

Exclusion of the principle of non-refoulement in article 33 paragraph 2 of the 1951 refugee convention

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Abstract

This study aims to examine whether non-refoulement in the refugee context has attained the status of a jus cogens norm or not and how the exceptions in Article 33(2) should be understood if non-refoulement is indeed considered as a jus cogens. This research adopts a normative juridical analysis approach to critically examine the status of the principle of non-refoulement. The study concludes that the principle of non-refoulement qualifies as a norm of jus cogens based on several key criteria. Firstly, it satisfies the requirements of a jus cogens norm by addressing matters of common concern to the international community, serving humanitarian purposes, and aligning with principles outlined in the UN Charter relating to treaties and the use of force in international relations. Secondly, the exception outlined in Article 33 Paragraph 2 of the Refugee Convention does not alter the non-derogable nature of the principle of non-refoulement. The fulfillment of Article 33 Paragraph 2 is contingent upon strict conditions and necessitates objective evidence to be provided by a country. The research is intended to contribute to the understanding of the normative status of the principle of non-refoulement within the framework of international refugee law.

Keywords: international law; jus cogens; non-refoulement

1. Introduction

The principle of non refoulement, enshrined in international refugee law (McAdam, 2020), serves as a fundamental safeguard to protect individuals fleeing persecution and seeking refugee. Under article 33 of the 1951 Refugee Convention and its 1967 Protocol (Benhabib, 2020), the principle prohibits the return or expulsion of refugees to territories where their lives or freedom would be at risk due to persecution, torture, or other forms of inhumane treatment. However, it is essential to examine the provisions within this article to understand the complex issue of exclusions from the principle of non-refoulement. The principle of non-refoulement, as a cornerstone of international refugee law, plays a vital role in safeguarding the rights and protection of individuals who are forced to flee their home countries due to persecution or other threats. The principle is enshrined in Article 33 of the 1951 Refugee Convention and its 1967 Protocol, which outline the obligations of states towards refugees.

Article 33 establishes the principle that no state should expel or return refugees to a territory where their life or freedom would be in danger on account of their race, religion, nationality, membership in a particular social group, or political opinion. This prohibition on refoulement reflects the international community's recognition of the need to ensure the safety and well-being of individuals seeking refuge.

However, it is important to recognize that there are certain circumstances in which states may seek to exclude individuals from the application of the principle of non-refoulement. The Refugee Convention itself allows for certain exceptions to the principle in specific cases. These exceptions are primarily based on concerns related to national security and public order.

The Convention recognizes that individuals who have committed serious crimes or pose a threat to the security of the country in which they seek asylum may be subject to exclusion from the protection of non-refoulement. Additionally, individuals who have been convicted of acts contrary to the purposes and principles of the United Nations or have been involved in activities that are considered a danger to the community may also be excluded. The determination of whether an individual falls within these exceptions is typically made on a case-by-case basis, taking into account relevant factors such as the severity of the crimes committed, the nature of the threat posed, and the available evidence. States have the responsibility to conduct individual assessments to ensure that the exclusion provisions are applied fairly and in accordance with international law.

It is important to note that while the principle of non-refoulement may have exceptions, the right to seek asylum and the need to protect individuals from persecution remain central. The exceptions to non-refoulement should be interpreted restrictively, and states must balance their legitimate security concerns with their obligations to provide protection to those in need.

In conclusion, the principle of non-refoulement is a crucial component of international refugee law, aiming to prevent the return or expulsion of individuals to territories where their lives or freedom would be at risk. Although there are exceptions to the principle based on national security and public order, these exceptions should be applied sparingly and in compliance with international legal standards. The protection of refugees and the fulfillment of states' obligations to provide asylum remain essential in ensuring the safeguarding of human rights and promoting humanitarian values.

This article aims to explore the specific exclusionary clause outlined in Article 33, paragraph 2 of the 1951 Refugee Convention. This clause permits states to withhold the application of non-refoulement in certain circumstances, allowing for the removal or expulsion of individuals seeking asylum. While the principle of non-refoulement is a cornerstone of refugee protection, the provision of exceptions raises important questions regarding its scope, application, and potential consequences for vulnerable populations.

In this analysis, we will delve into the historical context surrounding the drafting of Article 33, examining the intentions of its framers and the evolving interpretations over time. We will explore the various grounds for exclusion, such as national security, public order, and serious non-political crimes, as well as the potential challenges and controversies they present. Furthermore, this article will critically evaluate the implications of excluding individuals from the principle of non-refoulement. We will discuss the potential impact on refugee populations, their human rights, and the responsibility of states to provide international protection. By examining case studies and legal precedents, we will assess the practical application of these exclusionary clauses and the potential risks they pose. This analysis will discuss efforts to address the concerns and shortcomings related to the exclusion clause in article 33, paragraph 2.

We will explore alternative approaches and potential reforms aimed at striking a balance between safeguarding national interests and upholding the rights and protections afforded to refugees under international law. The exclusion clause in Article 33, paragraph 2 of the 1951 refugee convention represents a complex and contentious aspect of international refugee law. By examining its historical context, practical application, and consequences, this article aims to provide a comprehensive analysis of the exclusions from the principle of non-refoulement. It is essential to foster a nuanced understanding of these provisions to ensure the protection and well-being of refugees in an ever-changing global landscape.

