

# State Sovereignty Versus Non-Refoulement Principle in Providing Refugees with Protection (Case Study: The Australian Government's Policy Over Refugees)

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**ABSTRACT**--*This paper attempts to re-examine the meaning of state sovereignty in connection with non-refoulement principle. The article is focused on case study related to Australia's Policy over refugee. The writer's argument is based on the concept of jus cogens recognised in international law. In addition, the writer uses the doctrine of two-element theory to qualify the principle of non-refoulement as the norm of customary international law. This paper was based upon normative legal research, and secondary data related to the norms of international law, human rights and international refugees were collected to analyse the legal issue. The approach used in this paper is statutory approach. The results of the study show that the absolute and exclusive nature of the state sovereignty can no longer be maintained if it is related to the principle of non-refoulement.*

**Keywords:** *non-refoulement, sovereignty, refugees, human rights, protection*

## I. INTRODUCTION

The 1951 Convention on the Status of Refugees as amended by the 1967 New York Protocol concerning the Status of Refugees has regulated refugee protection comprehensively. The instruments specifically adopts the principle of non-refoulement forbidding member states to expel or return the refugees to areas where their safety will be threatened. However, in practice, Australian Government, among others, expelled the influx of refugees based upon the concept of state sovereignty, meaning that the state is fully authorised to govern everything within its national jurisdiction. The situation was then exacerbated by the fact that Australia, as a member state, did not obey the principle of non-refoulement. This kind of practice will inevitably be bad precedent for other states in the protection of refugees within their jurisdiction.

In this regard, this article re-examines the essence of the concept of state sovereignty in relation to the principle of non-refoulement, by focusing on the Australian's policy towards refugees. The writer's hypothesis is that the principle of non-refoulement may set aside the state sovereignty.

## II. RESEARCH METHODOLOGY

The paper was based upon a normative legal research. The secondary data collected consist of both

primary and secondary legal materials related to international norms, and the analysis used a statutory approach by examining international legal instruments concerning refugee protection, including the principle of non-refoulement, state sovereignty, and human rights. The research findings will be aimed to clarify the principle of non-refoulement based on the factual context.

## III. RESEARCH PURPOSES

The research was aimed at examining the essence of state sovereignty in connection with the principle of non-refoulement in refugee protection, especially focusing on the Australia's policy towards the influx of refugees into Australia. This paper will be expected to be a critical notes for, among others, Australian government in providing protection for refugees in relation with state sovereignty concept.

## IV. LITERATURE REVIEW

### 1. State Sovereignty and Its Development

Sovereignty is a concept closely related to a state [3]. F.H. Hinsley defines a sovereignty as a final and absolute power of a political community. There is no final and absolute power outside political community [7]. Daniel Philpott also says that sovereignty is the highest authority within a territory, and it consists of three elements, namely, prescription of legitimacy, rules for acquiring sovereign status, and prerogatives [19].

State sovereignty has two different sides. On one hand, it provides benefit for the state itself to determine what is useful for the welfare of its people. But on the other hand, state sovereignty will have a negative impact when it deals with a violation of international law obligations since the state concerned uses "sovereignty" as a shield for justifying its violation.

State sovereignty which in its inception was a basic norm within international law has experienced transformation. One phenomenon which has made the concept of state sovereignty relative is related to the respect and enforcement of human rights – another phenomenon: firstly, restrictions imposed on member states based on international treaty, such as the establishment of an International Criminal Court; and secondly, the emergence of both international and

supranational organisations able to enforce their powers over states to do or not to do something, such as European Union and WTO. Human rights began to develop at the end of the Second World War. This was marked by the establishment of the United Nations in 1945, and the Universal Declaration of Human Rights in 1948. Human rights has recently become the discourse around the world due to its universal characteristic in the sense that the existence of human rights is beyond geographical boundaries. Therefore, human rights issue is not only regarded as national issue, but instead, it becomes the issue of international community.

Accordingly, the violation of international obligation to respect and enforce human rights will result in state responsibility. National jurisdiction may not be used as a justification for violating international law obligation. Therefore, state sovereignty must be defined and related to the general principles of international law, such as, respect for other states' sovereignty, prohibition of rights abuses, proportionality, as well as minimum standards of civilisation. And it may be used as the main argument for implementing non-refoulement principle which, consequently, set aside the argument of state sovereignty.

Based on the above-mentioned analysis, the essence and characteristic of state sovereignty should be reviewed a concept that is no longer absolute. It is, therefore, no surprise that Boutros-Ghali in point 17 of his report wrote that *the time of absolute and exclusive sovereignty [...] has passed; its theory was never matched by reality* [4].

