JILS (JOURNAL *of* INDONESIAN LEGAL STUDIES)

Human Rights Issue in Various Context: National and Global Perspective

Published by Faculty of Law, Universitas Negeri Semarang, Indonesia
Volume 6 Issue 1, May 2021 ■ ISSN (Print) 2548-1584 ISSN (Online) 2548-1592

RESEARCH ARTICLE

THE PRINCIPLE OF NON-REFOULEMENT AS JUS COGENS: HISTORY, APLLICATION, AND EXCEPTION IN INTERNATIONAL REFUGEE LAW

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Submitted: Dec 18, 2020 **Revised**: February 16, 2021 **Accepted**: April 15, 2021

ABSTRACT

The existence of the principle of non-refoulement is a necessity and has been institutionalized in the various international legal instruments such as conventions, declarations and in customary international law. Non-refoulement principle is a fundamental concept and considered as the backbone for the entire international refugee legal system. That principle is an international legal norm that has been recognized and affirmed by the international community in multilateral international conventions and other relevant international legal instruments. This principle is very basic in the

international protection system for refugees and asylum seekers and cannot be distracted by states in international relations. International organizations also recognize and apply the principle of non-refoulement consistently. The consequence is that states, both individually and collectively, must not violate this principle. Based on legal procedures, a country can take different actions with the obligation to implement the non-refoulement principle.

Keywords: Non-Refoulement; Jus Cogens; Refugee

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HOW TO CITE:
Syahrin, M. A. (2021). The Principle of Non-Refoulement as Jus Cogens: History, Application, and Exception in International Refugee Law. *JILS (Journal of Indonesian Legal Studies)*, *6*(1), 53-82. https://doi.org/10.15294/jils.v6i1.43350

INTRODUCTION

ONE OF THE FUNDAMENTAL concepts in the international protection system for refugees and asylum seekers is the principle

of non-refoulement in international refugee law. The term non-refoulement comes from the French word *refouler* which means to return or send back. In the system of international refugee law, the existence of the principle of non-refoulement has been institutionalized in the various international legal instruments such as conventions, declarations, and in customary international law.[1] Meaning the main principle of non-refoulement is there should be no country to return or send the refugees and/or asylum seekers to a territory where the life and safety of refugees or asylum seekers would be threatened, unless the presence of refugees or seekers of asylum are really pose a problem of order and security for the country concerned.

The non-refoulement principle is not the same as expulsion or forced relocation. Deportation happens when a foreigner is found guilty of committing an act contrary to the local state's interests or becomes a suspect in in a criminal act and escapes from the legal process. Therefore, this principle must be distinguished from expulsion, deportation, or forced removal.[2] Expulsion or deportation occurs when a foreign national is found guilty of committing an act contrary to the interests of the local state or is a suspect in a criminal offense in a state.

The non-refoulement principle is the prohibition for country to return or send a refugee to an area where he will face persecution or life-threatening persecution for reasons related to race, religion, nationality, group membership, social, or because of his political beliefs. This principle is the backbone of the international protection

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1 Elena Fiddian-Qasmiyeh et al., *The International Law of Refugee Protection*, *in* THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES (2014).

2 Elihu Lauterpacht & Daniel Bethlehem, *The scope and content of the principle of non-refoulement: Opinion*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (2003).

system for refugees and asylum seekers institutionalized in various international and national legal instruments.[3] The presence of this principle in the legal system for the protection of refugees and asylum seekers is also very important in the wider sense of the protection of human rights.

Most people in the international law arena, whether states, non-governmental organizations, or analysts, see the concept of non-refoulement as central to refugee law. It has played a central role in how states deal with refugees and asylum-seekers since it was articulated in the Refugee Convention in 1951. But what exactly does the theory involve? It is described by a refugee law expert as the concept that no refugee should be returned to any place where he or she is likely to face persecution or torture.

To explain, a hypothetical example may be helpful. The theory forbids the government of State A, at its most basic level, from returning refugees from State B to State B, where there is a legitimate concern that they might be at risk if they are returned. There are many facets of this concept in the discussion, including whether a refugee needs to be located on the territory of State A or may merely attempt to join, as well as what criterion should be used to assess what risk warrants the refugee not to be returned.

This idea did not exist in international law prior to the 1930s. It is important to look at the conditions and factors underlying its production to understand the theory. The idea that it was morally wrong to return refugees to places where they would obviously be in danger was sometimes discussed in agreements or laws by states during the first half of this century or was apparent in the practice of some states.

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[3] James C Hathaway & Thomas Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence*, COLUMBIA J. TRANSNATL. LAW (2015).