Refugees occupy a position of profound vulnerability ([Hugman et al., 2011](#)) as they lack the protection of their own nation and often face the looming threat of persecution. In

response to this plight, the international community assumes the responsibility of ensuring the guarantee and preservation of refugees' fundamental rights. Within the framework of this global protection status, it becomes imperative to provide refugees with comprehensive and robust safeguards that encompass the entirety of their inherent human rights. This encompasses not only the physical safety of individuals, but also the broader dimensions of their livelihoods, and the preservation of their dignity and overall well-being.

Recognizing the multifaceted vulnerabilities experienced by refugees, the international community endeavors to establish a protective environment that actively promotes, upholds, and respects their rights. The need to structure refugees and asylum protection environment gave rise to the adoption of international and regional instruments providing the foundation for International refugee law. Consistently anchored in this frameworks is the principle of non-refoulement, which forms an essential component of the institution of asylum.

Principle of non-refoulement constitutes a fundamental concept within the international framework for the protection of refugees and asylum seekers (Syahrin, 2018). The principle prohibits the expulsion or repatriation of individuals deemed as refugees to territories where they would be subjected to persecution that jeopardizes their lives. Such persecution is conventionally hinged on factors such as race, religion, nationality, membership in a specific social group, or political beliefs. The principle of non-refoulement stands as a critical safeguard, ensuring that individuals fleeing persecution are not forcibly returned to situations where their fundamental rights and well-being would be gravely endangered. It serves to proscribe the expulsion or repatriation of individuals to their country of origin, where their life and liberty would be threatened. As such, the principle of non-refoulement (Bruin & Rene, 2003), as enshrined in Article 33 of the Refugee Convention, is an essential aspect of international refugee law and holds binding force upon all states that have acceded to the Refugee Convention.

However, while the significance of the principle of non-refoulement as a vital safeguard for refugees (Akal, 2023), ensuring their protection from being forcibly returned to situations where they may face persecution, is largely uncontested, the existence of Article 33 Paragraph 2 within the 1951 Refugee Convention introduces an intricate scenario that warrants an in-depth assessment. Article 33(2) of the Refugee Convention stipulates that the principle of non-refoulement may be overridden under specific circumstances, such as when there are legitimate concerns regarding a refugee's impact on national security or when the refugee has been convicted of a grave criminal offense.

These exceptions, if not carefully delineated and applied, possess the potential to undermine the essence of non-refoulement because, if broadly applied, the consequences could be catastrophic. Such an approach would result in the exclusion of deserving refugees from necessary protection, thereby undermining the fundamental principles of the refugee law regime. Moreover, it would pose a significant challenge to the legitimacy of the emerging peremptory norm. Therefore, in light of the arguments positing the emergence of non-refoulement as a jus cogens norm, an important question arises: How does this recognition of non-refoulement as a peremptory norm affect the validity and interpretation of the exceptions outlined in Article 33(2)?

Therefore, the determination of non-refoulement as a jus cogens norm requires a comprehensive examination (Costello & Foster, 2016), encompassing not only the provisions of the 1951 Convention, but also customary international law, scholarly discourse, state practices, and analogous expressions of the norm in other domains of international law, such as torture (Farmer, 2008). This study presents the argument that if non-refoulement in the context of refugees has indeed evolved into a jus cogens norm, exceeding the confines of convention law, it necessitates a reevaluation and strict limitation of the convention-based exceptions to non-refoulement. It does so by assessing the underlying justifications for such an exception within the context of national security safeguards and refugee protection. While duly considering the implications of the criminality exception articulated in Article 33(2) of the Refugee Convention, the study

intends to contribute to the ongoing discussions on the complex intersection of human rights, security concerns, and the legal frameworks governing international refugee law. The article begins by focusing on the emergence of non-refoulement within the refugee context, aiming to establish its widespread acceptance. Drawing on its somewhat absolute nature in relation to norms prohibiting torture and cruel, inhuman, or degrading treatment, this section presents a persuasive context for interpreting non-refoulement within the realm of refugee law. The subsequent section of the article delves into assessing whether non-refoulement in the refugee context has attained the status of a *jus cogens* norm or not. Consequently, it poses the question of how the exceptions in Article 33(2) should be understood if non-refoulement is indeed considered *jus cogens*. The article eventually concludes by rooting for a restrictive interpretation and application of the Article 33(2) exceptions in the Refugee Convention.

2. Methods

The Article combines elements of normative legal research and a qualitative approach, to investigate the exclusion of the principle of non-refoulement in Article 33(2). In examining the exclusion clause of the principle, the article utilizes a doctrinal legal research method. Its design incorporates a comprehensive analysis of legal provisions, international jurisprudence, and legal literature to provide a thorough understanding of the contentious issues around this provision.