## 2. Protection of Refugees and Human Rights

The discourse on refugees can not be separated from human rights, since refugees are also human beings, and there are considered as vulnerable group needed to be protected. Refugees are often the target of cruel and inhuman action, either in their own countries, in transit or in the destination countries. In this regard, refugees are forced to leave their countries, friend or, even, families.

Being refugees are not planned, because the threat of persecution may come anytime, and as a result, refugees do not have time to prepare necessary documents to support their lives, such as visas, passports, etc. The absence of these documents will inevitably hamper their entry into a country to ask for protection. It is also necessary to note that the refugees' rights are often neglected. They are often abandoned without any certainty of protection.

There are several provisions in International Covenant on Civil and Political Rights (ICCPR) related to refugees, such as Article 12 concerning the right to travel, either in their own countries or outside. This right may not be limited, unless the limitation is determined by law for the benefit of national security, public order, public health or morals, and the freedom of others [12]. ICCPR also set forth articles that may not be exempted at any cost, such as, right to live, the banning of torture or inhuman treatment, right not to be slaved, right not to be jailed only because of their inability to fulfill their contractual obligations, as well as activities that are not classified as criminal acts according to either national law or international law (these rights are regulated in Article

6,7,8,11,15,16 and 18 of ICCPR). These rights are parts of refugees' rights.

Refugees are always associated with risk, so they hope very much to be accepted and granted protection. Aside from the misery they suffer, refugees are always far from certainty over their future, as well as their families left behind. This traumatic condition may not be neglected, and it should be made the utmost consideration for granting protection. It is really inhuman if a state reject refugee and expell them by the reason of national security [9].

## V. ANALYSIS

The principle of non-refoulement bans every state to expel refugees by whatever ways outside state boundary or to areas where their safety will be threatened due to persecution. In this regard, the principle of non-refoulement is often identified as the backbone of the international protection system for refugees – in practice, this principle has also been expanded for asylum seekers [26].

In recent development, the influx of asylum seekers and economic migrant has increased. Several states increased their efforts to control the influx of migration by strictly limiting physical access [24], for example, requiring visas, imposing sanction on airline or shipping companies carrying people without necessary documents or intercepting individuals in order not to enter their areas [24]. However, unfortunately, these efforts have caused difficulties for refugees who badly need international protection. And as a result, they could not reach the safe place as the case of refugees trying to enter Australia's territory.

Australia has been the spotlight international level due to its policy in handling refugees. The Australia's policy has been considered as not supporting the fulfilment of refugees' rights. It is difficult for refugees to enter Australia's territory.

The above-mentioned condition was exacerbated when asylum seekers in Australia were called illegal. Jane McAdam and Fiona Chong said that both politicians and mass medias often called them illegal. Asylum seeker were considered as threatening national security of Australia, so that the government got the right to keep the refugees away from its territory [13]. The term "illegal" was used due to the absence of visas as required by the 1958 Migration Act [14] [15].

Asylum seekers asking for protection in Australia will be granted protection visa categorised into three kinds of visas, namely, Temporary Protection Visa (TPV), Safe Haven Enterprise Visa (SHEV), or Permanent Protection Visa (PPV). Protection Visa will be granted if there is legitimate visa. Those who have legitimate visas and have been examined by immigration upon their arrival may propose for PPV. Meanwhile, those who do not own legitimate visas and are not examined by immigration upon their arrival only have the rights to request TPV [17]. The latter was regarded as entering Australia's territory illegally, and they were only granted temporary

protection. It was far more limited protection, in terms of both duration and rights granted [13].

By reviewing the above-mentioned condition of refugees, the Australian policy over refugees should be rejected, since the main function of protection is to provide certainty for refugees to get safety [29]. The Australian policy in granting TPV is also considered inefficient, because within certain period, there is reassessment to get protection. It, therefore, proved that temporary protection was not durable solution to handle refugees as mandated by the 1951 Geneva Convention.

Besides being given temporary protection, Australian government also issued a policy called Mandatory Detention. Simply stated, temporary detention is a detention imposed on asylum seekers who usually come by boat and do not have visas. Asylum seekers should remain in immigration custody until they are granted visas [14] or expelled from Australia [14]. There is no time limit for asylum seekers to be in immigration custody [13].

Freedom is the most fundamental element of human rights, because without it, people can not enjoy the other rights. The restraint of asylum seekers' freedom will, therefore, be the same as slowly prevent them from enjoying their human rights. It violates Article 9 of UDHR saying that nobody may be arrested, detained or expelled arbitrarily. Furthermore, Article 9 paragraph (1) of ICCPR states that every person is entitled to freedom, personal safety, and accordingly, nobody may be detained arbitrarily, unless it is based on legitimate reason, as well as legal procedure.

