

HELPING REFUGEES SHOULD NOT BE ILLEGAL: CORRELATION BETWEEN HUMAN TRAFFICKING/SMUGGLING AND ASYLUM SEEKERS*

Thara Kunarti Wahab**

Abstract

Refugees are constantly being persecuted not only within the State's origin, but also within the State they seek refuge from. These asylum seekers have taken numerous measures in their attempt to flee from hostile situations. Thus, it would be reasonable that these people acquire assistance from humanitarian workers or even human traffickers/smugglers as a resort when faced with impediments to enter into another State's border. Although such conducts would amount to illegal actions, with the inability for States to lower its immigration demands and amend its policy, refugees are without any other options. This paper intends to elaborate the relation between refugees, human traffickers/smugglers and international obligations. The practices that will be assessed are from States which have a more developed and systematic refugee system, Australia and States under the European Union. By analyzing these two systems, States have still shown reluctance to fully adhere to international obligations under refugee law. These causes, impacts and solutions are further discussed within the article.

Intisari

Pengungsi terus-menerus dianiaya tidak hanya dalam asal negaranya, tetapi juga di dalam negara yang mereka mencari perlindungan. "Asylum seekers" tersebut telah mengambil banyak langkah dalam upaya mereka untuk melarikan diri dari situasi berbahaya. Dengan demikian, orang-orang tersebut memperoleh bantuan dari pekerja humaniter beserta pedagang/penyelundup manusia sebagai tindakan ketika dihadapkan dengan hambatan untuk masuk ke negara lain. Meskipun perilaku tersebut merupakan tindakan ilegal, dengan ketidakingin negara untuk mengurangi peraturan imigrasi dan mengubah kebijakannya, pengungsi tidak mempunyai pilihan lain. Tulisan ini bermaksud untuk menguraikan hubungan antara pengungsi, pedagang/penyelundup manusia dan kewajiban internasional. Praktek yang akan dibahas adalah dari negara yang memiliki sistem pengungsi yang lebih maju dan sistematis, yaitu Australia dan negara-negara di bawah Uni Eropa. Dengan menganalisis kedua sistem ini, negara-negara masih menunjukkan keengganan untuk sepenuhnya mematuhi kewajiban internasional dalam hukum pengungsi. Penyebab, dampak dan solusi akan dibahas lebih lanjut dalam artikel ini.

Keywords: *refugee, human trafficking, human smuggling.*

Kata Kunci: *pengungsi, perdagangan manusia, penyundupan manusia.*

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** 2012; International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. Introduction

In September 2007, Janet Hinshaw-Thomas, an American humanitarian aid worker, was arrested for aiding 12 Haitian refugees flee from persecution in hopes to enter the Quebec border. Hinshaw-Thomas has been charged with human smuggling under Canada's Immigration and Refugee Protection Act. Section 117 of the Act states that, *no person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.* Undocumented refugees would fall under the latter provision hindering them to seek refuge in Canada and other States with similar laws. Even though the charges were later dropped by the Canadian government, States have continuously showed lack of appropriate and effective measures or empathy in dealing with refugees, thus, failing to comply with their international obligations.

B. Obligation to Protect Refugees Under International Law

Assisting asylum-seekers and refugees shall remain one the most fundamental obligations of States under international law. Pursuant to Article 14 of the 1948 Universal Declaration of Human Rights, *everyone has the right to seek and enjoy in other countries asylum from persecution.* Although the declaration enumerates the right to seek asylum, such right has yet to be recognized in a legally binding instrument. This is mainly due to States' concern that the existence of such right would manifest a higher obligation of States to unquestionably accept asylum seekers. The closest this right has been implemented within legal conventions is within its implicit application on the enforcement of the 1951 United Nations Convention relating to the Status of

Refugees (hereinafter referred to as "Refugee Convention"). There are currently 145 State Parties to the Refugee Convention and the right of asylum has been implicitly stipulated through the principle of non-refoulement. The prohibition of refoulement is laid under Article 33(1) of the Refugee Convention in which,

