

Development Law in Law Enforcement: Effective Strategies in Dealing with Refugee Smuggling

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Abstract

The complex issue of human smuggling and refugees presents challenges for law enforcement officials in Indonesia. This study analyzes the effectiveness of law enforcement against cases of smuggling of mania, especially refugees, from the perspective of development law theory. Normative juridical research methods with legal and conceptual approaches. The research results show that human smuggling has been regulated in a special regulation through Emergency Law No. 8 of 1995 and Law No. 9 of 1992 concerning Immigration. However, the two laws and regulations only regulate the issue of immigration violations, so it is not possible to ensnare perpetrators of human smuggling crimes. On the other hand, the government's response efforts through Law Number 6 of 2011 are still ineffective in tackling human smuggling. In the context of Development Law Theory, there are strategies for effectiveness in handling the enforcement of refugee smuggling laws in Indonesia in the future, namely The Importance of Regulatory Reform in Dealing with Refugee Smuggling, Discretion in Law Enforcement, Decisions Based on Morals and Social, and



the Importance of International Cooperation in Handling Refugee Smuggling, as well as the Empowerment of Law Enforcement Officials

KEYWORDS

Development Law, Law Enforcement, Refugee Smuggling.

Introduction

Human smuggling will continue to grow in the 21st century as a result of economic and demographic inequality in the world, the emergence of conflicts, wars, and possible climate change.¹ Human smuggling itself has a meaning; that is, the process of entering citizens into other countries using methods that are not according to the applicable rules.² One of the factors causing the increase in human smuggling cases in Indonesia every year is the geographical condition of Indonesia as an archipelagic country, which has many small islands close to other countries. The three countries of origin of illegal immigrants that are most in Indonesia are Afghanistan, Iran, Pakistan, and, most recently, the Rohingya.³

The latest case of smuggling has emerged recently in Aceh province, where many Rohingya have fled their homes in Myanmar due to conflict and are seeking refuge in neighboring countries, including Indonesia.⁴ The wave of Rohingya refugees that continues to arrive in Aceh Province makes people curious about the total number of Rohingya refugees in Indonesia.

¹ Evi Masrifatin Silvia, "Upaya Penanggulangan Kasus Perdagangan Dan Penyelundupan Manusia Sebagai Kejahatan Transnasional Terorganisir," *Inicio Legis* 1, no. 1 (2020): 1–17, <https://doi.org/10.21107/il.v1i1.8821>.

² Siti Nurhalizah Takdir, "Ancaman Keamanan Maritim Indonesia: Studi Kasus Penyelundupan Manusia Di Pulau Bengkalis (Indonesia-Malaysia)," *Jurnal Hukum, Politik Dan Ilmu Sosial* 1, no. 4 (2022): 129–38, <https://doi.org/10.55606/jhps.v1i4.692>.

³ Muhar Junef, "Kajian Praktik Penyelundupan Manusia Di Indonesia," *Jurnal Penelitian Hukum De Jure* 20, no. 1 (2020): 85, <https://doi.org/10.30641/dejure.2020.v20.85-102>.

⁴ Patriandi Nuswantoro and Rerim Maulinda, "Pengaruh Persepsi Masyarakat, Identitas Budaya Dan Tingkat Akulturasi Pada Proses Adaptasi Migran Rohingya Di Lingkungan Baru Aceh, Indonesia" 1, no. 01 (2023): 10–20, <https://doi.org/https://doi.org/10.58812/sish.v1i01.300>.

Currently, as of December 10, 2023, the number of Rohingya refugees entering Indonesian territory has reached 1,684 people. This was revealed by the *United Nations High Commissioner for Refugees* (UNHCR) representative in Indonesia.⁵

The arrival of Rohingya refugees in Aceh Province, Indonesia, continues to cause polemics. On behalf of the Aceh Care Youth Students (MPPA), several youths also held a rally at the Simpang Roundabout in Banda Aceh city. Head of Ulee Madon Village, Muara Batu District, North Aceh Regency Rahmat Kartolo said that the residents refused the arrival of the refugees because they often made trouble and did not comply with village regulations.⁶ This incident is the main factor why the community, including the local government, is increasingly convinced to reject the presence of Rohingya refugees in their area. Previously, several incidents had occurred, such as Rohingya refugees who unknowingly escaped from the shelter camp after being given facilities; refugees who flee do not maintain cleanliness and did not comply with the norms and customs of the local community; and cases such as rape of a minor committed by one of the Rohingya refugees.⁷

For this polemic, the Banda Aceh Police succeeded in arresting Man MA (35), who was designated as a suspect for being involved in a human smuggling case; the MA is also known to be an ethnic Rohingya. He was named as a suspect after the police conducted an investigation related to the arrival of a boat carrying 137 ethnic Rohingya people on the coast of Blang Ulam Hamlet, Lameh Village, Mesjid Raya District, Aceh Besar Regency, Aceh Province, on December 10, 2023. Banda Aceh Police Chief, Kombes Pol Fahmi Irwan Ramli After being interrogated, ethnic Rohingya residents

⁵ Nada Naurah, "Kedatangan Pengungsi Rohingya Jadi Polemik Di RI, Ada Dugaan Perdagangan Manusia," Goodstats.id, 2023. {acceses-05-november-2024}

⁶Sari Hardiyanto Alinda Hardiantoro, "Polemik Penampungan Pengungsi Rohingya Di Indonesia, Ditolak Warga Tapi Dipuji UNHCR," Kompas.com, 2023. {acceses-04-november-2024}

⁷ Chairussani Abbas Sopamena, 'Rohingya Refugees and Potential Conflict & Horizontal Plurality in Aceh', *Jurnal Caraka Prabu*, 7.2 (2023), 85-115 <<https://doi.org/10.36859/jcp.v7i2.1927>>.

who want to leave the camp in Bangladesh and sail to Indonesia are charged 100,000-120,000 Taka or around Rp14-16 million per person.⁸ As for the latest, the Banda Aceh Police Satreskrim named two new suspects for the two suspects, namely MAH (22), a Bangladeshi citizen, and HB (53), Myanmar. Alleged human smuggling crimes against 137 ethnic Rohingya who landed in Aceh Besar. The suspects are subject to Article 120 paragraph (1) of Law Number 6 of 2011 concerning Immigration Jo articles 55 and 56 of the Criminal Code.^{9,10} Monopillites' efforts in optimizing law enforcement in their causative functions require the role of various elements in order to prevent a greater increase in the smuggling and trafficking of persons, so it is important to know the forms of practice (*modus operandi*).¹¹

