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Refugee Swap Deal: Will it Reduce Irregular Migration?

By Cheng Harrison

Synopsis

The refugee swap deal recently negotiated between Malaysia and Australia may tackle people smuggling – but at the expense of securing adequate protection for asylum-seekers. If passed, the deal will effectively downgrade the need for durable solutions under both the Regional Cooperation Framework set by the Bali Process and the 1951 Refugee Convention.

Commentary

A BILATERAL refugee swap deal was jointly announced on 7 May 2011 by the governments of Australia and Malaysia. Under the arrangement, Australia will resettle 4000 refugees from Malaysia over a period of four years. In exchange, Malaysia will receive and process 800 irregular maritime arrivals from Australia once the deal takes effect. The idea is to discourage asylum-seekers to Australia. By increasing the disincentives for asylum-seekers to journey to Australia, the deal aims to undermine the 'business model' of people smugglers. One such disincentive is the high probability of being returned to Malaysia, the transit country. The deal effectively delinks asylum from automatic resettlement.

Public pressure from within both countries as well as the international community has since been rapidly mounting over the potential human rights violations of the 800 irregular migrants bound for Malaysia.

Fragile Guarantees

The deal is an outgrowth of the Regional Cooperation Framework agreed upon at the recent Bali Process Ministerial Conference on 30 March 2011. However, Australian and Malaysian officials have been considerably reticent in spelling out how the Framework's guidelines would be adhered to in practice. Contradictory statements by Australian officials strongly hint that the deal may not be consistent with the Framework's principles.

Firstly, the deal presupposes the illegal status of migrants and denies them access to consistent assessment procedures on that basis. The likelihood of receiving such access in Malaysia is extremely low, given that domestic law regards asylum-seekers as prima facie illegal migrants, who are subject to arrest, detention, torture and deportation. The United Nations High Commissioner for Refugees (UNHCR) – while holding formal responsibility under the deal to conduct refugee status determination – lacks the formal authority to insist on access to irregular migrants the moment they step into Malaysian territory because Malaysia is not a signatory to the Refugee Convention. A cursory glance at UNHCR's working experience in Malaysia shows that frequent immigration raids, abuse and unwarranted detention still occur.

Australia's attempts to guarantee that transferees will be treated as a special case have been rebuffed by the Malaysian government. Malaysia is concerned that giving preferential treatment would not only spark a 'revolt' amongst the 94,000 illegal immigrants in Malaysia, but also create a pull factor by offering relatively better treatment of asylum-seekers – a move that may encourage "asylum-shopping", whereby individuals apply for asylum in different countries until they are successful.

Both Australia and Malaysia have consistently reaffirmed that UNHCR's approval is essential to the conclusion of the arrangement. Yet UNHCR has repeatedly expressed reservations about the danger of separating families, and the inadequacy of safeguards for unaccompanied minors who are to be sent to Malaysia. On 30 June 2011, the High Commissioner for Refugees Antonio Guterres justified his reluctance to approve the deal on the basis of "very clear protection principles" that were not to be compromised, and suggested he may not sign off on it.

Containing Irregular Migration

Yet without being more sensitive to the various root causes of irregular migration, the deal is likely to encourage asylum-seekers to resort to illegal channels to make their way into Australia. The incentive to enter legally is diminished by two considerations: even with proper documentation, individuals will be transferred to Malaysia where they will be treated as *prima facie* criminals; also, it is common for registered asylum-seekers in Malaysia to have their documents confiscated.

Secondly, the Framework states that those screened out should be voluntarily repatriated 'in safety and dignity.' Yet there is no indication of whether those screened out would be repatriated or locally integrated, or where responsibility lay for implementation. While UNHCR reported in 2009 that forcible deportation from Malaysia had ceased, the absence of a record on local integration leaves refugees with two options: existence in a protracted refugee situation or flight.

The former is defined as one 'in which refugees find themselves in a long-standing and intractable state of limbo' and 'their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile'. Rohingya Muslims from Myanmar who arrived in Malaysia in the 1990s continue to live there without access to healthcare, education and employment. Unable to ensure their self-sufficiency, refugees may even attempt the journey to Australia again, given the difficulty of finding adequate protection in neighbouring Southeast Asian countries. This suggests that the deal may be counter-productive in sustaining the smuggling model.

Unintended Consequences

As a signatory to the Refugee Convention, Australia is obligated to refrain from imposing penalties, on the basis of illegal entry or presence, on refugees who enter or are present in its territory without authorisation (Article 31). Furthermore, Australia should not expel or return refugees in 'any manner whatsoever' to territories where their lives or freedom would be threatened (Article 32). By denying irregular migrants the right to appeal against their illegal status, Australia will violate Article 16, which secures for the refugee 'free access to the courts of law on the territory of the Contracting States'.

The deal may also set a precedent for legitimising the outsourcing of obligations by Convention signatories to non-signatories who do not feel obligated to respect the principles of asylum and protection. If passed, this deal will further undermine the normative safeguards of the Convention that protect already vulnerable persons from deprivation and abuse.

Inadvertently, the deal may perpetuate the demand for smugglers. It may have this effect by prematurely foreclosing the possibility of valid claims to asylum while consigning migrants to protracted situations where flight is usually the only viable option. A durable arrangement requires a more nuanced appreciation of the root causes of irregular movements such that immigration policies can be fine-tuned to encourage migrants to choose legal entry channels over illegal ones.

Cheng Harrison is an intern at the Centre for Non-Traditional Security (NTS) Studies at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University. He is pursuing his Masters in International Relations at the National University of Singapore.