

REVIEW OF INTERNATIONAL LAW ON THE PROTECTION OF INDONESIAN MIGRANT WORKERS BASED ON HUMAN RIGHTS

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Abstract

Every human being has human rights that have been inherent since birth, are universal, and cannot be revoked. The protection of human rights has been regulated in international law so the entire international community needs to respect the human rights of others. If there is a human rights violation against migrant workers, the Indonesian government is obliged to protect the rights of Indonesian migrant workers outside the territory of the Republic of Indonesia. This study aims to determine the form of legal protection of Indonesian migrant workers abroad in terms of international law, and the obstacles of the Indonesian government in implementing the protection law. This research is qualitative research with a normative legal approach. Data collection is done by exploring legal reading materials conducted through literature studies. The results showed that Indonesia as a country that ratified international conventions related to the protection of Indonesian migrant workers seeks to protect the rights of migrant workers, but in its implementation, there are still obstacles caused by several factors related to laws and agreements between sending countries and placement countries, so that there are still many cases of crimes and human rights violations experienced by Indonesian workers.

INTRODUCTION

A state is a unit of the nation that has its own rules and government, laws and their enforcement, jurisdiction, and sovereignty. Based on the Montevideo Convention (1933), the standard definition of a state is a sovereign unit that has a primary interest in peace and respects the human rights of individuals and other countries. The qualifications or elements of the formation of a state as a subject of international law according to this convention, include: a) permanent population, b) sovereign territory, c) government, and d) the ability to establish relations with other countries. The Montevideo Convention is a treaty adopted by the Seventh International Conference of American States and signed in Montevideo,

Uruguay on December 26, 1933, and came into force the following year.^[1]

Every country has laws or regulations that are made to regulate the behavior and create order for its citizens. Laws summarize all actions that can and cannot be done, actions that are prohibited, or actions that are accepted. In addition to national or domestic laws, some rules apply globally called international law. The main subjects of international law are nation-states. International law is enacted when there is an agreement between countries, a crime involving two or more countries, an interest in protecting human rights, regulating individual criminal acts, and so on.

International law regulates all world activities that are global and relate between

one country and another based on legal rules and principles, such as war and peace, genocide, human rights, trade rules, environmental protection, shipping, as well as refugee protection. International law is divided into two types, namely private international law and public international law which is usually referred to generally as international law.^[2] Private international law deals with individual cases with a cross-border element giving rise to the application of foreign law or the role of foreign courts, such as international contracts, international marriages, and international accidents. Meanwhile, public international law regulates relations between states, both war and regulating the activities of international institutions because the rules in international law also involve entities other than states, which include companies, individuals, and minority groups.^[3]

Every human being has human rights that have been inherent since birth and are universal (have the same rights), and cannot be revoked (inalienable).^[4] Human rights are fundamental rights for every individual and group of people that include the right to life and liberty regardless of race, color, sex, religion, language, and political views, as stated in Article 2 of the Universal Declaration of Human Rights. Although a person's behavior and actions are inhumane, these rights are still attached to him as a human being.

Indonesia is one of the countries that recognizes the existence of human rights. The explanation of human rights is regulated in Law of the Republic of Indonesia No. 39/1999 on Human Rights followed by Law of the Republic of Indonesia No. 26/2000 on Human Rights Courts which intends to prosecute human rights violations, especially gross human rights violations.^[5] Article 1 of Law of the Republic of Indonesia Number 39 of 1999 affirms the meaning of human rights as a set of rights inherent in humans as creatures of God Almighty and must be respected, upheld, and

protected by the state, law, government, and every individual for the sake of honor and protection of human dignity.^[6] Gross human rights violations according to Law of the Republic of Indonesia Number 26 of 2000 article 7, include crimes of genocide and crimes against humanity. Perpetrators of gross human rights crimes will be tried by a human rights court.^[7]

In fulfilling the human right to work and a decent livelihood, the Indonesian government is obliged to provide jobs for citizens, as well as to protect in terms of employment and all support for a decent life by the limits of humanity as stipulated in Article 27 paragraph (2) of the 1945 Constitution.^[8] But in fact, the Indonesian government has not been able to provide jobs for the people, resulting in high unemployment and a low economy in Indonesia. Nevertheless, the government provides opportunities for its citizens to work abroad in an effort to improve a decent life. In addition, Indonesian Migrant Workers have an important indirect role in the country's economic growth.