The complexity of the issues surrounding human smuggling and refugees also presents challenges for law enforcement officials in law enforcement efforts against human smugglers and refugees.¹² Indonesia does not have a complete map and scope of human smuggling crimes, which impacts the non-optimal law enforcement process against human smuggling perpetrators. Human smuggling has been regulated in a specific regulation through "Emergency Law No. 8 of 1995" and "Law No. 9 of 1992 on Immigration". However, the two laws and regulations only regulate the issue of immigration violations, so it is not possible to ensnare perpetrators of human smuggling crimes. Finally, in 2011, the Government of Indonesia regulated human smuggling through the Immigration Law. However, just like the previous provisions, this Law is still considered ineffective in tackling human smuggling, and there are still many obstacles contained in

⁸ Anugrah Andriansyah, "Polisi Tetapkan Satu Pengungsi Rohingya Jadi Tersangka Penyelundupan Manusia.," *voaindonesia.com*, 2023. {acsses-04-november-2024}

⁹ Khairina zuhri Noviandi, "Polisi Tetapkan 2 Tersangka Baru Penyelundupan Etnis Rohingya Ke Aceh.," *Kompas.com*, 2023. {acsses-15-november-2024}

¹⁰ KementrianPANRB, "Atasi Pengungsi Rohingya, Indonesia Buru Pelaku Penyelundupan Orang.," *menpan.go.id*, 2023. {acsses-05-desember-2024}

¹¹ Nanda Ivan Natsir, "Kebijakan Aplikatif Tindak Pidana Perdagangan Orang (Human Trafficking)," *Jurnal Jatiswara* 34, no. 1 (2019): 72, <https://doi.org/10.29303/jatiswara.v34i1.197>.

¹² Tanius Sebastian, "Masalah Metodologis Ilmu Hukum Indonesia," *Veritas et Justitia* 4, no. 1 (2018): 59–87, <https://doi.org/10.25123/vej.2913>.

this provision.¹³ This creates legal uncertainty and opportunities for conflict between Acehese and Rohingya citizens due to the lack of supervision and the presence of the state in the territorial area so that it is easy for foreigners to enter.¹⁴

Some of the previous research conducted by Arjuna Al Ichsan Siregar titled "Restorative Justice as an Effort to Strengthen the Law Enforcement System Against Refugee Smuggling Perpetrators."¹⁵ Then Muhar June, "A Study of Human Smuggling Practices in Indonesia." As for Aime Zinedine Zack Sumolang, "Handling of Victims of Human Trafficking and Human Smuggling According to Law Number 6 of 2011 concerning Immigration."¹⁶ Meanwhile, Yasmirah Mandasari Saragih's "Law Enforcement Against Human Smuggling Perpetrators to Indonesia."¹⁷ Research by Shofy Ufairah Syarifah and Hasan Sidik, Cooperation between the European Union and Libya in Handling Human Trafficking Against Migrants 2017-2020.¹⁸ And Udiyo Basuki Law Enforcement for Human Rights Crimes.¹⁹ It can be seen from the title of the results of previous research that the material is very clear with this research research. Therefore, encouraging the author to further research related to law enforcement against human smuggling

¹³ Adi Papa et al., "Penguatan Kebikjaksanaan Imigrasi Dalam Pencegahan Tindak Pidana Penyelundupan Manusia Lintas Negara Macam Kejahatan Transnasional Yang Salah Satu Nya Adalah Perdagangan Dan Penyelundupan" 1, no. 6 (2023): 748–57.

¹⁴ Anggie Rizqita Herda Putri and Ridwan Arifin, 'Legal Protection for Victims of Human Trafficking in Indonesia (Legal Protection for Victims of Human Trafficking Crimes in Indonesia)', *Res Judicata*, 2.1 (2019), 170 <<https://doi.org/10.29406/rj.v2i1.1340>>.

¹⁵ Arjuna Al Ichsan Siregar, Muhammad Endriyo Susila, and Indra Firmansyah, "Keadilan Restoratif Sebagai Upaya Penguatan Sistem Penegakan Hukum Terhadap Pelaku Penyelundupan Pengungsi," *Jurnal Hukum Ius Quia Iustum* 29, no. 3 (2022): 567–90, <https://doi.org/10.20885/iustum.vol29.iss3.art5>.

¹⁶ Aime Zinedine Zack Sumolang, "Penanganan Terhadap Korban Perdagangan Orang Dan Penyelundupan Manusia Menurut Undang-Undang Nomor 6 Tahun 2011 Tentang Keimigrasian," *Lex Et Societatis* 8, no. 2 (2020): 16–24, <https://doi.org/10.35796/les.v8i2.28486>.

¹⁷ Yasmirah Mandasari Saragih, Ahmad Zaharuddin Sani, and Roziya Abu, "Penegakan Hukum Terhadap Pelaku Penyelundupan Manusia Ke Indonesia," *Jurnal Usm Law Review* 4, no. 1 (2021): 161, <https://doi.org/10.26623/julr.v4i1.3311>.

¹⁸ Shofy Ufairah Syarifah and Hasan Sidik, "Kerja Sama Uni Eropa Dan Libya Dalam Penanganan Perdagangan Manusia Terhadap Migran 2017-2020," *Jurnal ICMES* 6, no. 2 (2022): 125–47, <https://doi.org/10.35748/jurnalicmes.v6i2.135>.

¹⁹ Udiyo Basuki, "Penegakan Hukum Atas Tindak Pidana Perdagangan Orang Perspektif Hak Asasi Manusia," *Varia Justicia* 13, no. 2 (2017): 132–46, <https://doi.org/10.31603/variajusticia.v13i2.1887>.

perpetrators in Indonesia based on the concept of Development Law Theory, it is necessary to know that Law, in the sense of legal rules or regulations, can indeed function as a regulatory tool or a means of development in the sense of channeling the direction of human activities that are desired towards reform. With the above problems, what are the legal implications for refugee smuggling from a positive perspective? Second, according to development law theory, what is the strategy to strengthen the law enforcement process against refugee smugglers in Indonesia in the future?

