

Lampiran Peer Review Korespondensi Proses Submit Publikasi Nasional Terakreditasi

Judul Makalah : Non-Refolement Principle And Prohibition Of Entry For Refugees Due To The
COVID-19 Pandemic

Reputasi : Sinta 2

No	Item	Tanggal
1	[Dilrev] Submission Acknowledgement	27 Desember 2021
2	[Dilrev] Revisions Required 1	20 Januari 2022
3	[Dilrev] Review Responses 1	28 Januari 2022
4	[Dilrev] Revisions Required 2	15 Februari 2022
5	[Dilrev] Review Responses 2	22 Februari 2022
6	[Dilrev] Letter of Acceptance	31 Maret 2022
7	Online Version	April 2022



[Dilrev] Submission Acknowledgement

1 message

Ro'fah Setyowati <diponegorolawreview@gmail.com>

Dec 27 2021 at 1:36 PM

To: fransiscus joko <fransiskusjoko893@gmail.com>

FX.Joko Priyono:

Thank you for submitting the manuscript, "Non-Refoulment Principle and Prohibition of Entry for Refugees and Asylum Seekers in the Territory of a Country Due to the Covid-19 Pandemic" to Diponegoro Law Review. With the online journal management system that we are using, you will be able to track its progress through the editorial process by logging in to the journal web site:

Manuscript URL: <https://ejournal.undip.ac.id/index.php/dlr/author/submission/45317>

Username: audrey_tika

If you have any questions, please contact me. Thank you for considering this journal as a venue for your work.

Ro'fah Setyowati
Diponegoro Law Review

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[Dilrev] Revisions Required 1

1 message

Ro'fah Setyowati <diponegorolawreview@gmail.com>
To: fransiscus joko <fransiskusjoko893@gmail.com>

Jan 20 2022 at 10:00 AM

Dear FX.Joko Priyono

Sincerely,

Hereby your article is sent back with the title:

"Non-Refoulment Principle and Prohibition of Entry for Refugees and Asylum Seekers in the Territory of a Country Due to the Covid-19 Pandemic"

because there are a number of things that need to be revised, with reference to the results of the reviewer's review.

To be processed further to publish, the revised article will be sent to diponegorolawreview@gmail.com, or please upload it to OJS Diponegoro Law Review, no later than January 28, 2022 (at 24.00).

Thus our notice.

Thank you for your attention and cooperation.

Editor in Chief,
Ro'fah Setyowati, S.H., M.H., Ph.D.

Non-Refoulment Principle and Prohibition of Entry for Refugees and Asylum Seekers in the Territory of a Country Due to the Covid-19 Pandemic

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Abstract

The principle of non-refoulement has become *jus cogens* which obliges every country, both ratifying and not ratifying the 1951 Refugee Convention and the 1967 Protocol not to refuse refugees and asylum seekers to enter the territory of a country and not be returned to their country of origin because their lives will be threatened, persecuted, and tortured. The right to life is a right that cannot be reduced and must be protected and respected by everyone under any circumstances. The reason for the pandemic cannot be used as an excuse to refuse refugees and asylum seekers on the grounds of protecting the right to health for citizens of the host country. Efforts to quarantine asylum seekers and refugees suspected of or affected by Covid-19/Omicron is a policy that is in accordance with human rights as well as according to the principle of non-refoulement.

Keywords: non-refoulment principle, prohibition to entry, Covid-19

1. Introduction

Data from the World Health Organization (WHO) in January 2022 shows that the number of Covid-19 cases worldwide has exceeded 90 million cases, and reaching 90,054,813 on Wednesday, January 17, 2022,¹ with a death toll of 1,945,610. This data is expected to increase again in connection with the emergence of a new virus called omicron whose contribution can come from countries that are experiencing internal conflicts which result in population migration to neighboring countries due to pressures that lead to torture, rape, discrimination, persecution, and other human rights violations that threaten the lives of themselves and their families. They become refugees because they are forced, generally they are not provided with travel documents. The right to live for a person must be respected by anyone, including the country where he is displaced because there is a threat to his life in the country of origin. They may not be forced or returned to their country of origin as stipulated in Article 33 of the Convention Relating to the status of Refugees 1951 in terms of the prohibition of expulsion or refoulment. In addition, it is

¹ <https://covid19.who.int/table>, visited on January 18 2022.