Indonesian citizens who work abroad are referred to as Indonesian Migrant Workers and the term has been officially changed to Indonesian Migrant Workers (IMW) following Indonesian Law Number 18 of 2017 concerning the Protection of Indonesian Migrant Workers. The law stipulates that the placement of Indonesian migrant workers is an effort to realize equal rights and opportunities for workers to obtain work and decent income with due regard to dignity, human rights, and legal protection.^[9]

In international law, it is also stated that the state should protect its citizens living abroad and the sending country is obliged to protect its citizens abroad in the event of a violation of international law committed or occurring to the citizen.^[10] Thus, all problems that befall IMW must be resolved by the

sending country. Many efforts have been made by the government to protect its citizens abroad, one of which is the policy written in Law Number 39 of 2004 concerning the Placement and Protection and Placement of Indonesian Workers Abroad.^[11] It can be concluded that the state is obliged to protect its citizens both at home and abroad.

Indonesia has become one of the largest labor-exporting countries in Asia. According to Indonesian Economic and Financial statistics based on sources from Bank Indonesia and the National Agency for the Placement and Protection of Indonesian Migrant Workers (BNP2TKI) which is now the Indonesian Migrant Workers Protection Agency (BP2MI), the most popular destination countries for Indonesian Migrant Workers in 2021 include: countries within ASEAN, namely Malaysia, and Singapore; Asian countries outside ASEAN, namely Hong Kong; and countries outside Asia, namely Australia (Australia and Oceania), Saudi Arabia (Middle East), South Africa (Africa), America, and the Netherlands (Europe).^[12]

The protection of migrant workers is regulated in international law because it concerns the relationship that exists between the channeling country (the country of origin of workers) and the receiving country (the destination country of migrant workers). However, the protection that should be provided by the state has not been fully achieved. The reason is that many crimes still occur, resulting in the loss of workers' rights. Protection efforts have also not been implemented properly in the pre-placement, placement, and post-placement periods. Indonesian migrant workers often receive unpleasant treatment because they deviate from norms and human rights. These crimes are committed by irresponsible individuals, such as labor brokers or employers of migrant workers' workplaces. These criminal acts are

based on a sense of power and control over others.

Cases of crimes that have occurred against Indonesian Migrant Workers include:

1. Sexual harassment of female migrant workers by male "employers".
2. Verbal and physical abuse.
3. Fraud is committed by fake labor brokers and irresponsible individuals.
4. Murder committed intentionally or unintentionally.
5. Trafficking, where migrant workers are kidnapped or illegally employed without pay or a decent life.

Based on this background, the author is interested in researching how international law provides legal protection to Indonesian Migrant Workers who are involved in human rights violations and what obstacles are the causes of the non-resolution of cases of human rights violations in Indonesian Workers.

METHODOLOGY

A. Theoretical Background and Literature Review

The theory is used to facilitate researchers, practitioners, or the wider community in obtaining a better theoretical understanding globally. In legal discussions, a theory is intended to provide a global explanation of the law. This paper will use the theory of natural law (the natural right) as a theoretical background in examining the issue of how law, specifically international law, protects Indonesian migrant workers who are abroad and involved in violations of humanitarian boundaries. The theory of natural law was first introduced by Aristotle and then further developed by Thomas Aquinas, John Salisbury, Hugo Grotius, and others.^[13]