"no Contracting State shall expel or return [...] a refugee [...] to [...] territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

However, with the existence of rights and obligations provided under the Refugee Convention, international or regional bodies are still limited in their authority to interfere with the adjudication of asylum claims in the event States have failed to abide with international norms. Pursuant to Article 1(a)(2) of the Refugee Convention, the term 'refugee' shall apply to any person who,

"[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Regardless of a widely accepted definition of the term 'refugee', States have full discretion in deciding which asylum seekers would be granted refugee status depending on their respective national laws. Thus, States would implement different immigration policies and the

granting of these statuses would be on a case-by-case basis.

C. Relation Between Refugees and Human Trafficking/Smuggling

Until today, asylum seekers fleeing from persecution are still incurring difficulties in seeking refuge and fulfillment of refugee rights. The difficulty to be granted the status of refugee is as difficult and complicated as the initial entry to the State itself. Asylum seekers have been able to enter into foreign States through the help or aid of humanitarian workers or other non-authorized citizens. These entries are most often rendered illegal due to the similar nature and characteristics it has with human trafficking or smuggling. Protection under the Refugee Convention has been interpreted to not apply to asylum seekers benefiting from the help of a smuggler (*Bayerisches Oberstes Landesgericht Decision No. 230/99, 2000*) The main reason why refugees consent to employ a smuggler derives from the restrictive immigration policies enacted by the States and the lack of legal opportunities present to enter these States.

The terms human trafficking and human smuggling have been commonly used interchangeably. However, both terms obtain a different scope. Under Article 3(a) of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women, and Children, "trafficking" is defined as,

"the recruitment, transportation, transfer, harbouring 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."

On the other hand, smuggling merely requires the procurement to obtain financial or other material benefits of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.³⁹ While trafficking victims have not agreed to be moved, smuggling victims have consented to be taken to one place to another. Furthermore, trafficking schemes include exploitation of the victims which consist of prostitution, sexual exploitation, forced labor and slavery, while smuggling usually ends at the chosen destination.

Regardless of the difference in terminology, both illegal acts amount to irregular migration which takes advantage of desperate asylum seekers attempting to flee their nation. Smuggling refugees imposes numerous policy challenges including the necessity for the destination States to revise their border policies and simultaneously combat irregular migration, but also to comply with international commitments relating to the right of asylum and the protection of refugees (Koser, 2013). The European Union and Australia's refugee legal framework and its enforcement shall be assessed, seeing that both States acquire a relatively developed legal system and were most requested to accept refugees compared to other nations. The following elaboration is intended to analyze the refugee legal mechanisms and provide the most appropriate solution in dealing with the correlation of irregular migration and asylum seekers.

³⁹ Article 3 of Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime.

a. Developments in the European Union

Within EU law, the Union guarantees the right of asylum and recognizes the right of asylum. The law provides that,

*“the right to asylum shall be guaranteed with due respect for the rules [...] relating to the status of refugees and in accordance with the Treaty establishing the European Community.”*⁴⁰

Furthermore, the EU obtains a uniform asylum system in order to adjudicate and process claims of asylum, referred to as EU’s Common European Asylum System established under the Dublin Regulation or Council Regulation European Council No. 343/2003 and currently amended to No. 604/2013. The regulation sets criteria and mechanisms for EU States to examine an application for refugee status and requires that each asylum claim should be processed in the first EU country the asylum seeker had reached.⁴¹

Although Europe has a common asylum system of its own, bilateral arrangements between African and European countries are common in *promising to take measures to readmit individuals who have crossed illegally in exchange for aid and development, as well as financial and material support for their joint border controls*. However, not all EU States have made bilateral agreements for the interest of refugee protection. For example, the Italian-Libyan agreement allows the surveillance of boats and ships in the shared waters to intercept vessels attempting to arrive in Europe.⁴² As a

result, these vessels have taken detours further east to try and reach Europe. These alternative routes, which are usually led by smugglers, would be more complicated to pass with the low-quality boats provided, causing more risk towards the migrants and refugees. At some cases, these boats were ordered to return back to their State of origin. Initially, the cooperation between the two States were purposed to *fight terrorism, organized crime, drug trafficking and illegal immigration*. But, by increasing patrol stations and sending back migrants entering their borders without a formal processing, their actions are closely in contrary the principle of non-refoulement.