Commented [U1]: What is the host country? How the state reject/refuse refugees and assylum seeke r will be different based on the state position. Even we commonly know several typologies of state such as sender, transit and destination country for refugees and assylum seeker.

Reading recommendation

Atkinson and Hauck, 2021, Impact of Covid-19 on resettled refugees
The writers can find in this article lot of information about the problems and issues of refugees during Covid-19. It is not only the health issues but also the resettlement issues.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7538065/pdf/main.pdf>

also provided in Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which contains the following:

1. No state Party shall expel, return (refoul) or extradite a person to another state where there are substantially grounds for believing that he would be in danger of being subjected to torture
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant consideration including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights

The main problems faced empirically by refugees who are always ignored by the state or government are first, the protection of human rights in the country of origin which should try to prevent human rights violations, so that people are not forced to leave their country to find a better place. Second, the protection of human rights in the country of asylum by guaranteeing that those who fled because their human rights were violated are allowed to find a safe place, that they are provided with effective protection against forced repatriation (refoulment), and that their human rights are respected in the country where they seek protection. Third, the protection of human rights at the international level, namely through actions to ensure that human rights considerations are important and basic in making decisions to provide protection to refugees, such as the need to protect displaced persons in their own country, developments in international refugee law and refugee law practice, as well as programs to return refugees to their countries of origin.

Entering the third year of the pandemic, the policies of countries to open and close for refugees or asylum seekers have fluctuated. The basic principle of the policy is based on the sovereignty of each country to avoid wide spread and protect the right to health for citizens. Then with this rationale, is someone who leaves their country of origin due to persecution, torture, rape, death threats, and is not immediately allowed to enter the destination country due to pandemic reasons and the protection of citizens' rights to health.

The right to life is the most basic right as stated in Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR). Therefore, there is no legal reason to refuse the presence of refugees and return them to their country of origin whose lives are in danger if they are returned. This has also been emphasized in Article 33 paragraph 1 of the Convention

Commented [U2]: This paragraph is very important in the introduction to explain about the crisis of refugee and assylum seeker even before the pandemic. In this part, paper supposedly gives the practice or example where is this happened or this phenomenon become an universal situation around the world?

Relating to the status of Refugees 1951 which states that the prohibition of expulsion or refoulement of refugees in any way to the borders of territories where their life or freedom will be threatened because of race, religion, nationality, membership of a particular social group or political opinion.

The problem is whether a country that is inherently sovereign is justified by law to refuse refugees on the grounds of preventing the spread of Covid-19 and protecting the right to health for its citizens as also stipulated in Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to health is universal both for refugees and for other citizens. Thus, which rights should take precedence among the 3 (three) provisions, namely the right to life (Article 6 paragraph 1 ICCPR) and the principle of non-refoulement (Article 33 paragraph 1 Convention Relating to the status of Refugees 1951) with protection of the right to health for citizens who are used as an excuse by the destination country.

3. Research Method

This research is a research library based on legal materials derived from books, journals, and other documents relevant to the non-refoulement principle, refugee law, relevant cases and policy information in the health sector and the COVID-19 pandemic. Conceptual, case, and statutory approaches are used as the basis for the analysis of all legal materials that have been qualified and systematized to answer the problems studied.

2. Results and Discussion

2.1. The Right to Life and the Principle of Non-Refoulement

The right to life and the principle of non-refoulement are two things that cannot be separated. The rationale for the non-refoulement principle is the right to life which is a human right of every individual as stated in Article 6 paragraph 1 of the International Covenant on Civil and Political Rights² that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". Refusing the presence of

² The rights provided in the ICCPR are non-derogable rights, namely the right to life, freedom from acts of torture, from inhumane and degrading treatment, freedom from slavery, freedom from ex post facto laws. (applies retroactively) as well as freedom of thought, conscience and religion.

Commented [U3]: In the introduction, the paper also need some evidences or cases to support the understanding regarding how the country restrict or reject the refugees and assylum seekerm based on national law.

What is the main focus of the paper. Please give some sentences regarding what is the paper want to analyse. This is related to the scoupe and limitation of discussion or research.