The main sources of data include the Refugee Convention and its 1967 Protocol, with a specific focus on Article 33(2) which provide details on the exclusion of non-refoulement. Besides, in order to understand the original intent and scope of the exclusion clause, the study delves into the analysis of the accompanying travaux préparatoires of the Convention. Furthermore, relevant international instruments pertaining to the non-refoulement will be examined to gain insights into their implementation and interpretations of the principle under different circumstances. Equally, secondary sources such as academic articles, books, and scholarly publications that offer diverse perspectives and theoretical insights on the principle of non-refoulement, its scope, and limitations, and the exclusion clause are analyzed.

3. Results and Discussion

3.1. *The Principle of Non-Refoulement in the 1951 Refugee Convention*

The principle of non refoulement is a fundamental principle of international refugee law (Afriansyah et al., 2022). It was formally enshrined in the Refugee Convention under Article 33 as thus:

1. "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of the 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.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

In the same breath, subsequent international legal frameworks, following the Refugee Convention, have not only reaffirmed the principle of non-refoulement but have also expanded its scope in certain instances. The 1967 Protocol relating to the Status of Refugees revisits and reinforces the essential provisions of the 1951 Convention, including the definition of non-refoulement. Furthermore, many regional agreements on refugee law have adopted the standard of a well-founded fear of persecution, which is defined in similar terms as in the 1951 Convention, as the criterion for determining protection against refoulement.

Non-refoulement is not only recognized as a principle with wide-ranging application but has also attained acknowledgment as a fundamental tenet of refugee protection. This recognition was solidified through the 1984 Cartagena Declaration, where

members state present collectively designated non-refoulement as a "cornerstone of the international protection of refugees." They further asserted that the principle should be acknowledged as *jus cogens*, an imperative norm in the realm of international law. This sentiment has been repeatedly affirmed in both Executive Committee Conclusions by the Office of the United Nations High Commissioner for Refugees (UNHCR) and resolutions of the United Nations General Assembly, emphasizing the vital significance of non-refoulement within the framework of refugee protection. The non-derogable nature of this principle is accentuated in Article 42 of the 1951 Convention and subsequently reaffirmed under Article VII(1) of the 1967 Protocol.

Essentially, non-refoulement prohibits the expulsion, return, or extradition of a refugee to a territory where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion. The principle is based on the recognition that refugees are individuals who have fled their home countries due to a well-founded fear of persecution or serious harm. It is intended to ensure that refugees are protected from being sent back to situations where they would face persecution, torture, inhumane treatment, or other grave violations of their human rights (Adhaniah et al., 2021).

Notably, the principle of non-refoulement is grafted with certain essential elements that shape its significance in refugee protection (D'Angelo, 2009). Firstly, there is the aspect of the principle that prohibits returning of refugees to their country of origin or any other territory where they would be exposed to persecution or severe harm. This prohibition is not limited to direct forcible return but also includes indirect forms of refoulement (Sumarlan, 2019), such as expulsion or deportation to a third country where their safety and well-being are not guaranteed. In addition, the non-refoulement applies whenever there exists a genuine risk of persecution or serious harm based on various grounds, including race, religion, nationality, membership in a particular social group, or political opinion. These grounds are broadly defined to include a wide range of circumstances that may place individuals at risk.

Furthermore, the principle safeguards refugees who possess a well-founded fear of persecution. The element of well-founded fear must be based on reasonable grounds supported by objective circumstances and evidence not just subjective narration of the asylum seeker. Finally, the principle extends its protective scope beyond the boundaries of the initial country where refugees sought asylum. It ensures that refugees are not forcibly returned to any territory where their safety and well-being would be compromised. Lastly, the principle of non-refoulement applies universally to all refugees (Missbach, 2013), regardless of their nationality, race, or other characteristics. It serves as a universal principle upholding the rights and preserving the dignity of all individuals in need of international protection.

Additionally, the principle extends its protective scope beyond the boundaries of the initial country where refugees sought asylum (Sadjad, 2021). It acknowledges that situation in the country of origin might remain perilous and that refugees may continue to face risks even after crossing borders. As a result, it ensures that refugees are not forcibly returned to any territory where their safety and well-being would be compromised.

It is crucial to emphasize that the principle of non-refoulement applies universally to all refugees (Liliansa et al., 2015), regardless of their nationality, race, or other characteristics. It serves as a universal principle upholding the rights and preserving the dignity of all individuals in need of international protection. By adhering to this principle, states contribute to maintaining a global asylum regime that respects and upholds the fundamental principles of human rights and humanitarian obligations. However, despite the broad scope and importance of the principle of non-refoulement (Sadjad, 2021), article 33, paragraph 2 of the 1951 refugee convention introduces exceptions that allow states to exclude certain individuals from its protection. These exceptions, although intended to address legitimate concerns related to national security, public order, and serious non-political crimes, have been subject to debates and controversies due to their potential impact on the rights of refugees.

In the following sections, we will delve deeper into the specific grounds for exclusion and critically analyze their application and implications within the context of the principle of non-refoulement. Through this analysis, we aim to shed light on the complexities surrounding the exclusion clause and explore potential avenues for addressing the challenges it presents while ensuring the continued protection of refugees worldwide.