Methods

This study uses a juridical normative law research method, which focuses on the analysis of written legal norms as the main material of the study. Data is collected through library research by browsing relevant legal literature in the form of laws and regulations, official documents, and supporting scientific works.²⁰ The approach used in this study combines a statute approach and a conceptual approach. The legislative approach is carried out by examining the applicable positive legal provisions, while the conceptual approach is used to understand theoretical and philosophical legal concepts as an argumentative basis in analyzing the legal issues being studied. The type of data used in this study is secondary data, with primary legal materials, namely authoritative legal sources such as relevant laws, regulations, and international legal instruments; secondary legal materials, in the form of scientific explanations from experts, legal journals, textbooks, and previous research results that support the understanding of primary legal materials; Tertiary legal materials, such as legal dictionaries, encyclopedias, and indexes that function to help search for other legal

²⁰ Herman Herman, Oheo K Haris, and Syahbudin Syahbudin, "Criminal Law Aspect of Illegal Transshipment Under Act Number 45 of 2009 Concerning Fisheries," *Yuridika* 36, no. 2 (2021): 295, <https://doi.org/10.20473/ydk.v36i2.23225>.

materials. This research method and approach will provide an in-depth and comprehensive analysis of the legal problems raised.

Result and Discussion

1. Legal Implications for Refugee Smuggling Reviewed From Positive Law

According to Wayne La-Fave, enforcement is a process that is essentially the application of discretion that connects to making a decision that is not expressly regulated by legal rules but has its element of judgment, which, in essence, discretion is between Law and morality (ethics in a narrow sense), based on this explanation it can be said that interference with law enforcement can be created if there is no harmony between the "Tri Single" which is a value, attitudes, and behavior patterns, where the disturbance occurs when there is a misalignment between the paired values, which transform in conflicting rules and bad behavior patterns that interfere with social life. Therefore, law enforcement is not solely an implementation of legislation.²¹

The Law will have no meaning if its orders cannot be carried out; human efforts and actions are needed so that the orders and coercion that potentially exist in the regulations can become manifest,²² Because law enforcement cannot be judged the same as providing justice because people can enforce the Law but in a different way²³. Criminal Law is one of the many laws regulating life's order.²⁴ Even though it is one of the many laws that maintain order in life, criminal Law should be placed last on the list of

²¹ Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum* (Depok: Rajawali Press, 2021). [9]

²² Ahmad Jamaludin, "Kebiri Kimia Sebagai Sanksi Tindakan Dalam Double Track System," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 15, no. 2 (2021): 63–80, <https://doi.org/10.15575/adliya.v15i2.13910>.

²³ Zainuddin Ali, *Sosiologi Hukum* (Jakarta: Sinar Grafika, 2019). [23]

²⁴ Nimerodi Gulo, "Disparitas Dalam Penjatuhan Pidana," *Masalah-Masalah Hukum* 47, no. 3 (2018): 215, <https://doi.org/10.14710/mmh.47.3.2018.215-227>.

solutions to societal problems (*ultimatum medium*).²⁵ Even though it is an ultimate remedy, criminal Law is often unsatisfactory for the parties involved in the problem.²⁶ However unsatisfactory it may be for the parties, criminal Law is still necessary as long as Earth still exists and is inhabited by Man.²⁷ Of Law cannot stand alone, meaning he cannot realize the promises and wills in the Law.²⁸ Such promises and wills, for example, give a person the right to protect a person from imposing a criminal penalty on someone who meets certain requirements. Law enforcement can be carried out by humans, but because this law enforcement is carried out and aimed at human behavior, it is necessary to know how human behavior is.²⁹ This human act is due to the bond and response from their environment.³⁰

In terms of legal substance, for Indonesia, the problem of refugee smuggling is separate because Indonesia has not yet had a special law on refugees, including law enforcement or criminalization of refugee smuggling perpetrators.^{31,32} Indonesia has not yet signed the 1951 Convention on Refugees or the 1967 Protocol on the Status of Refugees, so the two international agreements do not directly bind it and have no

²⁵ Betania Fransiska Sitanggang and Irma Cahyaningtyas, "Penanganan Perkara Anak Dalam Perspektif Jaksa Penuntut Umum," *Jurnal Pembangunan Hukum Indonesia* 2, no. 1 (2020): 66–81, <https://doi.org/10.14710/jphi.v2i1.66-81>.

²⁶ Khilmatin Maulidah and Nyoman Serikat Putra Jaya, "Kebijakan Formulasi Asas Permaafan Hakim Dalam Upaya Pembaharuan Hukum Pidana Nasional," *Jurnal Pembangunan Hukum Indonesia* 1, no. 3 (2019): 281–93, <https://doi.org/10.14710/jphi.v1i3.281-293>.

²⁷ Muhammad Nurul Huda, *Hukum Pidana Internasional, Forum Kerakyatan, Pekanbaru* (Jakarta: PT CitraAditiya Bakti, 2018).[142]

²⁸ Syamsul Fatoni, "Fungsionalisasi Nilai Islam Dan Local Wisdom Dalam Pembaruan Hukum Pidana," *Justicia Islamica* 16, no. 1 (2019): 21–40, <https://doi.org/10.21154/justicia.v16i1.1598>.

²⁹ Satjipto Raharjo, *Penegakan Hukum Progresif, Kompas* (Yogyakarta: Cahaya Atma Pustaka, 2015).[42]

³⁰ Yudi Krismen, "Pertanggungjawaban Pidana Korporasi Dalam Kejahatan Ekonomi," *Jurnal Ilmu Hukum* 5, no. 1 (2014): 61, <https://doi.org/10.30652/jih.v4i1.2089>.

³¹ Muhammad Alvi Syahrin et al., "Juridical Argumentation in Limiting the Non-Refoulement Principle for Refugees: A Study of Immigration Policy and Indonesian State Sovereignty," *Journal of Infrastructure, Policy and Development* 8, no. 8 (August 2024): 6423, <https://doi.org/10.24294/jipd.v8i8.6423>.