In this paper, we can have at least two interpretations. **Firstly**, paper want to explain the rejection of the refugees and asylum seeker entering the country. **Secondly**, the refugees and assylum seekers already in the country and need more active and basic policy based on complex pandemic situation. The refugees and assylum seeker have double troubles not only because of the personal-civil status. But also,during the Covid-19 they did not have any protection and fulfillment of health rights.

Commented [U4]: The paper also need more comparison with other convention such as The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT').

Further reading, general comment from UN Bodies. Such as:General Comment Number 6 of 2005 on Treatment of unaccompanied and separated children outside their country of origin; General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 (can be accessed on https://reliefweb.int/sites/reliefweb.int/files/resources/CAT-C-GC-4_EN.pdf)

refugees and asylum seekers whose lives are at risk in their countries of origin and then returning them to their countries of origin clearly violates the right to life and the principle of non-refoulement regardless of the reason.

The principle of non-refoulement has become part of international human rights and customary international law and has been strengthened in Article 33 paragraph 1 of The Refugee Convention 1951³ and the 1967 Protocol. However, according to Aoife Duffy⁴, the existence of the principle of non-refoulement which has acquired the status of *jus cogens* does not guarantee to be implemented practically. By using natural law approach and international law (positivism), the right to life and the principle of non-refoulement have been universally applied to all countries, both those that have and have not ratified the convention as confirmed by the 1967 Protocol.⁵

The mandatory nature of the Non-Refoulement Principle is not only contained in the international instruments, but also in the nature of customary international law norms that have been linked to the principle, which means that it is mandatory for all countries. That is why the convention does not contain a reservation clause. The principle of non-refoulement is a customary international law norm based on consistent practice combined with recognition from countries that the principle has a normative character.⁶ M. Alvi Syahrin⁷ gave an example that was done by the Indonesian government when handling refugees (*manusia perahu*) from

Commented [U5]: Further read for non-refoulement principle. Trevisanut, S., 2008. The Principle of Non-Refoulement at Sea and the. *Human Rights*, 12, pp.205–246. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1798756

³ Article 33 paragraph 1 The Refugee Convention 1951: “*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*”.

⁴ United Nations, “A/RES/51/75”, 12 February 1997, para. 3, <http://www.un.org/docuPHQWVJDUHVVDUHVVKWP>; and United Nations “A/RES/52/132” 12 December 1997, para 12, [KWWWSZZXQKFKUFK+XULGRFGD+XULGRFDQVI6PERO\\$5\(6\(Q"2Sendocument](http://www.un.org/docuKWWWSZZXQKFKUFK+XULGRFGD+XULGRFDQVI6PERO$5(6(Q).

⁵ The 1967 Protocol removed the temporal and geographical restrictions of the 1951 Refugee Convention so that this Convention has become universally applicable. Article 1 of the 1967 Protocol says that countries that ratify this protocol are interpreted as agreeing to comply with the 1951 Refugee Convention. For example, the United States has not ratified the Refugee Convention but has ratified the 1967 Protocol. This means that it is bound to apply the provisions of the Convention, to which it is binding. to treat refugees in accordance with internationally recognized legal and humanitarian standards. This includes respecting the principle of non-refoulement – that is, not sending refugees to places where they are at risk of persecution, or to countries that may send them there; grant refugees legal status, including rights such as access to employment, education and social security; and not punishing refugees for entering ‘illegally’ – that is, without a passport or visa.

⁶ “UNHCR Note on the Principle of Non-Refoulement”, November 1997,

<http://www.refworld.org/docid/438c6d972.html>. Look Fernandez Arribas, Gloria, *Asilo y refugio en la Unión Europea*. Granada, España, Comares, 2007, p. 155.

⁷ M. Alvi Syahrin, 2017. The Implementation of Non-Refoulement Principle to the Asylum Seekers and Refugees in Indonesia, *Sriwijaya Law Review*, Faculty of Law, Sriwijaya University, page 170.

Vietnam for humanitarian considerations while the Indonesian government had not ratified the 1951 Convention.