Overall, the principle of non-refoulement stands as a vital pillar of refugee protection (Sultoni et al,). It serves as a fundamental safeguard against the return of refugees to situations where their lives or freedom would be at risk. While the exclusion clause in article 33, paragraph 2 introduces complexities, its proper interpretation and implementation are essential to strike a delicate balance between safeguarding national interests and upholding the rights and well-being of refugees.

Implementing the exclusion clause poses practical challenges, including the need for clear guidelines, consistent interpretation, and a robust evidentiary framework. Additionally, further examination and dialogue are warranted to assess the compatibility of the exclusion clause with other international human rights instruments and the overarching obligation to respect the fundamental rights of refugees. Balancing national security concerns with the protection of refugee rights remains a crucial challenge, demanding ongoing efforts to develop clearer guidelines and safeguards within the framework of international refugee law. Continued research, analysis, and engagement among stakeholders are essential in addressing these challenges and promoting a just and equitable approach to the exceptions to non-refoulement. Implementing the exclusion clause outlined in Article 33(2) of the Refugee Convention indeed presents practical challenges that need to be addressed in order to ensure a just and equitable approach to the exceptions to non-refoulement.

One of the challenges is the need for clear guidelines regarding the interpretation and application of the exclusion provisions. Clarity is crucial to prevent arbitrary or inconsistent decisions. Clear guidelines can provide states with a framework for assessing cases and determining whether the exceptions to non-refoulement are applicable. These guidelines should be developed through a collaborative process involving international organizations, legal experts, and relevant stakeholders.

Consistent interpretation of the exclusion clause is another challenge. Different states may have varying interpretations of the exceptions, leading to inconsistent decisions and outcomes. Efforts should be made to promote consistent interpretation through dialogue, training, and the exchange of best practices among states. This can contribute to greater predictability and fairness in the implementation of the exclusion provisions.

A robust evidentiary framework is necessary to ensure that decisions regarding the application of the exclusion clause are based on reliable and credible evidence. Establishing clear standards of evidence and providing guidance on the types of evidence that should be considered can help enhance the fairness and accuracy of the decision-making process.

Furthermore, it is important to assess the compatibility of the exclusion clause with other international human rights instruments. States must ensure that any measures taken under the exclusion provisions are in line with their obligations under other human rights treaties. This requires a comprehensive analysis of the relationship between the Refugee Convention and other relevant international instruments to avoid conflicts and ensure that the fundamental rights of refugees are respected.

Balancing national security concerns with the protection of refugee rights remains a complex challenge. States have a legitimate interest in safeguarding their national security, but this should not come at the expense of the fundamental rights of refugees. Continued efforts are needed to develop clearer guidelines, safeguards, and procedural mechanisms within the framework of international refugee law. These efforts should aim to strike a balance between security considerations and the protection of refugees, ensuring that individuals are not unjustly subjected to exclusion from non-refoulement.

In conclusion, addressing the challenges associated with the implementation of the exclusion clause requires ongoing research, analysis, and engagement among stakeholders. Clear guidelines, consistent interpretation, a robust evidentiary framework, and

compatibility with other human rights instruments are essential components of a just and equitable approach. By working collaboratively and fostering dialogue, the international community can enhance the implementation of the exclusion provisions while upholding the rights and protection of refugees.

3.2. Exceptions to Non-Refoulement in the Refugee Convention

The exclusion of the principle of non-refoulement as stipulated under Article 33 Paragraph 2 of the Refugee Convention presents a significant divergence from the fundamental goal of providing unconditional protection to refugees. Article 33(2) incorporates two exceptions to non-refoulement: the public order exception and the national security exception. The public order exception applies to a refugee who has been convicted of a particularly serious crime through a final judgment and poses a danger to the host community. The requirement of a final conviction establishes a threshold for the application of this exception.

The inclusion of exceptions to non-refoulement in Article 33(2) of the Refugee Convention represents a departure from the general principle of providing unconditional protection to refugees (Coleman, 2003; Barutciski & Suhrke, 2001; Kim, 2017). Article 33(2) specifies two exceptions to the principle of non-refoulement: the public order exception and the national security exception. The first exception, the public order exception, applies to refugees who have been convicted of a particularly serious crime through a final judgment and who pose a danger to the host community (Simeon, 2019). This exception recognizes that in certain circumstances, the host country may have legitimate concerns about the public order and safety of its citizens. By requiring a final conviction, a threshold is established to ensure that the exception is not applied arbitrarily or without due process.

The public order exception allows the host country to consider the potential risks posed by a refugee with a criminal record and take measures to protect its own population. It acknowledges that the principle of non-refoulement should not be absolute and that in exceptional cases (Supaat, 2013), the host country may need to balance the protection of refugees with its obligations towards its own citizens and the maintenance of public order.

The second exception, the national security exception, provides for the possibility of refoulement in cases where a refugee is considered to be a threat to the national security of the host country. The precise criteria and scope of this exception may vary between countries, as national security concerns are highly sensitive and subject to individual country assessments. The national security exception recognizes that there may be situations where the presence of a refugee poses a genuine threat to the host country's security, and measures may need to be taken to address this concern.