Natural Law Theory

Natural law theory is said to be the oldest theory in legal science. In Latin, natural law theory is called *jus naturalis*, *ius naturale*, or

lex naturalis. This theory divides two views into two streams, namely irrational and rational. The irrational school views universal law as coming from God with St. Augustine and Thomas Aquinas as its exponents. Then the rational school views universal law as originating from human ratios (reason). The exponents of the rational school are Grotius, Immanuel Kant, and so on. The starting point of this theory is that law becomes an instrument to achieve justice by referring to morals and ethics.^[14]

In the context of international law, the law has a function as a means of development and renewal of international society, whether in conducting diplomacy or other activities, in addition to the basic function of law to ensure certainty and order. It is understood that national and international law must be fair, not satisfying one party and harming the other. Natural law theory views that there are ideal values that are universal, based on the nature of humans as intelligent living beings, so it is not allowed to violate the rights of others.^[15]

According to Thomas Aquinas, one of the leading figures of natural law theory, said that law is the rules and measures of action or behavior. According to Aquinas, law is closely related to reason. The teaching of natural law requires the principle of legality (a basic guarantee for individuals to carry out activities or actions by providing precise and clear prohibitions). An action is determined based on the benchmark of legal norms, and the benchmark assesses whether a behavior contradicts the legal norms that have been previously established.^[16] The principle of legality is one of the fundamental principles of criminal law. The principle of legality requires the existence of laws and regulations first before punishing violators.^[17] It can be interpreted that a person cannot be charged with a criminal offense if they carry out activities that are not regulated in law or legislation.

In the case of human rights violations of Indonesian migrant workers through the theory of natural law, human rights, which are fundamental rights from God, must be respected and must not be violated. If there is a violation of this right, it becomes the duty of the law to seek justice, including those involving cross-border. The existence of Indonesian migrant workers abroad means that there has been an agreement between one country and another and between one party and another which then forms a binding law. That way, the resolution of this form of violation is through legal and legal channels to be sentenced to criminal law or other legal sanctions.

B. Data gathering Method

This research uses a qualitative method with a normative legal research approach, namely research conducted by examining laws and regulations by analyzing existing literature or literature studies. Normative legal research is also known as doctrinal legal research. In this research, the law is conceptualized as writing contained in laws and regulations, the law is conceptualized as a norm that becomes a benchmark, and law can be conceptualized as what is in action (law in action).^[18]

The data sources used in this research are secondary data sources with data collection techniques through primary legal materials, namely the 1945 Constitution and other laws and regulations related to this research, as well as secondary legal materials, namely literature studies consisting of books, journal articles, and other literature materials that allow and relate to the object to be examined in this study. According to Sugiyono, secondary sources do not provide data directly to data collectors, but through other people or documents and intermediary media.^[19] This means that secondary data sources are not

obtained directly through the source or from the original research object.

ANALYSIS

International Human Rights

The contemporary human rights movement dates back to World War I and II. The protection of fundamental rights then became a major focus of post-war international institutions, leading to the incorporation of human rights into the United Nations Charter in San Francisco in 1945.^[20] Human rights then became an issue of global concern until today. Therefore, every country that upholds peace and freedom of rights for individuals and groups wants human rights in their country to be guaranteed.

Contemporary human rights standards are expressed through constitutions, laws, state practices, international threats and customs, and the work of international institutions and bodies.^[21] Human rights and fundamental freedoms are the goal of the international organization, the United Nations, and were adopted in the United Nations Charter on June 26, 1945.^[22] The international human rights movement was strengthened when the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948.