Referring to this rationale, both from the aspect of natural law, positive international law and customary international law, the rejection of a country against refugees and asylum seekers whose lives are threatened if they are returned to their country of origin is a violation of human rights, especially the right to life and the principle of non-refoulment. Returning them to their countries of origin can be analogous to do indirectly persecution, torture to refugees and asylum seekers whose executor is the authority of the country of origin. It is recognized that at the ideological level, human rights law and refugee law are two things that cannot be separated. However, in practical terms it is not as ideal as it is in the human rights system. This problem can be answered by examining the failure of international refugee law and human rights in cases (practice). The settlement approach is also very different from the character or nature of each of them towards the settlement of refugees, even though both are rooted in law. Human rights law is not only rooted in positive law but also, most importantly, rooted in natural law. The concept of human rights as values rooted in natural law is often used as a way to evaluate practices that suppress and reject human rights. This is also often the case for countries' non-compliance with human rights instruments against refugees and asylum seekers.

2.1. Prohibition of Entry with the Reason of Covid-19

The emergence of Covid-19 in 2019, known as the delta virus to the new omicron virus attack, has caused almost all countries to issue restrictions on the presence of foreign nationals, including the arrival of refugees and asylum seekers. There is concern that they have the potential to spread the COVID-19 virus, which as a result could become a pandemic in society and have an impact on all aspects of life such as health, economic, educational and social aspects. Citizens also have the right to health which must be protected by the state. Health is a basic right that carries the consequence that every human being has the right to health and the state is obliged to fulfill that right. Efforts to fulfill rights that can be carried out by the Government, namely by means of healing and prevention efforts (including having a correlation

with the obligation for the Government to protect, respect and fulfill).⁸ So, with the right to health, can it be used as a reason to refuse refugees and asylum seekers to enter the territory of the destination country? while the right to life for refugees and asylum seekers whose lives are threatened is a basic and primary human right. Is there a right that must be prioritized between the right to life and the right to health?

The right to health is part of the economic, social and cultural rights as regulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). From the historical development of international human rights regulations, the ICCPR is categorized as the first generation of human rights, while the ICESCR is the second generation of human rights. Therefore, the ICCPR requires states to respect recognized rights and guarantees those rights to all individuals within its territory and subject to its jurisdiction,⁹ the ICESCR on the other hand, only requires that states “promise to take steps ... to the maximum extent of their available resources, in order to fully realize the recognized rights progressively.”¹⁰

At the level of pragmatism, making a distinction between the two is a far-fetched thing. We can't make it black and white or prioritize the right to life (ICCPR) over the right to health (ICESCR). Making a distinction between the two will not provide any real benefit. Whether the right is civil, political, economic, social, and cultural in orientation does not have much effect on its qualitative status as a right, but it can affect the state implementation of the right quickly. Both complement each other and do not sacrifice rights on either level. The important thing is not to sacrifice the right to life of refugees and asylum seekers by being returned to their country of origin (refoulment) where they will be persecuted, tortured, and threatened. As the *jus cogens* norm, the state has an obligation to protect and accept them as well as take anticipatory steps for the risk of the spread of COVID-19 and protect the rights to health of its citizens. The use of Article 12 (1) of the ICESCR (right to health) as an excuse for not applying the non-refoulment principle is baseless and a violation of human rights. As van Bowen said that because it bears a

⁸ Sholahuddin Al-Fatih, Felinda Istighfararisna Aulia, 2021. The State's Responsibility in the Case of COVID-19 As a Realization of the Protection of Human Rights, *Jurnal HAM*, Volume 12, No 3, December 2021, page 351.

⁹ Article 2 paragraph 1.

¹⁰ *I b I d.*

jus cogens norm, the rights mentioned above are binding on states even if there are no obligations required by the convention or no statement of approval or any specific comments.¹¹

In the context of a pandemic, the State shall respect and protect them from the threat of torture as regulated in the Convention Against Torture (CAT), Article 7 ICCPR (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No one shall be subjected without his free consent to medical or scientific experimentation) and customary international law. States can protect public health rights and respect non-refoulement by, for example, using quarantine measures for refugees and asylum seekers and conducting online asylum interviews. This means that there is no legal reason for a country not to apply the principle of non-refoulement during this pandemic, unless a refugee is declared to be endangering the security of the host country as stated in Article 33 paragraph 2 of the 1951 Convention.