The most reasonable argument by Australian Government over mandatory detention policy is that asylum seekers do not have legitimate visas or they entered Australia's territory illegally and it was a violation of the 1958 Migration Act. Meanwhile, if thoroughly examine, asylum seekers will not possibly get visas from their own countries because one of the reasons they leave their countries is that their countries do not grant visas. If protection is not granted, let alone legitimate documents for traveling, such as passports or visas. In this regard, Article 28 of the 1951 Geneva Convention has mandated every member state to provide documents for refugees. Besides that, there is an obligation for every member state not to impose sanction on refugees due to their illegal stay [9].

In 2012 Australian Government introduced a new concept called Regional Processing Country (RPC) through Migration Legislation Amendment (Regional Processing and Other Measures) Act of 2012 which amended Migration Act of 1958. The 2012 Migration Legislation Act mandated the Minister of Immigration to appoint one country as RPC [15]. The appointed country is assigned to do transfer activities and to process refugees' claim filed by asylum seekers entering Australia by boat. And to implement its policy, Australian Government came to bilateral agreements with Pacific Islands countries, such as Nauru and Papua New Guinea [13].

Both Nauru and Papua New Guinea are small-size countries and do not have sufficient experience to deal

with refugees, and it was exacerbated by the frequency of high-level crimes against foreigners that often took place in Papua New Guinea. It indicated that asylum seekers and refugees were vulnerable to xenophobia and racism among local people, and it is no surprise that those countries were not chosen to be destination places for seeking protection due to possible persecution. Based on this situation, the success of Australia's resettlement policy entrusted to those RPC will be questioned [13].

The Government of Australia also introduced a policy called Operation Sovereign Borders (OSB), that is, an operation for keeping border safety led by military and supported by various federal government agencies. This operation is aimed at fighting against people smuggling and protecting Australian border. By so doing, people traveling illegally to Australia by boat will be intercepted and expelled from Australian waters or sent back to other countries for being processed outside Australia (in this case: Papua New Guinea or Nauru).

Those Australian policies have widely been criticised as violations of human rights, including the violation of non-refoulement principle. The policy of OSB or RPC has clearly violated the principle of non-refoulement that forbids the expulsion or deportation of refugees to areas, not only areas where refugees come from, but all areas where their lives and freedom will be threatened due to different races, religions, nationalities, membership of social group or political opinions [2].

It is regrettable that Australia as a member of the 1951 Geneva Convention has violated the convention, especially Article 33 on non-refoulement principle. This disobedience can be a weakness for the enforcement of legal instruments concerning international refugees, let alone for non-member states. These countries will refer to Australia if they do not obey the convention, including the provision related to refugees within their own territories. In this regard, to examine the concept of state sovereignty applied by Australia, the writer argues that non-refoulement principle constitutes the norm of *jus cogens* that may not be superseded by whatever norms or concepts.

*Jus cogens*, also called peremptory norm, has been regarded as norms already accepted and recognised in international community. This norm has a binding force and may not be superseded or derogated by other legal instruments [27] [1] [18]. However, *jus cogens* may also be changed only if there is a new international norm having the same characteristic. And, as a result, all international treaties violating *jus cogens* should be null and void [27].

The implementation of *jus cogens* is not only limited to the 1969 Vienna Convention, but also for international law system as a whole. The emergence of *jus cogens* has merely been aimed at restraining the interests of states in treaty-making that threatens the sustainability of international law system within international community. And accordingly, a state may not promulgate national laws and regulations violating *jus cogens*, since it is related to a state's obligation to respect and comply with international treaty (*pacta sunt servanda*).

In this article, the discourse to be addressed is how the principle of non-refoulement should be regarded as the norm of jus cogens. The writer will refer to Article 53 of the 1969 Vienna Convention stating that there are two requirements to determine whether a norm may be regarded and recognised as jus cogens, namely, first, double consent, and secondly, norms that may not be superseded.

#### 1. Double Consent

According to this requirement, an international norm may be regarded as jus cogens if the norm has been accepted and recognised by international community as a whole. In order to prove whether an international norm has been recognised or not, we should refer to international treaty or international customary adopting that norm. In this case, international treaties adopting non-refoulement principle are, among others, as follow:

- a. the 1951 Convention Relating to the Status of Refugees.