It is important to note that the exceptions to non-refoulement outlined in Article 33(2) of the Refugee Convention are not intended to undermine the fundamental protection afforded to refugees (Syahrin, 2017). Instead, they provide a limited scope for the host country to consider certain exceptional circumstances in which the principle of non-refoulement can be set aside. The aim is to strike a balance between protecting refugees and addressing legitimate concerns related to public order and national security (Ahmed, 2016) (Cerović, 2015). The application of these exceptions is subject to careful consideration and should be carried out in accordance with the principles of international human rights law, refugee law, and due process. The host country must ensure that any decision to invoke these exceptions is based on well-founded and substantiated reasons, adhering to the principle of proportionality and respect for the rights and dignity of the individuals involved.

The national security exception is governed by a single test, which examines whether there are "reasonable grounds for regarding the refugee in question as a danger to the security of the country" of refuge. Unlike in the public order exception, the standard required for 'national security' is not as stringent, since it only requires the presence of "reasonable grounds" instead of a final judgment of conviction, and usually involves a simplified one-step evaluation. Besides, Article 33(2) does not specify the specific acts or behaviors that could trigger the national security exception but rather grants states the

discretion to determine the application of this exception, allowing for the potential for a wide range of interpretations and broad applicability.

From its very inception, the insertion of exceptions to non-refoulement in the Refugee Convention was a contentious one. The Convention is a product of an ad hoc committee that was constituted by the United Nations Economic and Social Council (Economic and Social Council [ESCOR] Res. 248B (IX), at 60, U.N. Doc. E/1553). At the time the committee convened to draft safeguards to deter refoulement, the principle of non-refoulement was considered so vital that no exceptions were initially envisaged. Indeed, some delegates, in particular the representatives of the Israeli and British governments emphasized the need for prohibition on refoulement to apply to refugees seeking admission as well as those already declared as having acquired legal status of a refugee. The delegate from the United States stated that regardless of the circumstances, refugees must not be turned back, and the guarantee of non-refoulement should not be overridden by considerations of public order. It was suggested that if a state sought to remove a refugee at any cost, they could send them to another country or place them in an internment camp.

3.3. Has the Principle of Non Refoulement attained Jus Cogens Status?

A principle can be categorized as a *jus cogens* norm if it fulfills several requirements (Adwani et al., 2021), firstly the rules concerning the common interests of the international community as a whole (Padmanabhan, 2011); secondly, the governments formed for the sake of humanitarian purposes and thirdly, the regulations placed by the UN charter against treaties agreements or the use of force in international relations. Experts define the principle of *jus cogens* as a rule that limits the will of the state (Oralova, 2015). Although states have the freedom to form laws and regulate their behavior, that freedom has limits; there are rules of law that limit the will of the state and that threaten the invalidity of any agreements made by states that conflict with it.

The basis for experts to make references that can be used for determining *jus cogens* norms is based on, first, the requirement of "double consent"; and, second, the requirement of universality. This requirement is manifested in Article 53 of the 1969 and 1986 Vienna Conventions; in that article, it is broadly said that the rule of law can be considered as *jus cogens* if countries have approved the rule of law as a rule of international law that is general and coercive (this is what is meant by the requirement of "double consent"). This rule must be recognized and accepted by the state community as a whole or universally by all countries without exception (universality requirement).

The full definition of *jus cogens* is a principle that contains certain norms where in its implementation, no exceptions are allowed (which no derogation is permitted). Article 53 of the Vienna Convention on International Agreements states that:

"[A] peremptory norm of general international law and recognized is a norm accepted by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Article 53 of the 1969 Vienna Convention on International Agreements explains that it is not permissible for countries to enter into agreements or agreements that are contrary to the certainty norms contained in the *Jus Cogens* principle. Any criteria contained in the principles of *Jus Cogens* can negate the application of the *Pacta Sunt Servanda* principle, which is the basis for the agreement's entry into force binding on the parties agreeing.

In practice, the norm of certainty in the *jus cogens* principle can appear to conflict with state sovereignty. Therefore the *Jus Cogens* principle can only be applied to the highest benefit of the international community, a belief whose truth is acknowledged by the entire international community. If it is not implemented, then the order of the world community will be damaged. The issue of human rights is a fundamental reason for applying the principles of *Jus Cogens*, such as in cases of genocide, enslavement, detention without limit, disappearances, mass killings, torture, and systemic racial discrimination, as well as the use of force in interstate relations. In the introduction to the UN Charter.

The norms contained in the *Jus Cogens* principle are norms that have the highest hierarchy than other norms, even above international agreements and customs. Thus, the *Jus Cogens* principle has a hierarchy above state approval in accepting or rejecting its application (Ernawati, 2019). These norms are mandatory; other international norms with equal power can only reduce their authority. Norms that fall into the category of certainty norms have several criteria. The formal criteria for certainty norms include: universal principles, are public, not private, enable the application of the principle of *jus cogens*, material containing certainty norms must be unambiguous, certainty norms at the internal level must be consistent with similar norms at the universal level, certainty norms must be prospectively, and norms of certainty must be continuously stable over a long period within the framework of international law. Meanwhile, the substance criteria of the certainty norm are integrity, equality, empathy, and significant security impact. Norms with such formal and substantial standards can be categorized as peremptory norms in the *jus cogens* principle.

