"LET THEM DROWN": STATES' OBLIGATION OF NON-REFOULEMENT VIS-À-VIS THE ENTRY OF REFUGEES THROUGH WATERWAYS*

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Abstract

*Under the current regime of international law, and even positively promoted in customary international law of which the status is undoubtedly obligatory, States have the exclusive obligation of non-refoulement for refugees seeking asylum in its territory. Meanwhile, a lot of fluxes in numbers of asylum seekers come through waterways – mainly boats of refugees. The very existence of those boats in itself arguably entails obligation for coastal states to exercise jurisdiction accordingly in its territory, especially its search and rescue (**"SAR"**) territory. The sudden influx of number of refugees, however, for States are especially worrisome. It has reached a systematic crisis level rather than an emergency. It is unquestioned that States' position in response to this is to think of refugees as burden to its wealth and security. This may lead to instances where States leave the refugees as they are, floating on water, or in other words; let them drown. One particular question then arises; is it not violating States' fundamental obligation to treat people in its jurisdiction's right to life? This paper will elaborate on States' obligation to conduct SAR under current regime for boats in its jurisdictional area, as well as the conjunction to States' jurisdiction in order to secure States' obligation to ensure human rights of people and refugees, especially to its obligation of non-refoulement.*

Intisari

*Di bawah rezim hukum internasional saat ini, yang bahkan secara positif dipromosikan dalam hukum kebiasaan internasional yang statusnya wajib, negara-negara memiliki kewajiban eksklusif untuk tidak melakukan penolakan bagi para pengungsi yang mencari suaka di wilayahnya. Namun, banyak jumlah pencari suaka datang melalui jalur air – terutama kapal pengungsi. Keberadaan kapal-kapal itu sendiri memberi kewajiban bagi negara-negara pesisir untuk menjalankan yurisdiksi sesuai wilayahnya, terutama wilayah pencarian dan penyelamatannya **("SAR")**. Masuknya jumlah pengungsi secara tiba-tiba sangat mengkhawatirkan bagi Negara. Hal ini telah menjadi krisis sistematis dan bukan lagi keadaan darurat saja. Tidak diragukan lagi, Negara dalam hal ini menganggap pengungsi sebagai beban bagi kekayaan dan keamanannya. Hal ini menyebabkan negara-negara meninggalkan para pengungsi begitu saja, mengambang di atas air, atau dengan kata lain; membiarkan mereka tenggelam. Pertanyaan yang kemudian timbul; bukankah hal ini melanggar kewajiban dasar negara untuk melindungi hak hidup orang-orang dalam yurisdiksinya? Makalah ini akan menguraikan kewajiban Negara untuk melakukan SAR di bawah rezim saat ini untuk kapal di wilayah yurisdiksinya, serta hubungannya dengan yurisdiksi negara dengan kewajiban Negara untuk menjamin pemenuhan hak asasi manusia dan pengungsi, terutama terhadap kewajibannya terhadap prinsip non-refoulement.*

Keywords: Non-Refoulement, Refugee, Refugee Convention, State Obligation
Kata Kunci: *Non-Refoulement, Pengungsi, Konvensi Pengungsi, Kewajiban Negara*

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A. States' Obligations of *Non-Refoulement* at Sea

Principle of *non-refoulement* is expressed firstly in Art 33(1) of the 1951 Geneva Convention relating to the Status of Refugees [**"1951 Refugee Convention"**] where it protects refugees against being returned to a risk of persecution, which states that:

"*No Contracting State shall expel or return ("**refoule**r") a refugee in any manner whatsoever to the frontiers of 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*"

In addition, there are several international instruments, which also pronounces the principle *non-refoulement*, such as Art. 7 of International Covenant on Civil and Political Rights (ICCPR), and Art. 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The principle of *non-refoulement* is considered to be a rule of Customary International Law (J.C. Hathaway, 2005, p. 233, p. 363-367), and hence binds all States – regardless of whether they are parties to these international conventions or not.

Following to the aforementioned provision, Art. 33(2) of the 1951 Refugee Convention gives limitation, wherein this benefit may not be claimed by whom there are reasonable grounds to regard them as a danger to the security of the Country in which he is entering, or by whom there areconviction by a final judgment of a particularly serious crime which constitutes a danger to the community of that country. The 1951 Refugee Convention not only covers recognized refugees but also asylum seekers waiting for status determination. Further, as stated in Eurupean Court on Human Rights' case *M.S.S. v. Belgium and Greece,* it also bans both the return to a country where a person would be at risk of persecution or serious harm (direct *refoulement*) and the return to countries where individuals would be exposed to a risk of onward removal to such countries (indirect or onward *refoulement*).

In the implementation of principle of *non-refoulement*, there are two main issues arising out of it, which are, (1) *when* the rejection of an individual can lead to the violation of the principle of *non-refoulement* and, (2) *who* are the individuals protected by this norm.