A number of asylum seekers coming from Africa continue to flee from war, poverty and persecution in their homelands. EU governments, especially Germany, Sweden, and France have been able to shelter approximately 185,000 refugees in 2014 which accounts to 50% more than the previous year. However, there continues to be reports of increase in trafficking and smuggling of asylum seekers due to Europe’s strict border enforcement policy.

By erecting border control which would hinder the asylum seekers access to international protection, they would take recourse to the services of smugglers in hopes to escape persecution and arrive safely in the destination State (Doomernik, 2004). Studies have shown that the traffickers recruit their clients in refugee camps and reception centers, as evinced in Sangatte (France), Somalia, Albania, and the former Yugoslav Republic of Macedonia in the midst of the Kosovo crisis (Heckmann et. al., 2000). Asylum seekers who have consented to be smuggled would have to not only be concerned about their safety during their migration, however, in the event they are ‘proven’ to be smuggled would lower their chance to proceed with

⁴⁰ Article 18 of European Union Charter for Fundamental Rights.

⁴¹ Article 25 and 26 of Asylum Procedures Directive 2005/85/EC.

⁴² Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People’s Libyan Arab Jamahiriya.

the asylum application (Koser, 2013). In the UK, rejection over asylum applications have been reported due to the failure to provide necessary documents, especially because it was a specific outcome of smuggling. In 2012, it had been reported that even with EU's uniform asylum system, nearly three out of four asylum applications in EU States were rejected. This comes to show that even without the assistance of human traffickers and smugglers, the EU's system had substantially restricted and set higher thresholds prior to accepting asylum seekers requests.

Europe has dealt with an increase case of illegal human trafficking and smuggling. However, most of the victims trafficked are persons seeking refuge and have been manipulatively deceived by traffickers to be able to legally enter the designated State. Understanding that States have complete sovereignty to determine the amount of refugees they would take in, by imposing higher standards, it would increase opportunities for traffickers and smugglers to recruit asylum seekers with the minimum possibility of being rejected of its application.

b. Australia's Policy

Australia has been internationally criticized for failing to comply with the international refugee regime due to its tendency to reject asylum seekers entering its borders. This includes the frequent maritime arrivals from African and Asian States without authorization. The right of asylum is recognized in Australia's 1958 Migration Act, however, if the asylum seekers are waiting for their visa or a removal, they are subject to immigration detention. The Act states that,

“(1) If an officer knows or reasonably suspects that a person in the migration

zone [...] is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone

(a) is seeking to enter the migration zone [...]; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.”⁴³

A flaw that remains to be disputed under this provision is the lack of time limitation of such detention. Furthermore, Australia had amended the mechanism of offshore processing system within its Migration Act. This means that if the asylum seeker arrives in Australia and is transferred to a third State, the processing shall be subject to that State's laws. This would mean the turning back of vessels after offshore processing and sending asylum seekers to camps in Nauru and Papua New Guinea where they would most likely be detained.

Similar to the situation in Europe, Australia has been reported to incur a high increase in asylum seekers with a total of 4589 asylum applications received in the first six months of 2014 (UNHCR, 2014). However, rejection towards these applications is also increasing. The main reasons to declining status of refugee are essentially because of the asylum seeker's unfounded claims. Meaning that the asylum seekers are not facing any fear of persecution and they are able to be sent home safely. Facilitation of smugglers is also used in order to assist the asylum seekers to reach the Australian borders. However, there were unexpected reports that the Australian government was allegedly reported to also support these illegal schemes by paying smugglers to turn back boats transporting migrants attempting to enter Australian territory.