Some argue that the certainty norm is mandatory and not subject to exceptions, either with or without state approval. Some of the phenomena that are believed to be part of the norm of certainty in international law are genocide, slavery, human trafficking, disappearances of individuals, torture and inhumane punishment, indefinite detention, racial discrimination, and the prohibition of the use of force in interstate relations which are contained in the UN charter. To find out whether the issue of handling refugees is part of the norm of certainty in the *jus cogens* principle or just an international custom, Rohmad Adi Yulianto explained in his writings the theoretical basis for placing the direction of *jus cogens* as the main principle in international legal norms.

The flow of international legal positivism places states sovereignty on the highest hierarchy of other international norms. This is considered because the state is the main subject of international law. Hence, any standards that apply in the global sphere require state approval as a manifestation of the owner of full sovereignty. The positivist school places the state's acceptance of the enactment of peremptory norms as the primary basis for applying the *jus cogens* principle in the country. The certainty norms are approved by the state and enforced in national rules as part of international treaties, customary international law, or part of general principles of law.

Rozakis argues that with approval from the state, it is necessary to establish an available code of a rule, norm, ethics, or legal status which contains the code of *jus cogens*. Shaw argues that only agreements made by states can give rise to the principle of *jus cogens* (Kristin et al., 2021). The positivist school places international agreements as a medium for enacting the *jus cogens* principle in the national sphere. This explains that the state's sovereignty is the highest hierarchy in international rules. The form automatically applies its sovereignty to adopt the *jus cogens* principle in the contract by agreeing to a specific agreement. International custom is also a medium for enforcing the doctrine of *jus cogens* in national rules because a sovereign state recognizes the principles of international custom and continuously applies them from generation to generation. Rarely do countries disagree with customary international norms because the enactment of these norms has been rooted in the world community at large. Apart from the media of international agreements and customs, the positivist school explains the validity of *jus cogens* norms through general principles recognized by the international community. (International presented the International Law Commission of the Commission of Law, ICL) the rooted nature of the norm of certainty in the principle of *jus cogens* in the international community does not have to be universal. Still, it can take the form of recognition from most countries as representatives representing the global community.

On the other hand, the naturalist school explains that the *jus cogens* principle, which contains peremptory norms of international law, applies to national rules because these forms are essential to the international community's awareness of global order. The naturalist school is of the view that the certainty norms contained in the principle of *jus cogens* are part of natural law where, even though there is an agreement underlying its application in national law, agreements that contradict or abolish the application of the

certainty norm cannot be accepted by human consciousness. In line with the opinion of naturalists, the ICJ (International Court of Justice) argued that in the jurisprudence of the Nicaragua case, it was explained that international humanitarian norms were the primary consideration from a humanitarian point of view, that these norms were principles that could not be exceeded or violated.

The theory of public order, on the other hand, explains that the principle of *jus cogens* is a principle that contains norms of certainty to regulate international world order, peace, and order through the aim of protecting the world and respecting the order of the global legal system (Andrițoi, 2010). Therefore, the state must comply with the enactment of certainty norms in national regulations. The state's disregard for these norms can result in losses to the international community.

Furthermore, the theory of public order emphasizes the importance of maintaining global stability and harmony by adhering to the principles of *jus cogens*. These principles are considered non-derogable and binding on all states, regardless of their consent. *Jus cogens* norms encompass fundamental principles of human rights, such as the prohibition of genocide, slavery, torture, and aggressive war.

The theory argues that by upholding *jus cogens* norms, states contribute to the overall well-being and protection of the international community. It posits that the violation of these norms not only undermines the rights and security of individuals but also threatens the broader global legal system. When a state disregards *jus cogens* norms in its national regulations, it undermines the order and stability of the international world.

In this context, the theory of public order places an obligation on states to align their national laws with the principles of *jus cogens*. By incorporating these norms into their legal frameworks, states demonstrate their commitment to upholding international order and promoting peace. Such compliance is crucial to prevent potential losses to the international community that may arise from the violation of *jus cogens* norms.

The theory recognizes that states have the sovereign authority to enact and enforce their own laws within their territories. However, it maintains that this authority should not be exercised in a manner that contradicts or undermines the fundamental principles of *jus cogens*. In cases where there is a conflict between national laws and *jus cogens* norms, the latter should prevail, as they represent the collective interests of the international community.

In summary, the theory of public order asserts that the principle of *jus cogens* contains norms that promote certainty and regulate the international world order. By adhering to these norms, states contribute to global stability, peace, and the respect for the global legal system. Neglecting *jus cogens* norms can lead to detrimental consequences for the international community, making it imperative for states to prioritize their compliance and integration into national regulations.