While it had been enshrined in a UK law by 1905 that refugees should be permitted into the country with a fear of persecution for political or religious reasons, it was not until later that the concept of non-refoulement of such individuals became generally accepted. The 1933 Convention relating to the Status of Refugees, which was however ratified by only few nations, was first articulated in international law.[4]

The huge refugee flows created by the ruins of the Second World War provided the impetus for a thorough review of the refugee laws. Before this time, states had been very aware of the degree to which consent to refugee-related laws, in particular international rules, would affect their sovereign right to decide who was permitted to live within their borders. While many seemed to have agreed that there was a moral obligation to accept and not return refugees, this was done mainly on an ad hoc basis.

Nevertheless, in the first few years of its existence, the United Nations demonstrated its concern about the refugee crisis. In 1946, a resolution was passed by the General Assembly specifying that refugees could not be returned if they had 'true objections. This issue, primarily caused by the large number of refugees in Europe after the war, ultimately led to the drafting of the 1951 United Nations Convention on the Status of Refugees.

Basically, the principle of non-refoulement relates to the principle of protection in human rights law, especially in relation to the protection of individuals from actions that can be categorized as torture and/or punishment that is harsh and degrading and inhuman. This fundamental principle for the entire international refugee legal system has been institutionalized in Article 33 of the 1951 Convention on the Status of Refugees.

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[4] Fiddian-Qasmiyeh et al., *supra* note 1.

Many conventions, most especially the 1951 Refugee Convention, but also the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Misapprehension, specifically set out the concept of non-refoulement. In addition, treaties on human rights are commonly interpreted as banning refoulement. This is protected by the ICCPR, for example, and by regional human rights treaties. In other words, as part of the positive commitments inherent in the responsibility to defend against violations of human rights, states are obliged to carry out a risk assessment and not to return citizens to whom they would face severe violations of human rights upon return. Moreover, it has been persuasively argued that such an obligation is also found in international humanitarian law, based on the obligation laid down in Article 1 of the Geneva Convention.

The non-refoulement concept reflected in a wide variety of treaties has the same underlying center, albeit articulated in slightly different terms through various treaties. The Refugee Convention forbids refoulement where, because of race, religion, ethnicity, membership of a particular social group or political opinion, a refugee's 'life or freedom will be threatened,' with regional instruments containing similar prohibitions.

THE DEVELOPMENT OF NON-REFOULEMENT PRINCIPLE

IN INTERNATIONAL REFUGEE legal system, the principle of non-refoulement only applies to refugees and asylum seekers. In relation to international protection for refugees, this principle is considered the most basic principle for the entire international refugee law system. The international community has institutionalized and

affirmed this principle in the 1951 Convention in Article 33. The provisions in Article 33 of the 1951 Convention which contain the principle of non-refoulement are provisions in the refugee convention which cannot be reserved. This is confirmed in Article 42 of the convention.

The principle of non-refoulement is a concept of prohibiting or not allowing a country to return or send a refugee or asylum seeker to an area where he will face persecution or torture that endangers his life for reasons related to race, religion, nationality, membership in certain social groups or political beliefs. In contemporary (international) refugee law discourse, as found in the writings of Sir Elihu Lauterpacht and Daniel Bethlehem, this principle is often put forward as the fundamental concept of refugee law. Before the 1951 Convention was accepted by the international community, this principle had also been affirmed in the 1933 Convention on the Status of International Refugees. This principle was basically related to the principle of protection in human rights law, especially in relation to the prohibition of acts of torture and/or harsh and degrading punishment. human dignity.[5]

The implementation of it in practice is also extended to asylum seekers. Support and adherence to the principle of non-refoulement by countries and relevant international organizations has emphasized the importance of this principle of non-refoulement in the international legal system in general. Furthermore, the main content of this non-refoulement principle was confirmed by the UN General Assembly in the 1967 Declaration on Territorial Asylum which was approved by acclamation. Article 3 of the Declaration were accepted by the Assembly of the United Nations General December 14, 1967, confirms that every person has the right to seek asylum may not be

[5] Jean Allain, *The jus cogens nature of non-refoulement*, INT. J. REFUG. LAW (2001).

expelled or denied entry to the country where he applied for asylum.[6] This asylum seeker may not be returned to any country where he or she faces the risk of persecution (persecution).