³² M Alvi Syahrin, M Rafly Qalandy, and M Syaran Jafizhan, "In Search of Durable Solutions for Refugees in Indonesia: A State Security and Human Rights Protection Approach," *The Age of Human Rights Journal*, no. 22 (April 2024), <https://doi.org/10.17561/tahrj.v22.8255>.

obligation to make specific refugee regulations.³³

On the other hand, Indonesia is very open to assisting refugees with human rights considerations, as per the mandate of the 1945 Constitution, including the Law on Human Rights (HAM).³⁴ So far, law enforcement against the perpetrators of refugee smuggling has been fully equated with handling the crime of human smuggling as stipulated in Article 120 of the Immigration Law.³⁵

In general, the 1951 Convention and the 1967 Protocol only regulate the model of handling refugees in all countries, especially for those signatories to the convention. This international provision related to refugees does not detail what kind of law enforcement can be carried out against perpetrators of smuggling refugees to other countries. However, the guidebook and guidelines for determining refugee status published by UNHCR in 2011 also describe serious non-political crimes related to refugees, including crimes that are contrary to human rights principles, such as terrorism.^{36,37} The crime of refugee smuggling can also be categorized as a serious non-political crime that is contrary to a set of international laws. Legal proceedings that can be carried out against refugee smugglers who are foreign nationals are subject to the criminal legal process applicable in the destination country of refuge.³⁸

³³ Dio Herdiawan Tobing, "Connecting the Obligation Gap: Indonesia's Non-Refoulement Responsibility Beyond the 1951 Refugee Convention," *Asian Journal of Law and Society* 8, no. 3 (October 2021): 521–35, <https://doi.org/10.1017/als.2021.7>.

³⁴ Firdaus Firdaus, Okky Chahyo Nugroho, and Oksimana Darmawan, "Alternatif Penanganan Deret Tunggu Terpidana Mati Di Lembaga Pemasyarakatan Dalam Konstruksi Hak Asasi Manusia," *Jurnal HAM* 12, no. 3 (2021): 503, <https://doi.org/10.30641/ham.2021.12.503-520>.

³⁵ Bani Syarif Maula, "Examining the Handling of Rohingya Refugees in Indonesia through the Lens of International Law and Maqāsid Al-Shari'ah: An Exploration of Islamic Humanitarianism," *Mazahib* 23, no. 1 (June 2024): 1–40, <https://doi.org/10.21093/mj.v23i1.7942>.

³⁶ Elif Gökşen, "Proportionality in Refugee Exclusion," *Journal of International Criminal Justice* 18, no. 5 (May 2021): 1131–56, <https://doi.org/10.1093/jicj/mqaa056>.

³⁷ N Djordjevic, "Exclusion under Article 1F(b) of the Refugee Convention: The Uncertain Concept of Internationally Serious Common Crimes," *Journal of International Criminal Justice* 12, no. 5 (December 2014): 1057–74, <https://doi.org/10.1093/jicj/mqu059>.

³⁸ A T Gallagher Ao and F David, *The International Law of Migrant Smuggling, The International Law of Migrant Smuggling* (Centre for International and Public Law,

The regulation of refugee problems in Indonesia is regulated in the Presidential Regulation of the Republic of Indonesia (Perpres) Number 125 of 2016 concerning the Handling of Refugees from Abroad. This regulation is a follow-up to Article 27 of Law Number 37 of 1999 concerning Foreign Relations, which observes that the President establishes regulations related to the issue of refugees from abroad whose main arrangements are regulated through a Presidential Decree.³⁹ Article 1 number (1) of Presidential Decree Number 125 of 2016 defines refugees as follows: "Refugees from abroad, hereinafter referred to as Refugees, are foreigners who are in the territory of the Unitary State of the Republic of Indonesia due to a justified fear of persecution on the grounds of race, ethnicity, agafarta', nationality, membership of certain social groups, and different political opinions and do not want protection from their country of origin and/or have obtained asylum seeker status or refugee status from the United Nations through the High Commission for Refugee Affairs in Indonesia."

This Presidential Regulation does not regulate in detail the mechanism for handling the criminal case of refugee smuggling. There is only 1 article, namely Article 41, which deals with smuggling, which reads in detail, "Handling of Refugees at all stages is carried out by separating Refugees from human smuggling groups." The legal vacuum related to law enforcement against refugee smugglers indirectly ultimately refers to the regulation of human smuggling or migrant smuggling as regulated in the Immigration Law.^{40,41} The definition related to human smuggling itself is

Australian National University, Australia: Cambridge University Press, 2014), <https://doi.org/10.1017/CBO9781139059619>.

³⁹ I Nyoman Prabu Buana Rumiarta and I Gusti Agung Mas Rwa Jayantiari, "Fulfilling Right to Education for Rohingya Refugee Children in Indonesia," *The Age of Human Rights Journal*, no. 21 (October 2023): e7659, <https://doi.org/10.17561/tahrj.v21.7659>.

⁴⁰ Yvon Dandurand and Jessica Jahn, "The Failing International Legal Framework on Migrant Smuggling and Human Trafficking," in *The Palgrave International Handbook of Human Trafficking*, vol. 1 (Cham: Springer International Publishing, 2020), 783–800, https://doi.org/10.1007/978-3-319-63058-8_47.

⁴¹ Roxane De Rebetz and Pınar Ölçer, "Aggravated Migrant Smuggling in a Transit Migration Context, Criminal Victimization under ECtHR Positive Obligations Case Law,"

regulated in Article 1 number (32), which reads: "An act that aims to seek profit, either directly or indirectly, for oneself or for another person who brings a person or group of people, either organized or unorganized, or orders another person to bring a person or group of people, either organized or unorganized, who does not have the legal right to enter Indonesian territory or leave Indonesian territory and/or enter the territory of another country where the person does not have the right to enter the territory legally, either by using legal or false documents or without using travel documents, whether through immigration or otherwise."