4. Conclusions

From the foregoing, the exceptions outlined in Article 33(2) of the Refugee Convention, despite their potential expansiveness, must be interpreted narrowly according to established principles of international law. The supportive provisions of Articles 31 and 32 of the Vienna Convention, recognized as reflective of customary international law, reinforce the limited scope of these exceptions. It is crucial to consider the overarching object and purpose of the Refugee Convention, which is to ensure protection for refugees, when interpreting these exceptions. This necessitates a restrictive approach. Exceptions may only be applied in certain circumstances, (Hailbronner, 1993).

However, the introduction of the exceptions raises concerns about potential differential treatment based on perceived threats to national security or criminal history, which may give rise to discrimination and unequal treatment. The application of the exclusion clause requires careful assessment of individual circumstances, adherence to due process, and consideration of proportionality to avoid arbitrary exclusions.

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Author Contribution

Conceptualization, Vincent Godana Yatani and Mochamad Safrin.; Methodology, Diangsa Wagian; Software, Vincent Godana Yatani; Validation, Vincent Godana Yatani; Formal Analysis, Vincent Godana Yatani and Mochamad Safrin; Data Curation, Diangsa Wagian.; Writing – Original Draft Preparation, Vincent Godana Yatani; Writing – Review & Editing, Vincent Godana Yatani.

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Ethical review and approval were waived for this study due to no personal data was collected in this study. The number of informants is six, and the interviews are mainly to gain insights on how food bank operates in Indonesia, no personal information is collected.

Informed Consent Statement

Informed consent was obtained from all subjects involved in the study.

Data Availability Statement

The data is available upon request.

Conflicts of Interest

The authors declare no conflict of interest.

References

- Adhaniah, N., Heryadi, D., & Sari, D. S. (2021). The Cooperation of UNHCR and Indonesia on Afghan Refugee Handling in Indonesia. *Andalas Journal of International Studies*, *X*(1), 51–65. [https://doi.org/DOI: https://doi.org/10.25077/ajis.10.1.51-65.2021](https://doi.org/DOI:https://doi.org/10.25077/ajis.10.1.51-65.2021)
- Adwani, A., Rosmawati, R., & Aiyub Kadir, M. Y. (2021). the Responsibility in Protecting the Rohingya Refugees in Aceh Province, Indonesia: an International Refugees Law Perspective. *IJUM Law Journal*, *29*((S2)), 1–21. [https://doi.org/10.31436/iiumlj.v29i\(s2\).677](https://doi.org/10.31436/iiumlj.v29i(s2).677)
- Afriansyah, A., Purnama, H. R., & Putra, A. K. (2022). Asylum Seekers and Refugee Management: (Im)Balance Burden Sharing Case between Indonesia and Australia. *Sriwijaya Law Review*, *6*(1), 70–100. <https://doi.org/10.28946/slrev.Vol6.Iss1.1145.pp70-100>
- Ahmed, A. (2016). Individual protection versus national security: a balancing test concerning the principle of non-refoulement. *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, *21*(5), 30–40. <https://doi.org/10.9790/0837-2105053040>
- Akal, A. B. (2023). Third Country Processing Regimes and the Violation of the Principle of Non-Refoulement: a Case Study of Australia's Pacific Solution. *Journal of International Migration and Integration*, *24*(1), 231–248. <https://doi.org/https://doi.org/10.1007/s12134-022-00948-z>
- Andrițoi, C. (2010). Interpretation Principles of Jus Cogens Principles as Public Order in International Practice. *Acta Universitatis Danubius. Juridica*, *6*(2), 96–108. <https://www.cceol.com/search/article-detail?id=240325>
- Barutciski, M., and Suhrke, A. (2001). Lessons from the Kosovo Refugee Crisis: Innovatons in Protection and Burden-sharing. *Journal of Refugee Studies*, *14*(2), 95–134. <https://doi.org/https://doi.org/10.1093/jrs/14.2.95>
- Benhabib, S. (2020). The end of the 1951 refugee convention? Dilemmas of sovereignty, territoriality, and human rights. *Jus Cogens*, *2*(1), 75–100. <https://doi.org/https://doi.org/10.1007/s42439-020-00022-1>
- Bruin, R., and Wouters, K. (2003). Terrorism and the Non-derogability of Non-refoulement.