The 1951 Geneva Convention constitutes an embryo for a discourse on international law of refugees. This convention has been considered as an opening step since it provided definition of a refugee. By this convention, the principle of non-refoulement has been institutionalised within multilateral convention as stipulated in Article 33 of the 1951 Geneva Convention.

- b. the 1967 Declaration on Territorial Asylum.

This declaration endorsed by the UN General Assembly provides international consensus recognising that the granting of asylum constitutes a peaceful and humanly action. According to this declaration, the responsibility to evaluate the request of refugee status is placed on the state where the individual proposes [24]. And according to Article 3 paragraph (1), a state shall not reject or expel asylum seekers either in the border or already within its territory to any country where those asylum seekers will be threatened due to persecution.

- c. the 1984 Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment.

The principle of non-refoulement is stipulated in Article 3 paragraph (1) of this Convention stating that no state party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. In determining whether there is a reason stipulated in Article 3 paragraph (1), the authority shall consider all related aspects, including if possible, permanent pattern of huge, massive and striking violation of human rights [8].

Apart from being adopted in international treaty, the principle of non-refoulement has previously been the international customary law. This principle has emerged and has been practiced among states since World War I. The implementation of non-refoulement principle has been triggered by the failure during World War II to

experience, states began to push and campaign for refugee protection [28].

This custom has been the state practice up to now, and it was reiterated in the Preamble Declaration of State parties to the 1951 Convention and/ or its 1967 Protocol relating to the Status of refugees stating as follow [10] [23]:

*“Acknowledging the continuing relevance and resilience of this international regime of rights and principle, including at its core the principle of non-refoulement, whose applicability is embedded in customary international law”*

It was further reiterated by jurists’ opinion in Expert Roundtable organised by UNHCR, Lauterpacht Research Centre for International Law and University of Cambridge stating that non-refoulement is a principle of customary international law [20]. Since state practice showed the implementation of non-refoulement principle, followed by Declaration and also supported by jurists’ opinion, there have been sufficient requirements to fulfill the criteria for which a norm becomes an international customary law as required by two-element theory (Those criteria are: firstly, the state practice represent the action commonly practiced by the states (evidence of material act), and secondly, the action already practiced has been accepted and complied as law (opinio juris)). Accordingly, that norm may directly be implemented within a state’s territory without any incorporation process of non-refoulement principle into state’s national law, and it is in line with the doctrine of automatic incorporation [16].

#### 2. As norms that may not be superseded or derogated

The principle of non-refoulement as norm that may not be superseded or derogated could be seen based upon facts as follow:

- a. Executive Committee Conclusion No. 79 (XLVII) dated on October 11, 1996 reiterated that [11]:

*“Distressed at the widespread violations of the principle of non-refoulement and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at report indicating that large numbers of refugees and asylum seekers have been refouled and expelled in highly dangerous situations: recalls the principle of non-refoulement is not subject to derogation.”*

- b. Paragraph (3) of the 1997 UN General Assembly Resolution No. 51/75 provides that every person shall be entitled to seek for and enjoy asylum in other countries and free from persecution without any discrimination. This resolution also mandates all states to uphold asylum as necessary instrument to internationally protect refugees and to respect the principle of non-refoulement as a principle that may not be derogated.
- c. Paragraph (13) of the 1998 UN General Assembly No. 52/132 strongly states that principle of non-refoulement is not subject to derogation.
- d. Article 42 of the 1951 Geneva Convention provides that Article 33 governing the principle of non-refoulement shall not be reserved. It means that the principle of non-refoulement shall be regarded as the

most essential basic norm and may not be exempted. This is supported by advisory opinion concerning non-refoulement principle as follows [25]:

*“Within the framework of the 1951 Convention or the 1967 Protocol, the principle of non-refoulement constitutes an essential and non-derogable component of international refugee protection [...] the General Assembly has called upon States to respect the fundamental principle of non-refoulement, which is not subject to derogation.*

- e. the Cartagena Declaration of 1984 reaffirmed that the principle of non-refoulement constituted a cornerstone for international protection of refugees. This principle is therefore, very important and shall be recognised as the norm of jus cogens in international law [5].

Since both requirements (double consent and norm that may not be derogated) have been fulfilled, the principle of non-refoulement has constituted the norm of jus cogens recognised in international law system and it may not be superseded by other general norms.

## VI. CONCLUSION

Based on the above-mentioned analysis, it can be concluded that the concept of state sovereignty has been interpreted as a relative concept when it associated with the principle of non-refoulement in refugee protection. There are several considerations that can be given regarding the previous statement, namely as follows.