Meanwhile, criminal threats related to human smuggling are regulated in Article 120, paragraphs (1) and (2), which reads, "(1) Any person who commits an act aimed at seeking profit, either directly or indirectly, for himself or others by bringing a person or group of people, whether organized or unorganized, or ordering another person to bring a person or group of people, whether organized or unorganized, who does not have the legal right to enter the territory of Indonesia or exit the territory of Indonesia and/or enter the territory of another country, for which the person does not have the right to enter the territory legally, either by using valid or forged documents or without using a Travel Document, whether through immigration checks or not, convicted of Human Smuggling with a minimum prison sentence of 5 (five) years and a maximum of 15 (fifteen) years and a fine of at least Rp. 500,000,000.00 (five hundred million rupiah) and a maximum of Rp. 1,500,000,000.00 (one billion five hundred million rupiah).⁴²

(2) Attempt to commit the crime of Human Smuggling shall be punished with the same penalty as intended in paragraph (1)." As explained at the beginning, the UNHCR distinguishes between refugees and migrants. Refugees are those who are forced to flee because of the threat of

Annales de La Faculté de Droit d'Istanbul, no. 71 (December 2022): 0–0, <https://doi.org/10.26650/Annales.2022.71.0009>.

⁴² Eka Annisa Salam, "Penegakan Hukum Tindak Pidana Penyelundupan Manusia (People Smuggling) Dalam Hukum Positif Indonesia," *Jurnal Pemuliaan Hukum* 3, no. 1 (2020): 9–20, <https://doi.org/10.30999/jph.v3i1.1024>.

persecution and because they feel that their country of origin no longer provides any protection,⁴³ Migrants go from their country of destination to various countries of destination for various reasons unrelated to persecution, such as work, family, or educational purposes.⁴⁴ This difference in meaning certainly has a quite serious impact on the law enforcement process. The ambiguity of the regulation of refugee smuggling and migrant smuggling in the Immigration Law is quite confusing for law enforcement officials when processing criminal cases of refugee smuggling, especially to provide the most fair punishment to the perpetrators.⁴⁵ Not a few judges exercise discretion and impose penalties under the special minimum threat stipulated in the Immigration Law to the perpetrators of refugee smuggling after considering various social facts in the field.

Several research results related to the practice of human smuggling and refugees show that many actors play a role in the process of transporting migrants and refugees from their country of origin to their destination country. Some actors act as regulators, carriers, supporting actors, collectors or fund holders, and parties who act as protectors. Other research differentiated the role of the perpetrators by grouping them into suppliers or service providers, recruiters, order recipients, guides, and supporters. However, the legal basis for punishing human smugglers and refugees in Indonesia only refers to one article in the Immigration Law, namely Article 120. The Law does not expressly regulate. Differentiation of punishments that should be given to the perpetrators of refugee smuggling according to their respective roles so that it has the potential to violate the principle of

⁴³ Icha Rachma Mutiara Fitri, Jehan Irianti Bektie Yepese, and Mochamad Gozzi Arofah, "Prinsip Non-Refoulement Penanganan Pengungsi Dan Relevansinya Dalam Perspektif Kebijakan Selektif Keimigrasian," *Jurnal Ilmiah Universitas Batanghari Jambi* 24, no. 1 (February 2024): 143, <https://doi.org/10.33087/jiubj.v24i1.4609>.

⁴⁴ Putri Galuh Pitaloka et al., "Optimalisasi Hukum Untuk Hak-Hak Perlindungan Anak Buah Kapal Migran Dan Memerantas Agensi Ilegal," *Mandub : Jurnal Politik, Sosial, Hukum Dan Humaniora* 2, no. 1 (2023): 56–70, <https://doi.org/10.59059/mandub.v2i1.855>.

⁴⁵ Mahrus Ali, Irwan Hafid, and Kurnia Dewi Anggraeny, "Criminalization Based on the Principle of Human Rights Limitation," *Jurnal Hukum Novelty* 13, no. 1 (2022): 98–108, <https://doi.org/10.26555/novelty.v13i1.a23606>.

justice in the Law. On the other hand, many public prosecutors, in their indictments and demands, finally do not use a single article (Article 120 of the Immigration Law) against the perpetrators of human smuggling and refugees but exercise discretion by associating their threats and criminal charges with Articles 55, 56, and 57 of the Criminal Code.⁴⁶ To simply distinguish the criminal burden for the perpetrator with the category of person who commits. Assisting in committing, directing, encouraging, or instructing others to commit criminal acts or assisting in the criminal act of human smuggling and refugees.

2. Strategic Analysis to Strengthen the Law Enforcement Process Against Refugee Smuggling in Indonesia According to Development Law Theory

Mochtar Kusumaatmadja argues that the Law is a tool to maintain order in society.⁴⁷ Given⁴⁸ The nature of the Law is essentially conservative, meaning that the Law maintains and maintains what has been achieved.⁴⁹ This function is necessary for every society, including the developing community, because results must be maintained, protected, and secured.⁵⁰ However, in a society that is developing, which means a society that is changing rapidly, the Law does not have enough to have such a function.⁵¹ He must also be able to help

⁴⁶ Bastianto Nugroho, "Peranan Alat Bukti Dalam Perkara Pidana Dalam Putusan Hakim Menurut Kuhap," *Yuridika* 32, no. 1 (2017): 17, <https://doi.org/10.20473/ydk.v32i1.4780>.

⁴⁷ Shidarta Shidarta, "Bernard Arief Sidharta: Dari Pengembangan Hukum Teoretis Ke Pembentukan Ilmu Hukum Nasional Indonesia," *Undang: Jurnal Hukum* 3, no. 2 (2020): 441-76, <https://doi.org/10.22437/ujh.3.2.441-476>.

⁴⁸ Harifin A. Tumpa, "Penerapan Konsep Rechtsvinding Dan Rechtsschepping Oleh Hakim Dalam Memutus Suatu Perkara," *Hasanuddin Law Review* 1, no. 2 (2015): 126, <https://doi.org/10.20956/halrev.v1n2.90>.

⁴⁹ I Gusti Bagus Suryawan, "Undang-Undang Sebagai Sarana Pembaharuan Bagi Masyarakat (Telaah Sosiologis Keberlakuan Undang-Undang Nomor 6 Tahun 2014 Tentang Desa)," *Hasanuddin Law Review* 1, no. 1 (2015): 17, <https://doi.org/10.20956/halrev.v1n1.37>.