- International Journal of Refugee Law*, 15(1), 5–29.
<https://doi.org/https://doi.org/10.1093/ijrl/15.1.5>
- Cerović, I. (2015). Is It Permitted To Strike A Balance Between The Interests Of National Security Of A State And The Rule Of Non-Refoulement In The Context Of Article 3 Of The European Convention Of Human Rights And Fundamental Freedoms? *Strani Pravni Život*, 4. <https://www.ceeol.com/search/article-detail?id=575919>
- Coleman, N. (2003). Non-refoulement revised renewed review of the status of the principle of non-refoulement as customary international law. *European Journal of Migration and Law*, 5, 23–68. <https://doi.org/https://doi.org/10.1163/157181603100405657>
- Costello, C., and Foster, M. (2016). Non-refoulement as custom and jus cogens? Putting the prohibition to the test. In *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (pp. 273–327). https://link.springer.com/chapter/10.1007/978-94-6265-114-2_10
- D'Angelo, E. F. (2009). Non-Refoulement: The Search for a Consistent Interpretation of Article 33. *Vanderbilt Journal of Transnational Law*, 42(1), 279–316. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/vantl42&div=9&id=&page=>
- Ernawati, N. (2019). The Legal consequences of the Application of Two Australian Policies as Members of the 1951 Refugee Convention Reviewed from the VCLT 1969. *Jurnal IUS*, 7(1). <http://dx.doi.org/10.29303/ius.v7i1.591>
- Hailbronner, K. (1993). The concept of 'Safe Country' and expeditious Asylum Procedures: a western European perspective. *International Journal of Refugee Law*, 5(1), 31–65. <https://doi.org/https://doi.org/10.1093/ijrl/5.1.31>
- Hugman, R., Pittaway, E., and Bartolomei, L. (2011). When 'do no harm' is not enough: The ethics of research with refugees and other vulnerable groups. *The British Journal of Social Work*, 41(7), 1271–1287. <https://doi.org/https://doi.org/10.1093/bjsw/bcr013>
- Kim, S. (2017). Non-refoulement and extraterritorial jurisdiction: State sovereignty and migration controls at sea in the European context. *Leiden Journal of International Law*, 30(1), 49–70. <https://doi.org/doi:10.1017/S0922156516000625>
- Kristin, D., Trie, C., & Dewi, I. (2021). The Rights of Children Refugee in Transit Country under the CRC, A Case of Indonesia: An Intended Negligence on the Implementation of Non-Discrimination Principle? *Padjadjaran Journal of International Law*, 5(1), 2549–1296. <https://doi.org/https://doi.org/10.23920/pjil.v5i1.349>
- Liliansa, D., & Jayadi, A. (2015). *Should Indonesia Accede To The 1951 Refugee Convention And Its 1967 Protocol?* 5(3). <https://doi.org/10.15742/ilrev.v5n3.161>
- McAdam, J. (2020). Protecting people displaced by the impacts of climate change: The UN human rights committee and the principle of non-refoulement. *American Journal of International Law*, 114(4), 708–725. <https://doi.org/doi:10.1017/ajil.2020.31>
- Missbach, A. (2013). Waiting on the islands of 'Stuckedness'. Managing asylum seekers in island detention camps in Indonesia from the late 1970s to the early 2000s. *ASEAS - Austrian Journal of South-East Asian Studies*, 6(2), 281–306. <https://doi.org/https://doi.org/10.4232/10.ASEAS-6.2-4>
- Oralova, Y. (2015). Jus cogens norms in international space law. *Mediterranean Journal of Social Sciences*, 6(6), 421. <https://doi.org/10.5901/mjss.2015.v6n6p421>
- Padmanabhan, V. M. (2011). To transfer or not to transfer: identifying and protecting relevant human rights interests in non-refoulement. *Fordham L. Rev*, 80, 73. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/flr80&div=6&id=&page=>
- Sadjad, M. S. (2021). What Are Refugees Represented to Be? A Frame Analysis of the Presidential Regulation No. 125 of 2016 Concerning the Treatment of Refugees "from Abroad." *Asian Journal of Law and Society*, 8(3), 451–466. <https://doi.org/10.1017/als.2021.3>
- Simeon, J. C. (2019). What is the future of non-refoulement in international refugee law? In *Handbook Chapter on International Refugee Law* (pp. 183–206). Edward Elgar

- Publishing. <https://doi.org/https://doi.org/10.4337/9780857932815.00020>
- Sul-toni, Y., Widagdo, S., and Suryokumoro H. (1951). The Reason of Indonesia Not Ratified Refugee Convention 1951 And Legal Protection For Refugees in Indonesia. *Jurnal Hukum*, 6, 1–14. <https://core.ac.uk/download/pdf/294925809.pdf>
- Sumarlan, Y. (2019). Political economy of pragmatic refugee policies in Indonesia as a transit country. *Asian Review*, 32(3), 63–93. <https://doi.org/https://so01.tci-thaijo.org/index.php/arv/article/view/240363>.
- Supaat, D. I. (2013). Escaping the Principle of Non-refoulement. *International Journal of Business, Economics and Law*, 2(3), 86–97. <https://www.ijbel.com/wp-content/uploads/2014/07/Escaping-The-Principle-Of-Non-Refoulement-Dina-Imam-Supaat.pdf>
- Syahrin, M. A. (2017). The Implementation of Non-Refoulement Principle to the Asylum Seekers and Refugees in Indonesia. *Sriwijaya Law Review*, 1(2), 168–178. [file:///C:/Users/Asus/Downloads/41-114-1-PB%20\(4\).pdf](file:///C:/Users/Asus/Downloads/41-114-1-PB%20(4).pdf)
- Syahrin, M. A. (2018). The Rohingya Refugee Crisis: Legal Protection on International Law and Islamic Law. *1st International Conference on Indonesian Legal Studies (ICILS 2018)*, 94-99. <https://doi.org/10.2991/icils-18.2018.18>