⁴³ Section 189 of Australia's 1958 Migration Act.

Similar to Canada's legislation, Section 233A of Australia's Migration Act; Anti-People Smuggling and Other Measures Bill 2010 recognizes the act of organizing and facilitating persons to enter Australia illegal would amount to smuggling. The acts of smuggling offence shall be punished through imprisonment or fine. However, in the event the person suspected of illegal migration corresponds with the characteristic of an asylum seeker, the asylum seeker should not be punished as he/she does not constitute as a 'regular migrant.' Australia similar to other countries is mainly focusing on measures to implement to reduce illegal migrations. However, these migrations are closely related to the entry of asylum seekers. Thus, most national laws regarding the prohibition of smuggling and trafficking may overlap on the asylum seeker's intent to request an application as refugees.

D. Possible Recommendations

There should be a distinction of legal consequences between aiding refugees and smuggling illegal migrants. These asylum seekers require the assistance of smugglers or human traffickers due to the strict and infeasibility of the State's enforcement border measures to accept and grant refugee status. States must develop appropriate and effective anti-smuggling laws however, the laws must also tolerate and allow asylum seekers to enter the State's border subject to further processing. Fundamentally, the definition of smuggling within national laws must be narrowed in order to exclude people motivated solely to aid refugees. Further, tackling the issue of smuggling illegal migrants shall be conducted through the root of the problem. This means taking necessary measures to prevent traffickers from operating and obtaining vehicles or vessels to transport the migrants. Taking

into example the European Union in its attempt to combat smugglers from increasing, the EU has offered to provide warships to patrol the coasts of the conflicted country. Thus, it should be an obligation of the States to distinguish migrant smugglers and not prosecute those who are solely acting under humanitarian motives.

Additionally, States should provide more feasible methods to granting asylum seekers a refugee status. Adhering to the Refugee Convention, States shall provide refuge and protect refugees. However, with the rigidity and complexity of the State's administrative law to process asylum seekers, such aim has yet to be fulfilled. State's border enforcement policies are understandable due to the issue of sovereignty and to prevent arbitrary claims of asylum as justifications for entry. Nevertheless, Article 31(1) of the Refugee Convention provides that entering a foreign State illegally (without the necessary documents eg. visa) shall not be illegal when the person is seeking asylum. Thus, States must increase legal migration opportunities and essentially lessen requirements for refugees to enter the territory (Koser, 2013). Strengthening anti-smuggling laws and revising refugee status determination standards to be less restrictive would contribute to achieving the Convention's goals.

Another probable solution includes the increase in refugee camps or posting of migration officers to process people overseas (Maley, 2000). Such would decrease logistical expenses, prevent casualties caused by boat accidents, and lessen the demand of smugglers. However, this would require more funding as well as the consent and cooperation with the refugee-producing State. Nevertheless, it is for the sake of humanitarian values that the principle of right of asylum shall be

upheld. Hence, such international principle must prevail over administrative laws hindering refugees to seek asylum.

E. Conclusion

By virtue of the increase in border control under national laws, it would increase the probabilities of asylum seekers and refugees to be vulnerable targets for smugglers. In minimizing and eliminating these illegal acts, States would need to reconsider and revise their migration laws. By restricting and limiting the chances for asylum seekers to be provided refugee protection, traffickers and smugglers would use this opportunity to gain interest for people seeking to successfully migrate to the destination State.

However, understanding that States are reluctant to ease their border control, it would be difficult to address the issue of human trafficking without firstly dealing with the State's migration policy. Taking into account the systems within the EU and Australia clearly shows the increase of these irregular migrations as an impact of the inability for refugees to access legal protection. As a result, States are able to circumvent from its international obligation by depending on its sovereign right to regulate their internal laws. This would provide an immense leeway for traffickers to profit from using these asylum seekers.

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