⁵⁰ E. Fernando M. Manullang, "Subjek Hukum Menurut Hans Kelsen Dan Teori Tradisional: Antara Manipulasi Dan Fiksi," *Jurnal Hukum Dan Peradilan* 10, no. 1 (2021): 139, <https://doi.org/10.25216/jhp.10.1.2021.139-154>.

⁵¹ Suryawan, "Undang-Undang Sebagai Sarana Pembaharuan Bagi Masyarakat (Telaah Sosiologis Keberlakuan Undang-Undang Nomor 6 Tahun 2014 Tentang Desa)."

the process of changing society. An outdated view of the Law that emphasizes the function of maintaining order in a static sense and emphasizes the conservative nature of the Law assumes that the Law cannot play a meaningful role in the process of reform.⁵²

In the next development, the concept of development law is called "Development Law Theory." Furthermore, Mochtar Kusumaatmadja is of the view that Law is expected to function more, not only to ensure certainty and order but also as a "means of *social engineering*" or "means of development" with the following points of thought: *Law* is a "means of community renewal" based on the assumption that the existence of order or order in the business of development and renewal is something that is desirable or seen (absolutely) necessary.⁵³ Another⁵⁴ The assumption contained in the conception of Law as a means of renewal is that Law, in the sense of rules or legal regulations, can indeed function as a tool (regulator) or means of development in the sense of channeling the direction of human activities in the direction desired by development and renewal.

The core of the *Development Law Theory* created by Mochtar Kusumaatmadja is: (a) Order or order in the context of renewal or development is something desirable, even considered absolute; (b) Law in the sense of rules or legal regulations can indeed function as a regulatory tool or a means of development in the sense of channeling the direction of human activities that are desired towards reform.⁵⁵

⁵² Faizal Kurniawan, Erni Agustin, and Rizki Amalia, "Unsur Kerugian Dalam Unjustified Enrichment Untuk Mewujudkan Keadilan Korektif (Corrective Justice)," *Yuridika* 33, no. 1 (2018): 19, <https://doi.org/10.20473/ydk.v33i1.7201>.

⁵³ Zainal Arifin Mochtar, "Antinomi Dalam Peraturan Perundang-Undangan Di Indonesia," *Hasanuddin Law Review* 1, no. 3 (2015): 316, <https://doi.org/10.20956/halrev.v1n3.112>.

⁵⁴ Hamdan Zoelva, "Prospek Negara Hukum Indonesia: Gagasan Dan Realita," *Hasanuddin Law Review* 1, no. 2 (2015): 178, <https://doi.org/10.20956/halrev.v1n2.78>.

⁵⁵ Aris Irawan, "Hukum Islam Dalam Kerangka Pembaruan Hukum Pidana Di Indonesia, Dilihat Dari Perspektif Teori Hukum Pembangunan Mochtar Kusumaatmadja," *Al Hurriyah: Jurnal Hukum Islam* 4, no. 2 (December 2019): 98, <https://doi.org/10.30983/alhurriyah.v4i2.1571>.

Thus, one of the roles of Law in development is Law as a means of development control.⁵⁶ Development carried out by a country is a must because people's welfare can be improved. Because the development that is being and will be carried out in Indonesia covers a very wide range, a law is needed to cover all development activities being and will be carried out.⁵⁷ The role of Law as a tool of development is very necessary, both at the planning stage and implementation stage, as well as when control and supervision are carried out.⁵⁸ Related to this description, in realizing community welfare, at least it needs to be supported by at least three pillars, namely the state, in case the government, the Law, and the law enforcement apparatus. Furthermore, in order for law enforcement to be truly realized, the government establishes laws and regulations that are in favor of the wider community, in the sense that the material (substance) of the Law must contain the values of justice for the realization of community welfare,¹⁸ and based on the Mochtar Kusumaatmadja Development Law Theory, that Law in the sense of rules or legal regulations can indeed function as a regulatory tool or means of development in the sense of "*Law as a Tool of Social Engineering*,"⁵⁹ The regulation of legal products and supporting policies in enforcing human trafficking laws.

This situation encourages the need to reform Indonesia's legal system and be more responsive and adaptive to growing social problems, especially in the face of the phenomenon of refugee smuggling that is increasingly widespread. Within this framework, the Theory of Development Law introduced by Mochtar Kusumaatmadja is an important foundation for understanding how Law in Indonesia can be optimized to maintain order

⁵⁶ Lia Trizza et al., "Pembangunan Hukum Pada Aspek Budaya Hukum Masyarakat" 5 (2025): 3630–42, <https://doi.org/https://doi.org/10.31004/innovative.v5i1.18027>.

⁵⁷ Dwi Nur Setiawan and Zainal Arifin Hoesein, "Jurnal Retentum Implikasi Politik Hukum Dalam Pembangunan Ekonomi Di Indonesia Di Masa Depan Jurnal Retentum," 2025, 257–69, <https://doi.org/http://dx.doi.org/10.46930/retentum.v7i1.5287>.

⁵⁸ Muhammad Sabiq Balya et al., "Januari PEMBANGUNAN SISTEM HUKUM NASIONAL BERBASIS PADA NILAI-NILAI PANCASILA Januari" 4, no. 1 (2025): 37–49, <https://doi.org/https://doi.org/10.61863/gr.v4i1.48>.

⁵⁹ Ely Kusumastuti, "Penetapan Tersangka Sebagai Obyek Praperadilan," *Yuridika* 33, no. 1 (2018): 1, <https://doi.org/10.20473/ydk.v33i1.7258>.

and function as a tool for more just social reform. Development Law, according to Mochtar Kusumaatmadja, serves as a tool to create and renew social order in a developing society, where Law must be able to respond to changing social dynamics.⁶⁰ In the Indonesian context, this theory is particularly relevant in dealing with the challenges of refugee smuggling, especially regarding human rights and protecting vulnerable groups such as refugees.⁶¹

Law in Indonesia, although it functions as a means of maintaining order, must be able to adapt to social, economic, and political changes that occur in society.⁶² One example of the major changes that have occurred is the increasing number of refugees, as seen in the case of the Rohingya, which has led to new legal problems that have not been fully accommodated in existing regulations. Therefore, the Development Law encourages existing regulations to be more responsive to the development of social problems by ensuring that the protection of refugees and law enforcement against human smuggling can run more fairly and humanely.⁶³

Some legal experts believe that legal adaptation to social change is indispensable in the face of global problems such as refugee smuggling. Satjipto Rahardjo,⁶⁴ A leading legal expert in Indonesia said that the Law must be dynamic and not only focus on maintaining order but also be able to solve new problems that arise in society. Rahardjo emphasized that the

⁶⁰ Nor Fadillah, "Tinjauan Teori Hukum Pembangunan Mochtar Kusumaatmadja Dalam Undang-Undang Ibu Kota Negara (IKN)," *Supremasi Hukum: Jurnal Kajian Ilmu Hukum* 11, no. 1 (August 2022): 45–65, <https://doi.org/10.14421/sh.v11i1.2559>.