In the Expert Roundtable held by UNHCR, several conclusions that were relevant to the principle of non-refoulement were agreed. The conclusions produced are:[7]

1. The non-refoulement principle is a basic concept that recognized in international customary law;
2. This principle extends to any intervention by the state that may give rise to the return of asylum seekers or refugees to border areas where their lives and freedoms are endangered, or to areas where they are at risk of persecution, including interception and refusal.
3. This principle applies in circumstances of mass migration. It takes imaginative steps to deal with the unique problems that occur in mass displacement circumstances.
4. Based on the legal theory of state accountability, the state's right to take measures that can lead to refoulement is decided. A consideration that must take precedence over international duty to behave in compliance with international obligations;
5. This principle has exceptions stipulated in the convention. These exceptions must be interpreted and implemented very strictly. This exception must be made when recognizing the opportunity for a rescue to be carried out and as a last step that the state should take. Refoulement should not, without exception, be carried out in cases involving acts of torture.

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[6] María Teresa Gil-Bazo, *Refugee protection under international human rights law: From Non-Refoulement to residence and citizenship*, REFUG. SURV. Q. (2015).

[7] Sigit Riyanto, *Prinsip Non-Refoulement dan Relevansinya dalam Sistem Hukum Internasional*, 22 MIMB. HUK. - FAK. HUK. UNIV. GADJAH MADA 434–449 (2010).

In its development, the principle of non-refoulement is also reflected in the practice of states within the framework of modern international relations. The opinion of international legal experts as formulated in the conclusions of the UNHCR Expert Roundtable and the Declaration. This part is strong evidence that the principle of non-refoulement is supported by legal opinion and is reflected in the practice of states in modern international relations.[8] The existence of opinions and practices of countries regarding the acceptance of this principle has been accepted as customary international law.

Since its appearance in the 1933 Convention relating to the International Status of Refugees, non-refoulement has been a guiding principle in refugee law. In complementary fields of international law, in human rights treaties and in international customary law, non-refoulement has also arisen. Non-refoulement effectively guarantees that a government does not expel a refugee from its state-territory or borders and *'refoule'* that person to a location (country of origin or otherwise) where he or she may be subjected to torture or persecution. The prohibition of repossession is connected to the total prohibition of torture, but where the expected mistreatment does not require especially severe acts of torture, there is controversy as to the degree of protection provided by the various instruments in the field of human rights. Several writers attest to the non-refoulement status of jus cogens as a corollary of the peremptory status gained by the torture prohibition.

The concept of jus cogens was codified in Article 53 of the Vienna Convention on the Law of Treaties (1969), which states that 'A treaty shall be null and void if it clashes with a provisional standard of general international law at the time of its conclusion.' The definition of jus cogens by Christos Rozakis will underpin the philosophical

[8] Hathaway and Gammeltoft-Hansen, *supra* note 3.

structure of this essay,' There are general rules of law that preclude the conclusion of unique contractual agreements that clash with them by actually banning derogation from their substance and by threatening any attempt to violate the prohibition with invalidity. Typically, these laws are called jus cogens.

International customary law is often commonly known to be the principle of non-refoulement, which implies that all Nations, whether or not they are a party to the human rights and/or refugee treaties incorporating the refoulement ban, are obligated not to return or extradite any individual to a country where the existence or welfare of that person will be seriously jeopardized. The international community of states reached consensus in 1982, prior to the ratification of the Convention Against Torture, that the ban on torture was a provision of customary international law. Non-refoulement may be claimed to be a central component of the customary ban on torture and barbaric, inhuman and degrading treatment or punishment. Does this sufficiently establish the normative status of non-refoulement in international law, with 90% of the world's sovereign states party to a treaty which prohibits refoulement in some form or form? The presence of this concept in key international instructions is also a testament to consistent practice and a clear opinion juris that leads to the establishment of a customary standard.[9] By looking beyond European and UN-based human rights treaties, and reviewing non-binding soft instruments and resolutions provided by authoritative bodies interpreting developing international customary law, the following discussion will seek to determine the customary normative status gained by the non-refoulement principle.

[9] Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-refoulement in a world of cooperative deterrence*, COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2015).

The Office of the United Nations High Commissioner for Refugees asserts that the principle of non-refoulement has become a norm in customary international law on the basis of two sources of evidence, firstly, state practice with respect to non-refoulement and, secondly, opinion juris of the principle. Although the stance of the UNHCR Executive Committee on the normative existence and the position of non-refoulement in international customary law is generally in line with the prevailing legal doctrines, the concept is stated in the 1982 Excom resolution. The 'progressive acquisition of the character of a peremptory rule of international law' of non-refoulement was less than convincing. If non-refoulement had steadily gained peremptory status in 1982, one would have imagined that the theory would be held in the highest position of the normative hierarchy a quarter of a century later.