As the obligation of *non-refoulement* is the only guarantee that refugees will not be returned to persecution causing the departure, it becomes the core of asylum-seekers protection (Feller et al., 2003, p. 87), however it does not guarantee the access to the territory of the destination State or admission to the procedures granting the refugee status. Although there exists the principle of *non-refoulement* at the frontier, which in its meaning of "non-rejection at the frontier" is mostly shared today (Lauterpacht and Bethlehem, 2003, p. 113), but its application to interdiction operations on the high seas or within territorial waters is less clear because of the difficulties related to the determination of the moment of enter into the territory for sea-borne asylum-seekers.

The unlawful entry of asylum-seekers does not exclude them from the scope of application of the *non-refoulement* principle as guaranteed in Art 31(1) of 1951 Refugee Convention (Hathaway, 2005, p. 386). Furthermore, the non-rejection at the frontier was included in the principle of *non-refoulement* in the instruments subsequent to the 1951 Refugee Convention. However, Art 3(2) of the 1967 Declaration on Territorial Asylum states that exception may be made only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

As the UNHCR has played an important role both in the evolution of the principle of *non-refoulement* to include cases of rejection at the frontier as well as in the evolution of the interpretation of Art. 33, there exists a discrepancy between the *rationae personae* application of the 1951 Refugee Convention and the content of the mandate of the UNHCR. Protection of five

categories of individuals under the mandate of the UNHCR has expanded progressively; (1) those falling under the definition of the 1951 Refugee Convention and 1967 Protocol; (2) broader categories recognized by States as entitled to protection and assistance of the UNHCR; (3) those individuals for whom the UNHCR exercised 'good offices'; (4) returning refugees; (5) non-refugee stateless persons. Meanwhile, the 1951 Refugee Convention applies to the so-called "statutory refugee", i.e. "*[the term refugee shall apply to any person who] owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or opinion […]*"(UNHCR, 1992, para.11).

Individuals do not possess a subjective right of asylum but he/she is merely entitled to request the status of a refugee and the required State has a discretionary power to accept or refuse the request (Pallis, 2002, p. 329, 341). Notwithstanding the discretion of States, preventing an individual from presenting the request can imply a breach of Art 14 UDHR in its meaning of "right to request" which is safeguarded by the principle of *non-refoulement*.

Particularly in sea regimes, Art. 2(1) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides that, "*the sovereignty of a coastal State extends, beyond its land territorial and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the, described as the territorial sea,*" (Nordquist (ed.), 1993, p. 266). The only general exception to the exclusive powers of the coastal State in its territorial sea consists of the right of innocent passage as stated in Art 17 UNCLOS (Dupuy and Vignes (ed.), 1985, p.688). However, in Art 25 UNCLOS, the coastal State can also prevent a passage which it considers not innocent and suspend the related right in specific areas of its territorial sea when this "is essential for the protection of its security."

Furthermore, Art. 33 of the 1951 Refugee Convention applies to the States parties' territory including the territorial sea. Since the first State of arrival has the duty to host refugees, at least temporarily, pursuant to the concept of "territorial asylum", the vessel transporting refugees cannot be impeded from entering into the territorial sea upon its arrival at the border of the territorial sea, nor can it be *refoulé* to high seas or to territories where the risk of persecution exists (Trevisanut, 2008, p. 223).

Refugee protection and States' interests pursuant to the law of the sea are not completely incompatible. Moreover, the principle of safety of life at sea permits guaranteeing to boat people minimum protection standards, which are completed by the non-rejection at the frontier dimension of the *non-refoulement* principle for asylum-seekers.

As such, although States possess sovereignty under UNCLOS, the principle of non-rejection at the frontier and eventually *non-refoulement*is still in effect insofar as that territory is the rightful territory of the coastal State's as pronounced in the Refugee Convention.

B. States' Obligation to Ensure Right To Life vis-à-vis SAR Operations

It is out of question that right to life has attained a certain degree of customary international law. Right to life has been pronounced in numerous human rights instrument of which all of them is of particular prominence to States alike, such as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, as well as regional instruments of human rights such as the American Convention on Human Rights, African Charter on Human and Peoples' Rights, ASEAN Human Rights Declaration, European Convention on Human Rights, and many more. The existence of this pronouncement ultimately means that most, if not all, States in the world are under a positive law regime to protect the rights of the people in its jurisdiction.

In those instruments, not only that States have the obligation to refrain from arbitrary deprivation of life, but this is also a positive obligation for States to protect

the right to life of the people in its jurisdiction by taking appropriate measures to safeguard the lives of the people. This is particularly outlined in the case of *Osman v. United Kingdom*:

'*Where there is an allegation that the authorities have violated their positive obligation to protect the right to life (...), it must be established to the [Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*'.