1. The principle of non-refoulement constitutes the norm of jus cogens and it may not be derogated. Every state, either member state or non-member state, will indirectly be obliged not to promulgate laws and regulations, both national and regional levels, which are in conflict with the principle of non-refoulement.
2. The principle of non-refoulement is closely related to the respect and protection of human rights, including the right of refugees not to be expelled or returned to areas where their lives or freedom will be threatened. the existence of human rights is to limit states in applying their states' sovereignty and to call upon states to act under the frame of universal standards recognised by human rights and international law [6]. It means that a state may not use state sovereignty concept as a shield for expelling refugees asking for protection.
3. The principle of non-refoulement as an international customary law norm can directly bind third party countries that are not participants of the 1951 Geneva Convention and 1967 New York Protocol. Thus these countries must abide by the non-refoulement provisions. This is also reinforced by the provisions of Article 38 of the Vienna 1969 Convention which confirms that a third country is bound by a treaty if it relates to the provisions of customary international law that has been recognized.

## REFERENCES

- [1] Alfred verdoss. (1966). “Jus Dispositivum and Jus Cogens in International Law”. American Journal of International Law, 60 (1), 55-63.
- [2] Atle Grahl-Madsen. (1997). UN High Commissioner for Refugees (UNHCR). Commentary of the Refugee Convention 1951 (Article 2-11, 13-37).
- [3] Atul Mishra. (2008). “Theorising State Sovereignty in South Asia”. Economic and Political Weekly, 43 (40), 65-72.
- [4] Boutros-Ghali, An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping, Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992.
- [5] Cartagena Declaration. 1984.
- [6] Christian Reus-Smit. (2001). “Human Rights and the Social Construction of Sovereignty”. Review of International Studies, 27 (4), 519-538
- [7] Christopher W, Morris. (2000). “The very Idea of Popular Sovereignty: Why the People Reconsidered”. Social Philosophy and Policy, 17 (1), 1-26.
- [8] Convention against Torture, cruel, Inhuman or Degrading treatment of Punishment. 1984.
- [9] Convention relating to the Status of Refugees. 1951.
- [10] Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees. 16 January 2002. HCR/MMSP/2001/09.
- [11] General Conclusion on International Protection No. 79 (XLVII) – 1996.
- [12] International Covenant on Civil and Political Rights. 1966
- [13] MacAdam, Jane and Fiona Chong. (2014). Refugees: Why Seeking Asylum is Legal and Australia's Policies are not. Sydney: New South Publishing.
- [14] Migration Act of 1958.
- [15] Migration Legislation Amendment Act of 2012
- [16] Oliver Jones. (2009). “Customary Non-refoulement of Refugees and Automatic Incorporation into The Common Law: A Hongkong Perspective”. International and Comparative Law Quarterly, 58 (2), 443-468.
- [17] Part A Form 866 Application For a Protection Visa. Department of Home Affairs. Australian Government.
- [18] Reports of the Commission to the General Assembly. (1966). Draft Articles on the Law of Treaties with Commentaries. Volume II.
- [19] Richard W, Mansbach. (2004). “Review: Revolution in Sovereignty: How Idea Shaped Modern International Relation”. Journal of Politics, 66 (1), 282-283.
- [20] Summary Conclusions: The Principle of Non-refoulement, Expert Roundtable, organised by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law. University of Cambridge, UK. 9-10 July 2011.

- [21] UN General Assembly Resolution No. 51/75, adopted on February 12. 1997.
- [22] UN General Assembly Resolution No. 52/132, adopted on February 27. 1998.
- [23] UN General Assembly Resolution No. A/RES/57/187, adopted on December 18, 2001.
- [24] UNHCR. (2005) "An Introduction to International Protection: Protecting Persons of Concerns to UNHCR. Self Study Modul I.
- [25] \_\_\_\_\_. (2007). Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and Its 1967 Protocol.
- [26] United Nations Declaration on Territorial Asylum. 1967.
- [27] Vienna Convention on the Law of Treaties. 1969.
- [28] Vijay M, Padmanabhan. (2011). "To transfer or not to transfer: Identifying and Protecting Relevant Human Rights Interests in Non-refoulement". *Fordham Law Review*, 80, 73-123.
- [29] Kuku Tejomurti. (2019). "Online Transportation: Violation of Privacy Rights and Vulnerability to Sexual Violence by Drivers in Digital Platform-Based Work. *Advances in Social Science, Education and Humanities Research* Volume 358, Proceedings of the 3<sup>rd</sup> International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019), pp. 243-244. DOI: <https://doi.org/10.2991/icglow-19.2019.61>