The principle of non-refoulement has even appeared and been practiced by countries since the First World War (1914-1918). This principle is also recognized in international instruments such as the 1933 Convention Relating to the International Status of Refugees, 1949 Geneva Convention on the Protection of Civilian Persons, 1984 Convention Against Torture, Cruel, Inhuman or Degrading Treatment of Punishment.[10] In fact, the principle of non-refoulement is also formulated in Declarations and Resolutions adopted by regional international organizations as follows:[11]

[10] M Alvi Syahrin, H Budi Artono & F Santiago, *Legal impacts of the existence of refugees and asylum seekers in Indonesia*, INT. J. CIV. ENG. TECHNOL. (2018), http://www.scopus.com/inward/record.url?eid=2-s2.0-85047853115&partnerID=MN8TOARS.

[11] Riyanto, *supra* note 7.

1. 1969 African Unity Organization Convention

In 1969 the Organization of African Unity Convention Governing the Specific Aspects of Refugees (hereinafter: OAU Convention 1969), Article II paragraph (3) states:

> No person shall be subjected (by a Member State) to measures such as rejection at the frontier, return or expansion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened (for the reasons set out in Article I, paragraphs 1 and 2).

This convention addresses specific refugee issues in the African region. The conflicts that accompanied the end of colonialism in Africa have resulted in a series of displacement events on a large scale on the continent. Removal of the people in the region of the African continent is encouraging not only designed and acceptance of the Protocol Year 1967, but also design the 1969 Convention governing the specific problems relating to refugee's companies in Africa in the year 1969. By asserting that the 1951 Convention on is an instrument basic and universal respect to the status of refugees. The 1969 Convention is the only regional international treaties that have legally binding force.

It should also be noted that one of the most important parts of the 1969 Convention is its definition of refugees. The 1969 Convention follows the definition of refugees contained in the 1951 Convention, but also includes a more objective basis for consideration, namely: every person forced to leave his country because of external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality.

It means that persons who have fled the territory of their country as a result of civil unrest, widespread violence and warfare have the

right to claim refugee status on the territory of countries that are parties to the 1969 Convention regardless of whether they have fear of oppression or persecution that is truly based. In addition to expanding the definition of refugees, the 1969 Convention also calls on member states to provide asylum or protection, affirms the principle of non-refoulement, and institutionalizes voluntary repatriation for refugees.

2. 1969 American Convention on Human Rights

In the 1969 American Convention on Human Rights, Article 22 states:

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.

3. 1966 Asian African Legal Consultative Committee

This committee has adopted a Declaration which is also known as The Bangkok Principles. The declaration adopted by the Committee in it also recognizes the concept of non-refoulement to provide international protection for people seeking asylum.

4. 1984 Cartagena Declaration

In 1984, a colloquium of government representatives and leading legal experts from Latin America was held in Cartagena, Colombia to discuss international protection of refugees in the region. This meeting agreed on an instrument which later became known as the 1984 Cartagena Declaration. This declaration recommends that the definition of a refugee in the 1951 Convention was expanded to include also people who have fled their country because their lives, safety or freedom are threatened because of the violence that

is widespread, the aggression of foreign, internal conflict, human rights abuses, or other circumstances that destroy public order.

Although the 1984 Cartagena Declaration is not legally binding on countries. The definition is agreed by most South American countries for practical reasons. This term has also been adopted by some countries into their national regulation. The 1984 Cartagena Declaration not only accepts and recognizes the principle of non-refoulement as the foundation for international protection of refugees, but also recognizes that the principle of non-refoulement is a principle categorized as jus cogens in international law.

THE NON-REFOULEMENT PRINCIPLE AS JUS COGENS

IN THE INTERNATIONAL legal framework, a legal provision agreed and acknowledged by the international community is the definition of jus cogens, or what is sometimes referred to as a peremptory rule in international law, and such legal rules cannot be infringed. In classical international legal discourse, it can be argued that the jus cogens concept has been introduced by several international jurist such as Hugo Grotius (1853-1645) and de Vattel in the XVI century. In 1953, Hersch Lauterpacht in his capacity as a special rapporteur of the International Law Commission also incorporated the concept of jus cogens into the draft convention on international treaties as a principle in international legal order. The definition of jus cogens was eventually embraced by the international community and institutionalized in the 1969 Vienna Convention on the Law of Treaties.[12]

[12] Naoko Hashimoto, *Refugee resettlement as an alternative to asylum*, 37 REFUG. SURV. Q. (2018).