The question that arises related to that is whether Covid-19 can be categorized as an element of endangering state security? The Article 33 paragraph 2 should be understood as provisions or clauses that are individual in nature, meaning that there must be reasonable reasons to suspect that a particular refugee has caused. Even if a refugee has COVID-19, this is by no means a danger to the security of the country nor is it a major loss to the interests of the host country. There is no such threat posed by a refugee infected with COVID-19. The problem of entry and exit for both citizens and non-citizens can actually be solved by requiring everyone who enters the country to be quarantined. For citizens who want to go out (outbound) can be overcome with less disturbing measures such as requiring all travellers to be tested before departure.

It is acknowledged that in recent months, many governments have violated the principle of non-refoulement by closing their borders completely and halting asylum processing. The United Nations High Commissioner for Refugees (UNHCR) estimates that “167 countries have partially or completely closed their borders to contain the spread of the virus” and that 57 of

¹¹ van Bowen, Distinguishing Criteria of Human Rights, in Vasak, Volume 1, p. 48. Quoted by Scott Davidson, 1994. Human Rights History, Theory, and Practice in International Association, Graffiti, Jakarta, p. 57.

those countries “are no exception to people seeking asylum.”¹² In the United States, for example, the Centers for Disease Control and Prevention issued an order on March 20, 2021, suspending asylum processing for people “traveling from Canada or Mexico.” The order applies to road trips from Mexico and Canada and covers non-citizens arriving without valid travel documents. The CDC has since indefinitely extended the March 20 order, which will be in effect until the Director has determined that “the danger of COVID-19 to the United States is no longer a serious hazard to public health.” The real aim of the policy appears to be to quickly expel asylum seekers. Experts note that the policy is too broad and debate whether there is a credible reason to categorically ban all asylum seekers.¹³

The Indonesian government has also officially closed the door of arrival for foreigners who have visited eight countries in Africa. This policy was carried out following the emergence of the Covid-19 variant B.1.1.529 or Omicron which had triggered several other countries to limit flights to their territory. However, towards refugees and asylum seekers, the Indonesian government is still careful despite the fact that it is recognized that some refugees from Rohingya have been accepted into Indonesian territory and have been treated humanely and have not been returned to their country of origin (Myanmar).

Does a public health emergency give the government the right to deviate from the principle of non-refoulement? The application of Article 33 paragraph 2 requires “individual determination by the country where the refugee is located and whether there are indicators of endangering security”. This determination is very subjective and one-sided. However, Article 33 paragraph 2 does not “affect the non-refoulement obligations of the host country under international human rights law, and there are no exceptions.” In other words, the host State must make an individual decision based on Article 33 paragraph 2 that a refugee poses a danger to the security of the State. If the host State finds the refugee posing a danger, then the

¹² Covid-19 and International Law: Refugee Law and The Principle of Non-Refoulement, <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/>, visited on December 2021.

¹³ Ibid.

Commented [U6]: In this part, paper also can give other example around the world regarding the best practice of refugees and assylum seekers policy. Or the paper shows several ideal standards how the state should handle covid situation that affecting the refugees and assylum seekers.

Recommendation
Read

<https://apps.who.int/iris/bitstream/handle/10665/344793/WHO-2019-nCoV-immunization-refugees-and-migrants-2021.1-eng.pdf>

This second discussion is the key for the paper to explain about the relation between covid-19 and refugees policy. More exploration and explanation related to case by case will be more helpful for the reader. Because in few parts, paper do some redudants related to norm and policy.

Commented [U7]: The paper already mentions several reason for the non-refoulement and covid-19. However, the the paper limiting reason only based on health emergency. This still to broad based on the complex situation. The state also have other reason such as understanding the refugees problem as another trouble for national interest. Other reason can be the political economic reason.

For instance, in Indonesia based on Presidential Regulation No. 125 of 2016 about the handling on refugees have other political economy motives. This Regulation mobilizes all Armed Forces and Police Force (even commu- nity members) to rescue (intercept) refugees wherever they are found and authorizes community-based detention centers whenever neces- sary.