⁶¹ Kriswanto Kriswanto, "Harmonisasi Hukum Di Indonesia Dalam Perspektif Teori Hukum Pembangunan," *Istinbath: Jurnal Hukum* 19, no. 01 (August 2022): 37, <https://doi.org/10.32332/istinbath.v19i02.4763>.

⁶² Peni Jati Setyowati, "Fungsi Filsafat, Agama, Ideologi Dan Hukum Dalam Perkembangan Politik Di Indonesia," *Yuridika* 31, no. 1 (2016): 37, <https://doi.org/10.20473/ydk.v31i1.1957>.

⁶³ Ramaldy Krisna Indradipradana and Frieska Haridha, "Kebijakan Luar Negeri Indonesia: Studi Kasus Penerimaan Pengungsi Rohingya Asal Myanmar Tahun 2020-2022," *Indonesian Perspective* 8, no. 2 (December 2023): 211–36, <https://doi.org/10.14710/ip.v8i2.59246>.

⁶⁴ Irwan Safaruddin Harahap, "Perlindungan Hukum Terhadap Anak Korban Kejahatan Seksual Dalam Perspektif Hukum Progresif," *Jurnal Media Hukum* 23, no. 1 (2016): 37–47, <https://doi.org/10.18196/jmh.2015.0066.37-47>.

Law must be able to "respond" to changes that occur in society and new problems that cannot be solved only with existing regulations.^{65,66} In the context of refugees, Rahardjo argued that Indonesian Law needs to adopt regulations that align with human rights principles and refugee protection.⁶⁷In^{68,69} Additionally, Thomas Carothers, an international law expert, argues that countries facing migration or refugee flows should develop a "more responsive legal framework" that can provide faster and more appropriate treatment for refugees without neglecting humanitarian values.⁷⁰ Carothers reminded us that the Law must involve the "social justice" principle, which includes protection for vulnerable groups such as refugees.

Based on the principles of the Development Law, the following steps can be taken to improve the handling of human and migrant smuggling in Indonesia namely;

1. The Importance of Regulatory Reform in Addressing Refugee Smuggling

Indonesia, although it has several laws related to immigration, does not have clear and comprehensive regulations regarding refugees. Presidential Regulation No. 125 of 2016 concerning the Handling of Refugees from Abroad only regulates administrative aspects and does not include law enforcement arrangements for perpetrators of refugee

⁶⁵ Mahrus Ali, "Sistem Peradilan Pidana Progresif; Alternatif Dalam Penegakan Hukum Pidana," *Jurnal Hukum IUS QUIA IUSTUM* 14, no. 2 (2007): 210–29, <https://doi.org/10.20885/iustum.vol14.iss2.art2>.

⁶⁶ Muhammad Jazil Rifqi, "Dinamika Perkembangan Batas Usia Perkawinan Dalam Perspektif Hukum Progresif," *Arena Hukum* 15, no. 2 (2022): 285–306, <https://doi.org/10.21776/ub.arenahukum.2022.01502.4>.

⁶⁷ Setiyo Utomo, "Penerapan Hukum Progresif Dalam Penyelesaian Konflik Agraria," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 3, no. 2 (2020): 33–43, <https://doi.org/10.24090/volksgeist.v3i2.3998>.

⁶⁸ M. Zulfa Aulia, "Hukum Progresif Dari Satjipto Rahardjo," *Undang: Jurnal Hukum* 1, no. 1 (2018): 159–85, <https://doi.org/10.22437/ujh.1.1.159-185>.

⁶⁹ Made Oka Cahyadi Wiguna, "Pemikiran Hukum Progresif Untuk Perlindungan Hukum Dan Kesejahteraan Masyarakat Hukum Adat," *Jurnal Konstitusi* 18, no. 1 (2021): 112–37, <https://doi.org/10.31078/jk1816>.

⁷⁰ Sri Hapsari Wijayanti, Aditya Gunawan, and Pinky Sibuea, "Pemberdayaan Pengungsi Dalam Program Persiapan Kerja," *Dinamisia : Jurnal Pengabdian Kepada Masyarakat* 5, no. 5 (October 2021): 1164–69, <https://doi.org/10.31849/dinamisia.v5i5.7776>.

smuggling.⁷¹ In addition, Indonesia has not ratified the 1951 Refugee Convention and the 1967 Protocol, which provide an international legal framework for protecting refugees. Existing regulations, such as the Immigration Law, only regulate the issue of human smuggling in general and do not make a firm distinction between refugees and migrants seeking economic opportunities.⁷² This leads to major problems in law enforcement, as refugees are often treated the same as migrants in legal proceedings, even though the two have very different statuses under International Law.

2. Discretion in Law Enforcement Decisions Based on Morals and Social

Effective law enforcement also requires a deep understanding of discretion. In his theory, Wayne La-Fave explains that law enforcement officials often have to make decisions that are not fully regulated by existing legal regulations.⁷³ Meanwhile⁷⁴, Hans Kelsen⁷⁵ In his theory of legal positivism, discretion is viewed as part of the legal system necessary to fill the legal void.⁷⁶ Although Kelsen is best known for his formalist view of Law, he acknowledges that positive Law does not provide sufficient guidelines to solve problems mechanically in many

⁷¹ Diandra Paramita Anggraini, "Solusi Pemenuhan Kesejahteraan Pengungsi Selama Proses Resettlement Dari Perspektif Hukum Indonesia," *Jurnal Ilmiah Kajian Keimigrasian* 5, no. 1 (August 2022): 1–15, <https://doi.org/10.52617/jikk.v5i1.260>.