Acceptance of jus cogens in the modern international law institutions as reflected in the Vienna Convention on the Law of Treaties 1969 shows that the international legal system, the international community recognizes two kinds of characters legal norms are applicable, namely *jus dispositivum* and *jus cogens*. *Jus Dispositivum* is a term of international law in which the state as a member of the international community based on the situation and the conditions specified it is possible to deviate or modify the provisions of the law.

On the other hand, jus cogens or peremptory norm of international law is a standard of international law that the international community has acknowledged and embraced which cannot be deviated, modified, and/or defeated by other legal provisions. Jus cogens is categorized as a legal norm that has a higher position than the *jus dispositivum* norm. States as members of the international community, for whatever reason, cannot deviate from international legal norms which have the type of jus cogens. Jus cogens is considered as an essential norm for the international legal system, so that violations of this essential norm can threaten the continuity of the international legal system that applies in the international community.[13]

The institutionalization of coercive legal norms into the 1969 Vienna Convention is an acknowledgment and affirmation of the international community, especially states, of the fact that in the international legal system, states cannot formulate deviant rules with jus cogens, both in relation to other countries and in their respective national legal frameworks. In this regard, it should also be noted that the application of jus cogens is not limited

[13] Sigit Riyanto, *KEDAULATAN NEGARA DALAM KERANGKA HUKUM INTERNASIONAL KONTEMPORER*, YUST. J. HUK. (2012).

to the 1969 Vienna Convention but applies to the entire international legal system in general.

The coercive and irreversible nature of jus cogens is a principle that applies to any state action as a member of the international community within the framework of international law. With so jus cogens limit the interaction of the state within the framework of the system internationally. The discourse that needs to be raised is how to identify and evaluate the principle of non- refoulement as a jus cogens norm in international law.[14] To assess whether the principle of non-refoulement is *jus cogens*, it must be used a reference to the provisions exist in Article 53 of the Vienna Convention of 1969. Based on the formulation of Article 53 that, then the conditions that must be met as a term of jus cogens are: (1) the non-refoulement principle is accepted and recognized by the international community; (2) the non-refoulement principle is a norm that cannot be deviated.

The qualification of the non-refoulement principle as a jus cogens norm in international law can be judged based on the following facts:

First, the principle of non-refoulement is a norm of international law institutionalized in multilateral international conventions, namely in Article 33 of the 1951 Convention. *Second*, customary international law has also been the non-refoulement principle, followed by countries long before the principle was established in international mechanism. Countries which practice the non-refoulement principle are not restricted to countries which are parties to the 1951 Convention and to the Protocol of 1967. In fact, other countries which are not parties to the 1951 Convention also adhere to the principle of non-refoulement. *Third*, the principle of non-

[14] Erin Collins, *Repatriation, Refoulement, Repair*, DEV. CHANGE (2016).

refoulement has also been reaffirmed and even explicitly recognized as jus cogens. The reaffirmation of the principle of non-refoulement in legal instruments accepted by the several international communities. *Fourth*, acceptance and affirmation of the principle of non-refoulement in the international protection system for refugees and asylum seekers can be found in the practice implemented by the relevant international organization, namely UNHCR. This can be found in decisions issued by the Executive Committee of the Program of the UNHCR. These decisions of the UNHCR Executive Committee reflect the consensus of countries in their capacity to provide opinion and advice on aspects of international protection.

Furthermore, it should also be noted that the existence of the principle of non-refoulement and its qualification as jus cogens is supported by the opinion of international legal experts. The opinion of international legal experts regarding the existence of this non-refoulement principle is a strong and factual argument that the non-refoulement principle as one of the sources of international law which has the legitimation of jus cogens is recognized and supported by the opinion of international legal experts.[15] The opinion of international legal experts proves the existence of the principle of non-refoulement as a source of international law in accordance with the formulation of sources of international law as stated in the Statute of the International Court of Justice.

In the practice, the violations of the principle of non-refoulement have been found. This was also pointed out by UNHCR, that violations that occur against refugee rights that have been recognized by the international community, including violations of

[15] Seunghwan Kim, *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*, LEIDEN JOURNAL OF INTERNATIONAL LAW (2017).

the principle of non-refoulement, are very disturbing practices that can even damage the international protection system for refugees and asylum seekers.[16] However, it should also be emphasized that the violation of the principle of non-refoulement is irrelevant and cannot be presented as an argument to negate its status as jus cogens in the international law.

