of more specific crimes for example in Migrants Smuggling Protocol. Migrants Smuggling Protocol does not only oblige the state parties to criminalize migrants smuggling but also other related acts such as documents forgery, aid and attempt on criminalization of migrants smuggling, as well as the aggravating circumstances in migrants smuggling. Such provisions contain the elements which define an act to be deemed as migrants smuggling and therefore can be criminalized. One of the most important things in criminalization of migrants smuggling is that migrants smuggling criminalization does not criminalize the migrants, rather the smugglers.

In implementing the above-mentioned obligations, Indonesia, Australia and UK observe different ways. Indonesia, in implementing the obligation to criminalize migrants smuggling has completely implemented the elements contained in the article of criminalization of migrants smuggling in Migrants Smuggling Protocol. Aside from that, Indonesia has also explicitly incorporated non-criminalization to migrants through Article 136 of Law No. 6 of 2011.

Different from Indonesia, Australia implements a stricter regulation in criminalizing migrants smuggling by eliminating the element

of “purpose of financial benefit.” Australia has its own justification by referring to the provisions of UNCTOC stating that what is governed in UNCTOC shall be seen as provisions with minimum standard and as such state parties can tighten the regulations in their respective countries.

Different from Indonesia and Australia which have adapted its national regulations towards criminalization of migrants smuggling, UK on the other hand had not done so although UK is a state party to UNCTOC and Migrants Smuggling Protocol. The policies to criminalize migrants smuggling are still considered as violation of general immigration law. According to the writer’s view, UK, a country of destination of the migration, should have bigger awareness in terms of status and handling of the asylum seekers, however there is no special policy designed to criminalize migrants smuggling.

- c. The implementation of criminalization of migrants smuggling provisions in the three countries are still of particular issues. In Indonesia, the provisions of criminalization still face hindrances in its enforcement in judiciary level. Judges have understood how to apply the elements of the article however in making decisions, where the judges feel to be confined since there is the limitation of the minimum punishment. The judges feel that this provision is too rigid and against their conscience. On the other hand, if the judges consideration is based on conscience, such will cause the deterrent effect to be not achievable.

Different with Australia, the provisions of migrants smuggling is still considered as new and as such there are differences in the interpretation of the provisions of the migrants smuggling in Australia. Meanwhile in UK, since there has been no specific regulation on migrants smuggling, it is difficult to punish the smugglers for the acts they have committed. This has caused the existence of many cases which are purely migrants smuggling cases and cannot be criminalized by provisions of assistance of asylum seeking, but would be too general if charged only with provision of regular immigration violation.