Human rights law became part of international law. Scutter in his book discusses that human rights norms fall into the category of *jus cogens* or *ius cogens* norms.^[23] *Jus cogens* norms are basic norms of international law that are accepted and recognized by states as the international community as a whole that must not be violated, so they must trump other laws. Respect for human rights is of interest to the entire international community, which allows any state to provide legal remedies against a state accused of violating its obligations under human rights obligations under applicable international law or as generally accepted principles of law. This is in

contrast to diplomatic protection, where respect for human rights in one country has no special importance in another.^[24]

International human rights law sets out obligations that states as parties to international treaties must respect. Under international law, states are obliged to respect, protect and fulfill human rights. The United Nations Human Rights explains that the meaning of the obligation to respect is that states must refrain from interfering with or restricting human rights. The obligation to protect means that the state is required to protect individuals and groups from human rights violations. Then, the obligation to fulfill requires the state to facilitate the positive enjoyment of human rights.^[25]

Indonesian Migrant Workers (Factors and Effects for Indonesia)

A migrant worker is someone who migrates from one country to another to be employed. The International Labor Organization describes a migrant worker as "a person who migrates from one country to another intending to be employed otherwise than on his or her account."^[26] Meanwhile, the definition of Indonesian migrant workers is all Indonesian citizens who will, are, or have done work and receive wages outside the territory of the Republic of Indonesia. The policy of allowing its citizens to work outside the country of Indonesia is a form of government concern to meet the needs of the people for decent work and sufficient income to improve life.

The categories of Indonesian citizens who migrate to work and earn wages abroad are very diverse, both men and women, young and old, devoting themselves to work in other countries for the betterment of the economy and life. Based on job placement, can be divided into formal and informal sectors, where migrant workers who work in the formal sector are defined as workers who work

in companies with legal entities and have clear work contracts and wages are given permanently or permanently, such as jobs in the health sector, company employees, industrial workers, mining workers, and so on. Meanwhile, migrant workers who work in the informal sector are defined as workers who work for individual users who are not legal entities and whose employment relationships are based on agreements, such as household assistants, construction workers, drivers, garden workers, and others.

The number of placements of Indonesian migrant workers has increased over the past two years. It was recorded in 2021 with a total of 72,624 migrant workers placed and experienced a significant increase to 200,761 in 2022. Then from 2023 until April, it reached 16,356 placements.^[27] Given that the data only shows the number of placements for the first four months, there is a possibility of an increase in the number of migrant worker placements until the end of 2023. Labor and immigration issues are certainly unavoidable. Thus, the Indonesian state and the country of placement of Indonesian migrant workers need to reach cooperation and agreement in protecting their citizens outside the territory of Indonesia.

Indonesian citizens who decide to work outside the territory of the Republic of Indonesia are usually influenced by internal and external factors and are influenced by social, cultural, and economic factors. Factors that influence the high number of Indonesian migrant workers include:

- a) The high birth rate and lack of development have led to inadequate job opportunities resulting in increased unemployment in Indonesia.
- b) To fulfill basic needs to survive due to the economic crisis

- c) Lack of quality human resources so that they do not meet the qualifications of available jobs
- d) Many people in the neighborhood have become migrant workers abroad.
- e) Encouragement from people around
- f) The wages earned are so small that they are insufficient to support themselves, let alone their families. By working abroad, the wages offered will be sufficient to support their families.
- g) There is a desire to find and earn a more decent life, and sometimes this can be achieved by marrying a local.

However, Indonesian migrant workers have an indirect influence on Indonesia's economic growth. In addition, the placement of migrant workers abroad has both positive and negative impacts. The positive impact of the placement of migrant workers is the reduction of unemployment in Indonesia, the increase in foreign exchange, and the improvement of the family economy since 2017. Meanwhile, the negative impacts that arise are the facts and issues that are often voiced by migrant workers who are involved in human rights violations. Remittances obtained by the state from the labor service sector are the second largest source of revenue after oil and gas and the first largest in the service sector.^[28] Bank Indonesia (BI) noted that remittances from Indonesian migrant workers in 2021 reached a total of US\$ 9.16 million and increased in 2022 to a total of US\$ 9.71 million based on the country of placement.^[29]

Law on the Protection of Indonesian Migrant Workers in Relation to International Law

Protection of life and work is part of human rights. Human rights are fundamental rights that come from God so they need to be respected by all humans and protected internationally. So things or actions that violate human rights and violate applicable laws and

regulations will be tried according to national and international law if it involves violations outside the boundaries of a country's sovereign territory.