⁷² Meidiana Bethari Kusuma, Humiati Humiati, and Muhammad Mashuri, "Perlindungan Khusus Terhadap Pengungsi Anak Dari Luar Negeri Ditinjau Dari Pasal 61 Undang-Undang Republik Indonesia Nomor 23 Tahun 2002 Tentang Perlindungan Anak," *Yurijaya: Jurnal Ilmiah Hukum* 5, no. 3 (January 2024): 54–70, <https://doi.org/10.51213/yurijaya.v5i3.114>.

⁷³ Samsul Rijal Sahir, "Use of Discretion in Criminal Acts by the Police in Hart's View," *International Journal of Law and Society* 1, no. 4 (August 2024): 153–61, <https://doi.org/10.62951/ijls.v1i4.176>.

⁷⁴ Aleksandr Aleksandrovich Nikitin, "Legal Discretion in Criminal Law: General Theoretic and Branch-Wise Aspects," ed. A.P. Alekseeva, *SHS Web of Conferences* 108 (May 2021): 02015, <https://doi.org/10.1051/shsconf/202110802015>.

⁷⁵ Sunaryo Sunaryo, "Konsep Fairness John Rawls, Kritik Dan Relevansinya," *Jurnal Konstitusi* 19, no. 1 (March 2022): 001, <https://doi.org/10.31078/jk1911>.

⁷⁶ Syofyan Hadi and Tomy Michael, "Hans Kelsen's Thoughts about the Law and Its Relevance to Current Legal Developments," *Technium Social Sciences Journal* 38, no. December (December 2022): 220–27, <https://doi.org/10.47577/tssj.v38i1.7852>.

situations.⁷⁷ Kelsen argues that discretion is not a violation of the principle of legal certainty but rather part of adjusting the Law to evolving social realities, which require judgment based on moral and social considerations. This discretion becomes especially important in the case of refugee smuggling, where the social and humanitarian situation is often more complex than reflected in existing regulations. For example, Rohingya refugees fleeing violence and persecution in Myanmar cannot be treated like ordinary migrants who come in search of work or education. Therefore, law enforcement officials need discretion to assess the situation comprehensively, considering the humanitarian and human rights factors that must be protected. Decisions taken by law enforcement must strike a balance between law enforcement's existing provisions and the protection of refugees' basic rights.

3. The Importance of International Cooperation in Handling Refugee Smuggling

Refugee smuggling is a problem that knows no national borders and often involves cross-border networks. In his speech, Antonio Guterres, who previously served as UNHCR High Commissioner, emphasized that international cooperation is an important element in preventing and tackling refugee smuggling.⁷⁸ According to him, cooperation between countries and international institutions is needed to build stronger mechanisms to protect refugees and crack down on smugglers. Guterres also argued that countries should coordinate to reduce refugees' vulnerability to smuggling through education, capacity building of recipient countries, and developing more holistic protection

⁷⁷ Ferdinand Sembiring and Yasmirah Mandasari Saragih, "Legal Certainty In Financial Disputes Case Resolution Progressive Legal Perspective," *Journal of Progressive Law and Legal Studies* 2, no. 02 (May 2024): 152–62, <https://doi.org/10.59653/jppls.v2i02.845>.

⁷⁸ Prytha Yunir Omar Azhari Atiri Laode, Retno Wulandari, and Rozaq Al-Ghifary, "Peran Imigrasi Dalam Hubungan Internasional Terhadap Permasalahan Pengungsi Bersama UNCHR," *Jurnal Sosial Teknologi* 1, no. 4 (April 2021): 272–81, <https://doi.org/10.59188/jurnalsostech.v1i4.63>.

programs. He emphasized the importance of multilateralism in addressing the refugee problem, with UNHCR as a mediator facilitating cooperation between countries.⁷⁹ Therefore, international cooperation is essential in the face of these challenges. Countries involved in refugee management, such as countries of origin, transit countries, and destination countries, must work together to ensure that refugees' rights are protected and that international Law can deal with smugglers. As a country that is often a destination for refugees, Indonesia must strengthen cooperation with other countries and international institutions such as UNHCR. Through this cooperation, Indonesia can access information, share data related to refugee smuggling, and cooperate in investigating and prosecuting smugglers. By increasing international cooperation capacity, Indonesia can strengthen law enforcement and refugee protection efforts more effectively.

4. Empowerment of Law Enforcement Officers

Necessary Skills and Understanding It is important to empower law enforcement officials through more comprehensive training in handling refugee smuggling cases. This training includes knowledge of international Law and human rights and skills in using discretion wisely. Law enforcement officials must deeply understand refugee status, the international regulations that protect them, and the correct procedures for handling refugee smuggling cases. In addition, law enforcement officials must also understand the social and cultural context faced by refugees so that they can carry out their duties in a manner that respects human dignity and the principles of social justice. This empowerment will increase the effectiveness of law enforcement, as the authorities will be better prepared to face the challenges and provide protection for the rights of refugees.

⁷⁹ Denny Simanjuntak, "Urgensi Kerja Sama Internasional Kepolisian Indonesia Dan Malaysia Dalam Penanggulangan Kejahatan Lintas Negara Perdagangan Orang "Trafficking in Persons," *Jurnal Cahaya Mandalika ISSN 2721-4796 (Online)* 5, no. 1 (2024): 410–23, <https://doi.org/10.36312/jcm.v5i1.2768>.

Conclusion

Based on the reality that has occurred, the rampant cases of human smuggling are due to the weak legal awareness of the community and the existing enforcement. Therefore, the role of development law theory is vital in reducing smuggling cases that occur in Indonesia. The essence of the development law theory is that creating order or order in the context of renewal or development is desirable, even seen as absolute. In the sense of rules or legal regulations, Law can function as a regulatory tool or a means of development by channeling the direction of human activities that are desired for reform. The manifestation of the theory of development law was the formulation of Law Number 6 of 2011 Article 120, which contains criminal sanctions and fines against human smuggling perpetrators. Through these measures, Indonesia will be better equipped to address the challenges associated with refugee smuggling and can improve the existing legal system to ensure better protection for those in need while improving law enforcement against smugglers who harm many.

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