In other words, the character of the non-refoulement principle as coercive legal norms in international law cannot be aborted or canceled by the facts of violations against him. The character of the non-refoulement principle as jus cogens can only be aborted or replaced if the public accepts and recognizes the emergence of new jus cogens that replace the principle in the international legal system. It is also in line with the arguments put forward by the International Court of Justice based on decisions made in the case of Nicaragua in 1986, which states that the violations committed by the state against a provision of international law does not always have to be interpreted as something that weakens the strength of the provisions of the law are concerned as applicable international legal norms. According to the opinion of the International Court of Justice in the Nicaragua case in 1986, in fact the violations that occur against a provision of international law can even confirm or strengthen the position of the provisions of international law concerned rather than weaken them.

The important thing that needs to be put forward in the discourse on the character of the principle of non-refoulement as a norm of coercive law in international law is that this principle is very basic in the international protection system for refugees and asylum seekers and cannot be distracted by states in international relations. In the current system, the existence of the non-refoulement principle is a

[16] M Alvi Syahrin, *The Implementation of Non-Refoulement Principle to the Asylum Seekers and Refugees in Indonesia*, 1 SRIWIJ. LAW REV. 168–178 (2017), http://journal.fh.unsri.ac.id/index.php/sriwijayalawreview/issue/view/7.

necessity and has been institutionalized in the various international legal instruments. This principle is a fundamental concept which considered as the backbone for the entire international refugee legal system.

The character of the non-refoulement principle as a jus cogens is based on the consideration that in fact, currently the non-refoulement principle is an international legal norm that has been recognized and affirmed by the international community in multilateral international conventions and other relevant international legal instruments. This principle is very basic in the international protection system for refugees and asylum seekers and cannot be distracted by countries in international relations. Relevant international organizations also recognize and apply the principle of non-refoulement consistently. Considering that this principle is a rule of international law recognized and adopted by the international society and has the type of jus cogens, the implication is that states must not infringe this principle, both individually and collectively. Regarding the application of the principle of non-refoulement, based on certain valid reasons and based on justifiable legal procedures, a country can take different actions with the obligation to implement the non-refoulement principle.

To decide if the standard for the prohibition of refoulement has achieved the normative status of jus cogens, it is important to analyze the dual conditions for its recognition by the international community of states as a whole and as a law from which no derogation is permitted. In other words, in the absence of an international convention specifying that the rule of refoulement is *jus cogens*, its incorporation into the corpus juris gentium by means of customary international law must be examined.

It is clear at present that the standard banning refoulement is part of customary international law and thus binding on all Nations,

whether they are parties to the 1951 Convention. What remains unclear is whether the status of jus cogens has been met by that criterion. The fact that non-refoulement is a customary norm indicates that there is state practice; but do states undertake not to refoul because they agree that jus cogens is the status of the norm? Probably the most relevant medium for the identification of

The importance assigned to the non-refoulement standard can be found in the findings adopted by the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR)). These conclusions reflect the consensus of the States, working in an advisory capacity where issues are concerned. Security and non-refoulement are globally discussed. In the creation of customs, their pronouncements bear a disproportionate weight, since they are the states most directly affected by non-refoulement issues. In Conclusion No. 25 of 1982, the Executive Committee broached the first preliminary mention of the non-refoulement standard as jus cogens, where it was determined by the Member States that the concept of non-refoulement gradually acquired the character of a peremptory rule of international law. [17]

The Executive Committee decided in the late 1980s that all Governments were bound to refrain from refoulement on the grounds that such actions were 'contrary to the basic prohibitions against these activities. Finally, in 1996, the Executive Committee decided that the level of the jus cogens requirement had been gained by non-refoulement when it determined that the concept of non-refoulement was not subject to derogation. As such, the Member States of the Executive Committee, those States whose interests are most clearly affected by the protection of international protection and the

[17] Seth M. Holmes & Heide Castañeda, *Representing the "European refugee crisis" in Germany and beyond: Deservingness and difference, life and death*, AM. ETHNOL. (2016).

prohibition of refoulement, agreed by agreement that the standard of non-refoulement was, in effect, the standard of jus cogens, from which no derogation was allowed.[18]

Consideration of the non-refoulement norm in the light of its jus cogens character has shown that it is forbidden for Governments, either individually or collectively, to breach its provisions. The problem goes beyond the political interests of institutions such as the United Nations Security Council or the European Union to focus on the jus cogens essence of non-refoulement, confirming the unlawfulness of acts that would breach the right of a person not to be returned to a State in which he or she might be subjected to persecution. By playing this 'trump' card, which places the individualized right to non-refoulement above all other considerations that do not reach the jus cogens threshold, it means that citizens will question and hold accountable the actions of States. Restricted access of persons to international adjudication is a basic flaw of international law. The refugee determination mechanism implicitly mandated by the 1951 Convention suggests that States need to take decisions that are likely to be reviewed at the municipal level. Decisions taken by the State in a federal, supranational, or foreign sense must also be naturally enforced. It is here that advocates may appeal to the jus cogens essence of non-refoulement and argue that it should not be implemented in such a way as to send an individual back to a State to face the risk of persecution regardless of the policy and wherever it may emanate from.