Indonesian citizens who work abroad mean that they have migrated so that they get rights as migrant workers and foreigners according to universal legal instruments and national legislation on Indonesian labor.^[30] In addition to international law being used because of violations outside the borders of sovereign states, international law is also used in the protection of human rights by controlling the actions of the state. International law can be a second defense for human rights to ensure that the state and its domestic legal system do not lose control. In addition to national and international law to protect human rights, international politics can also be an important tool in ensuring human rights are used to achieve the country's foreign policy goals.^[31]

General international human rights provisions at the universal level are adopted within the framework of the United Nations as a regional system and its human rights mechanisms are more effective. The protection of human rights and fundamental freedoms is contained in international conventions, such as the Vienna Convention and the European Convention on Human Rights (ECHR). The protection of migrant workers' rights is found in The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family (ICMW) which was adopted on December 18, 1990. The Convention states that migrant workers and their families have the right to live in any country including their country of origin (Article 8), migrant workers and their families should not be subjected to violence or crime, inhumanity, or punishment (Article 10), and all migrant workers and their families should be treated properly and their cultural identity should be respected (Article 17).^[32]

Declarations are usually adopted by states and international organizations in the form of resolutions. Declarations on human rights are found in the Universal Declaration of Human Rights (1948) and have been the first and most frequently referred to document in United Nations human rights documents for a long time, followed by the American Declaration of the Rights and Duties of Man, the Cairo Declaration on Human Rights in Islam (1990), the ASEAN Human Rights Declaration (2012), and so on.^[33]

As a state of law, Indonesia needs to pay attention to the four requirements of a state of law that the government is obliged to implement, which include Human Rights, Division of Powers, Government based on Law, and Administrative Justice.^[34] Similarly, Indonesian labor and Indonesian migrant workers cannot be separated from the protection of the state to its citizens. Every individual needs to get their basic rights so that they have a decent life. According to Article 28 paragraph (3) of the 1945 Constitution, "every citizen has the right to work and to be remunerated and to receive fair and equitable treatment in labor relations." Based on this law, it is certain that every citizen has the right to get a decent job and citizens who work abroad have their rights recognized and must be protected by the Indonesian government. Because it involves human rights, this protection is not only provided by the Indonesian government but also by the government of the country that houses these workers.

By referring to Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, it provides the core that the government is obliged to protect citizens who will get their jobs abroad while still getting proper services while prioritizing labor safety, both physical and moral. To protect Indonesian migrant workers abroad, the Indonesian government coordinates IMW issues with the

Ministry of Foreign Affairs of the Republic of Indonesia (Kemenlu RI) together with the Representative of the Republic of Indonesia abroad. Representatives of the Republic of Indonesia according to the Law of the Republic of Indonesia Article 1 paragraph (24) Number 18 the Year 2017 on the Protection of Indonesian Migrant Workers are "*...diplomatic representatives and consular representatives of the Republic of Indonesia who officially represent and fight for the interests of the nation, state, and government of the Republic of Indonesia, as a whole in the destination country of placement or international organizations.*"^[35] The protection of Indonesian migrant workers can be realized in the form of technical protection, juridical protection (including the efforts of the Indonesian Representative in providing legal assistance), and political protection (Memorandum of Understanding (MoU)).^[36]

Human rights violations of Indonesian migrant workers include violating the fundamental rights of individuals listed in international law, including if violations occur between Indonesian migrant workers and individuals or groups in migrant worker placement countries. If human rights violations occur to Indonesian migrant workers outside the territory of Indonesia, the state through its territorial jurisdiction rights has authority over related issues. Indonesia as one of the largest migrant worker-sending countries in the world should have ratified conventions under the UN in terms of protecting migrant workers. Indonesia itself has also signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family (ICMW) and commits to ratifying this convention. In addition, the country of placement of migrant workers needs to ratify the relevant conventions so that the country has a legal obligation to implement and provide the fulfillment of the rights of migrant workers in the country, to provide

protection to foreign workers who live or work in the country.