This obligation also includes the obligation to conduct emergency measures in cases where risk may be identified. In the case of *Furdik v. Slovakia,* it is outlined that States have the obligation to perform emergency services in cases where certain risks have been made known to the authorities of the State.

Not only when the risks are made known explicitly, States also have obligation when risks are implied. This is taken *per analogiam*from the case of *Kemaloglu v. Turkey,* in which it was regarding a seven-year-old elementary school student frozen to death from its way back to school. In such case, the school closed early due to snow blizzard, but the authorities failed to inform the shuttle authorities hence leading up to the lateness in the shuttle's arrival. In the meantime, the boy froze to death. Ultimately, the Court decided that Turkish authority failed to take the necessary measures to provide emergency services, which eventually led to the death of the boy. This is of particular importance to States, as this lay out the obligation of States to conduct *due diligence* to avoid risks that may entail from not doing so.

These cases aforementioned are not without importance. These cases mostly concern the peoples' right to life, and States' positive obligation to safeguard such right –by performing emergency measures and due diligence. This is of particular importance to SAR operations, as will be further elaborated in the following paragraphs. However, to start with, it should be noted that SAR operations is laid out in UNCLOS, particularly in article 98 as follows:

> *1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:*
> *(a) to render assistance to any person found at sea in danger of being lost;*
> *(b) to proceed with all possible speed to the rescue of persons in dis- tress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (...)'*

These obligations are also included in numerous conventions, such as 1974 Convention for the Safety of Life at Sea (SOLAS Convention), the 1979 Search and Rescue Convention (SAR Convention), and the 1989 International Convention on Salvage.

However, a link is missing; when does jurisdiction start? When does a State start to have the positive obligation to protect the rights of the people in the sea? When does the human rights instrument imposing positive obligations for States start to have binding force? This is then where the aforementioned cases take importance.

Based on the case of *Furdik v. Slovakia,* jurisdiction starts when risks become known to States. With this in mind, we can infer that particularly in cases of SAR operations, States have jurisdiction over the people in the seas after a distress call has been made. Even then, it is hard to tell if the distress call is made from high seas –no one's SAR zone—and therefore there is no positive obligation from regimes of international law (Trevisanut, 2014, p. 12). It is different if the distress call is made from SAR zone of a coastal state, in

which case it will be the obligation of the State to follow-up the distress call.

Even if there is no distress call, if we were to take the case of *Kemaloglu v. Turkey per analogiam*, States still have the obligation of due-diligence in its SAR zones. This is to identify risks and take necessary measures to ensure the protection of people in its SAR zones. Ultimately, SAR is of an undeniable obligation for States, especially after a distress call.

As is made clear in the previous sections, States have the obligations to accept people in its frontier. This obligation shall be effected duly and accordingly before States may take arrangements to transfer the asylum seekers to a third State. This is of course an obligation from an international law regime, which eventually lies on jurisdictional matters.

With regards to SAR obligations, it needs to be taken into account that what is required by customary international law is to render assistance to *any* persons. Asylum seekers through boats, especially but not limited to those in distress, will undeniably fall into such category. SAR obligation also has to be into account in order to effectively protect the people in the SAR zones' right to life, as inside coastal States' SAR zones would ultimately mean being in the State's jurisdiction as has been extensively elaborated in the previous section.

Sea regimes in UNCLOS specifically lay out the areas of which coastal States may have certain jurisdictional powers, and this is especially important in the current topic. Being in the regulated sea regimes of UNCLOS except for high seas would automatically mean that a boat is inside a place of possible jurisdiction of the coastal State. Even being in the high seas, calls of distress would be a bridge to establish jurisdiction with a particular flagship met in the voyage.

This therefore leads to the fact that *non-refoulement* obligation of coastal State has to most of the time, if not always, be effected. Any SAR operations conducted to

a refugee boat would then entail that those refugees enjoy –arguably—the *right* to be rescued, and after entering ports, right to be accepted in the coastal State, pending a possible arrangement to send those refugees to a third State.

C. Conclusion

As is explained in previous sections, the obligation of States of *non-refoulement* is a customary international law obligation, wherein it is already codified by numerous instruments. This then means that save in circumstances stated in the limitations of the obligations, States will have to accept refugees.

Further, States have the obligation of due diligence to conduct SAR operations in their waterways –which would lead to the findings of refugees entering through their waterways. Considering the right to life of the refugees come to play, in which the States will have to save the refugees in accordance with this right.

Eventually, the obligation of *non-refoulement* and SAR obligations, as well as the protection of right to life of the people rescued is mutually inclusive. States do not have the right to "let them drown" –and this obligation needs to be acknowledged now, more than ever, especially after influx of refugees become a systematic crisis. On the burden placed upon the States' shoulder, that is an inherently, entirely different issue. Albeit such, States still have the obligation to save the refugees coming in through waterways, and accept them pending certain further arrangements.

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