[18] Hathaway and Gammeltoft-Hansen, *supra* note 3.

THE JUSTIFICATIONS AND EXCEPTIONS OF NON-REFOULEMENT PRINCIPLE

A REFUGEE OR ASYLUM SEEKER'S definition of refugee and international security defined under refugee law does not constitute an absolute assurance of protection. Possible action exemptions in the refugee legal system where, for certain reasons, refugees and asylum seekers do not obtain international protection. In refugee law, an exclusion clause is a legal rule that cancels the provision of foreign protection for people who may already meet the refugee status requirements, but in fact these refugees or asylum seekers have certain qualifications that make them unworthy of international protection. In the 1951 Convention, this exemption clause is formulated in Articles 1D, 1E, and 1F and applies to the following groups of people:

1. Persons seeking protection or assistance from agencies of the United Nations other than the UNHCR;
2. The person who has the same rights and obligations in the country where he lives;
3. The person who have been regarded as having committed breaches of peace, war crimes, crimes against humanity, non-political crimes or actions contrary to the goals and values of the United Nations.

Likewise, the application of the non-refoulement principle. If we look closely, the formulation of the principle of non-refoulement contained in Article 33 paragraph (1) of the 1951 Convention, there is a possibility that a country, based on certain valid reasons and based on accountable legal procedures, performs different actions from must implement the non-refoulement principle. In this case, the

action a country can take against refugees and asylum seekers is in the form of expulsion from the territory of the country.

Based on Article 33 paragraph (2) the 1951 Convention, there are two reasons that can be used as a basis for a country to take actions that can be considered negating the obligation to implement the non-refoulement principle formulated in Article 33 paragraph (1).

First, the presence of refugees or asylum-seekers in a country can be a threat to national security. In this case, it should be noted that the formulation of threats to national security is a formula that has a very broad and relative meaning. Basically, the interpretation of threats to national security is the authority of the local state as the holder of sovereignty. However, an assessment of the existence of threats to national security by the local state due to the presence of refugees, which is carried out on a case-by-case basis, must be based on good faith.

Second, such refugees or asylum seekers have committed serious crimes in such a way that the presence in a country of refugees or asylum seekers has disturbed public order in that country. Based on the provisions in Article 33 paragraph (2) the 1951 Convention, the international instrument accepted by the UN General Assembly, namely the Declaration on Territorial Asylum 1967 also provides notes on the implementation of the non-refoulement principle by member countries.

In the context of expulsion of refugees and asylum seekers in its territory, the state needs to pay attention to the following limitations. First, the decision of a country to take action to evict a refugee or asylum seeker from its territory is casuistic and based on a strict and accountable legal process and consideration. The strict legal process and can be accounted for to arrive at a decision to carry out the expulsion is also accompanied by respect for the general principles of human rights law. Second, in carrying out an act of

expulsion a country must make sure that refugees and asylum seekers who are obliged to leave their territory can be accepted in a safe third country.[19]

There is the possibility of not applying the non-refoulement principle, basically growing with the provisions contained in Article 2 of the 1951 Convention. In Article 2, general obligations must be obeyed by refugees in the country of asylum. The general obligations of refugees as defined in this article are essentially in accordance with the applicable provisions of international law in general; where everyone including foreigners residing in the territory of a country is obliged to obey the laws and regulations of the country concerned. Therefore, the provisions contained in Article 2 are a reaffirmation of the provisions that apply in international law in general.

In contrast to the 1951 Convention and the 1967 Protocol which allows deviations from the application of the principle of non-refoulement. In the 1969 Convention, there are absolutely no exceptions or reasons. anything that can be used to circumvent the application of this non-refoulement principle. In this case, the convention emphasizes that threats to national security cannot be used to deviate from the principle of non-refoulement but can be used as an excuse to resettle in an area that is considered safe.