Barriers to the Implementation of Legal Protection for Indonesian Migrant Workers

Implementation related to the protection of Indonesian migrant workers as well as handling issues related to Indonesian Citizens (WNI) and Indonesian Legal Entities (BHI) abroad is with the establishment of the Representative of the Republic of Indonesia which is carried out together with the Ministry of Foreign Affairs (DEPLU), especially the Directorate of Protection of WNI and BHI.^[37] The implementation of the protection of Indonesian migrant workers includes shelter, repatriation, and includes the provision of legal assistance and assistance, rehabilitation to restore physical and psychological health and return assistance to reunite with their families.

The issue of migrant workers abroad has never been resolved. Several cases involving violations of the human rights of migrant workers, such as verbal and sexual harassment, rape persecution, slavery, fraud, to murder which means taking away someone's fundamental rights committed by the worker's employer or certain individuals are still rampant cases. As citizens, they have the right to get protection and guarantees from the authorities. In addition, another problem of migrant workers is that they do not have official documents or residence permits so they are considered illegal migrant workers. As such, Representatives of the Republic of Indonesia abroad are mobilized to assist with problems that occur by providing legal assistance.

Unfortunately, the efforts made by the Indonesian government are still not going well in terms of eradicating the problems experienced by Indonesian migrant workers. These obstacles include: bilateral agreements made between the Indonesian government and

the government of the country of destination of migrant workers are only temporary, so there will be negligence towards protection; legal protection from the country of placement of migrant workers is still not going well; cases that are not resolved due to lack of strong evidence or lack of legal sources; placement countries do not ratify international conventions related to the protection of human rights of migrant workers, and so on.

Therefore, the protection of migrant workers must be the focus of placement countries or countries that are the destination of migrant workers. Improvement of protection by the placement country can be done by signing conventions or agreements related to the protection of human rights or related to migrant workers so that the law can run as it should. According to Indonesian law regulated in legislation Number 18 of 2017, perpetrators who violate the human rights of migrant workers or who place Indonesian migrant workers not following the agreement or contract will be subject to administrative sanctions or criminal sanctions. Administrative sanctions are in the form of written warnings, temporary suspension, part or all of the business activities, or revocation of licenses. Meanwhile, criminal sanctions vary widely, ranging from imprisonment for a maximum of 5 years to 10 years and a fine of at least Rp 1 billion to Rp 15 billion.

CONCLUSION

Indonesia is a state of the law in which all policies and behaviors of its citizens are regulated by laws that have been made with the 1945 Constitution as a guide to the life of the nation and state. Indonesian law also regulates the freedom of human rights for Indonesian citizens who are at home and abroad. According to international law, the protection of human rights is an obligation of the entire international community to respect human rights, and the state is obliged to protect

its citizens both at home and abroad. As one of the countries that send the most migrant workers in the world, Indonesia has ratified international conventions and treaties as a legal umbrella for the protection of the human rights of its citizens abroad. Human rights protection for Indonesian citizens abroad, one of which is for Indonesian migrant workers, is regulated in Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In addition, the country of placement of migrant workers must also protect the human rights of foreign workers in their country. This is a form of fundamental human rights that comes from God and if violated, it is included in the violation of the law based on the principle of legality. The Indonesian government's efforts to provide protection have been carried out for a long time through bilateral agreements and so on. However, these efforts are still not well implemented due to several factors, so there are still many cases of crimes against Indonesian migrant workers.

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