As stated earlier, states also have very good reasons for violating the principle of non-refoulement. For instance, one can hardly expect a small state with limited resources, which is already struggling with large numbers of refugees, to embrace another mass influx on its own. In Chapter III, the states addressed all offered justifications for why they actually could not accept any more refugees, or why they had to limit the numbers they admitted. In addition, we must also recognize the fact that states must have a discretion to prohibit such individuals

[19] M Alvi Syahrin, *Pembatasan Prinsip Non-Refoulement*, 1 BHUMI PURA, 2018, at 12–16,

from invoking the principle of non-refoulement. What is of primary concern, however, is that these justifications and exceptions are at risk of being generalized to the point that they begin to render the theory itself obsolete.

Next, let's look at what justifications and exceptions international law specifically prescribes. Articles 33 and 1(F) of the Refugee Convention provide that person convicted of certain crimes or who pose a 'threat to the protection of the country' do not assert the value of the principle of non-refoulement, as discussed when looking at the understanding of exceptions by the United States. In order to return such a person to the country from which they came, a state would therefore be justified. But what other constitutionally valid justifications? National security and public order have long been regarded as possible justifications for derogation, Professor Goodwin-Gill asserts.[20] The ILC Draft Articles on State Accountability also provide that a violation of a duty under international law is justified in exceptional cases of need. Yet we find ourselves once again in unknown territory. How much of a threat is needed to public order or national security? What would be listed as an extreme requirement case? The 'need' argument is useful to explain the value of restricting exceptions and justifications.[21]

Article 33 of the ILC Draft demands that the situation (in our case, refugee influx) must jeopardize the 'critical interest' of the State and put it in a 'significant and immediate danger' position. A state can invoke need as a reason only then. Roman Boed considered in depth the effect of Article 33 of the draft on the concept of non-refoulement, in particular in cases of mass influx. He considered that internal stability, which could be threatened, as in the case of Macedonia, by a

[20] Sofia A. Perez, *Immigration Policy*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES: SECOND EDITION (2015).

[21] Lauterpacht and Bethlehem, *supra* note 2.

large influx of individuals of a certain ethnicity, would fall into the category when considering the 'critical interest' factor. Economic stability and environmental protection were other 'important interests' that were listed. He noted, however, that it would have to be decided on a case-by-case basis if this was a 'important interest'. Boed proceeded to discuss the consequences of 'significant and immediate risk' and concluded that this aspect is 'fact-specific' as well.

Therefore, is this a good way to give a 'safety valve' to states if the burden on them becomes too much to bear? And I must say it is. The test used is a relatively strict one. A very serious risk is suggested by 'Grave and immediate danger.' It would be hard to believe that, on this basis, the Australian government might have justified Tampa's refusal. In addition, it is helpful that the test is explicitly laid out, with comments on the scope of the article given. It could be shown that both elements of the test are very reliant on the specific factual situation, leaving too much space for movement. Nevertheless, it would be difficult to predict any potential situations that would constitute, for example,' significant and immediate risk.' Obviously, any statement of necessity must be made in good faith, and not merely to escape the financial burden or political outcry that refugee acceptance might create. This test tends to strike a good balance to ensure that refugees are safe by not putting too heavy a duty on those states that accept them.

Any clarification of these exceptions in the present political climate is likely to be compromised by the issue of terrorism. Terrorism and refugees are also seen as intertwined concerns, as was stated earlier. Clearly, there may be fears that people applying for refugee status who have left a state known for its use of terrorism, such as a Palestinian, could be connected to terrorism in some way, and therefore be a threat to the group. Indeed, this seems to have been the method taken by the US to enact its anti-terrorist clause, which

fully prohibits all Palestinian Liberation Organization members from applying for refugee status. However, it has been argued that this effort to shield the United States from terrorists goes too far and raises the danger of violation of the clause of non-refoulement. Therefore, it seems necessary to carefully consider ways in which any clarification of non-refoulement exceptions can better protect the rights of refugees while protecting the population of the host state from terrorist attacks.[22]

CONCLUSION

IN THE CURRENT SYSTEM, the existence of the non-refoulement principle is a necessity and has been institutionalized in the various international legal instruments such as conventions and declarations. This principle is a fundamental concept and considered as the backbone for the entire international refugee legal system. The character of the non-refoulement principle as a jus cogens is based on the consideration that in fact today the non-refoulement principle is an international legal norm that has been recognized and affirmed by the international community in multilateral international conventions and other relevant international legal instruments. This principle is very basic in the international protection system for refugees and asylum seekers and cannot be distracted by states in international relations. Relevant international organizations also recognize and apply the non-refoulement principle consistently. Based on legal procedures, a country can take different actions with the obligation to implement the non-refoulement principle.

[22] Kim, *supra* note 15.

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