Futher read, Sumarlan, Y., 2019. Political economy of pragmatic refugee policies in Indonesia as a transit country. *ASIAN REVIEW*, 32(3), pp.63–93.

Can be accessed on <https://so01.tci-thaijo.org/index.php/arv/article/view/240363>

host State has the right to refuse entry to the refugee, as long as the State does not violate its non-refoulement obligation.

3. Conclusion

1. The purpose of Article 33 of the 1951 Refugees Convention is to protect the right of life for asylum seekers and refugees and is in accordance with Article 6 (1) of the ICCPR. This right is the most basic right in Human Rights Law. There is no authority from anyone, including the state, to deny the right to life of a human being, even if it takes one's life. Violations against it constitute a crime against humanity. Meanwhile, Article 12 paragraph 1 of the ICESCR, namely the right of everyone to obtain a standard of health, is a right of the second generation whose degree is lower than Article 6 (1) of the ICCPR. The right to life is the main right. The application of Article 12 paragraph 1 of the ICESCR is the responsibility of the state. From the aspect of legal philosophy, it can be said that Article 33 of the 1951 Refugees Convention, especially concerning the principle of non-refoulement, is consistent with Article 6 paragraph 1 of the ICCPR. Asylum seekers and refugees have their right to life which must be protected by all countries in any condition, which is also a reflection of the right to life as stipulated in Article 6 paragraph 1 of the ICCPR. The right to life and the right to health (Article 12 paragraph 1 ICESCR) must go hand in hand without violating the principle of non-refoulement.

2. Countries are allowed to apply criteria for citizens and non-citizens who enter or leave their territory, but the country concerned has an obligation not to return asylum seekers or refugees to their country of origin who will be persecuted and tortured. Countries must come together in the name of humanity to fight the Covid-19 pandemic that is experienced not only by citizens but also non-citizens so that there is no legal reason for a country to refuse asylum seekers or refugees. The limitation of these criteria must not conflict with the most basic human rights principles, namely the right to life, especially for asylum seekers and refugees. Efforts to quarantine asylum seekers and refugees suspected of or affected by Covid-19/Omicron is a policy that is in accordance with human rights and the principle of non-refoulement as well.

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EDITOR REVIEW FORM

1. Editor Name : Ro'fah Setyowati
2. Title of article : Non-Refoulment Principle and Prohibition of Entry for Refugees and Asylum Seekers in the Territory of a Country Due to the Covid-19 Pandemic
3. Author : FX.Joko Priyono, Audrey Kartika
4. Result of Review :

Editor Review

No	Editor Element	According To The Guide Line (1)		Suggestion	According To The Guide Line (2)	
		Yes	No		Yes	No
1	General Guidelines					
	Introduction	v				
	Method	v		It is recommended to add a description.		
	Results and Discussion	v				
	Conclusion		v	In conclusion, there is no need to use numbers.		
	Acknowledgement	-	-			
	References (min 60 % journal, from 10 references)		v	Journal references in this article need to be added, so that a minimum of 60% of 10 references.		
2	Manuscript Format Guidelines					
	Title		v	18 size - font		
	Author Name and Affiliation	v		The writing of affiliation needs to be adjusted to the policy of the institution.		
	Abstract	v				
	Keyword	v				
	Citations and Source References	v				
	Number of pages (10-15: conceptual; 15-17: Research)		v	This article needs to be added a description, because the article is the result of research, a minimum of 15 pages.		
	Font size & type	v				
	line spaced (1,5) & margin	v				
	Style in references writing.		v	Reference writing style must use the Mendeley system.		


Note :

5. Recommendation

- ☐ 1. Accepted without repair
- ☐ 2. **Received with a minor revision**
- ☐ 3. Major revision needed
- ☐ 4. Not accepted

If you choose point 2 or 3, you need to review it

☐ Yes ☒ **No**

Editor

(Ro'fah Setyowati)



[Dilrev] Review Responses 1

1 message

fransiscus joko <fransiskusjoko893@gmail.com>

Jan 28 2022 at 1:00 PM

To: Ro'fah Setyowati <diponegorolawreview@gmail.com>

Yth. Editor Jurnal Diponegoro Law Review

Berikut saya kirimkan paper hasil revisi. Mohon berkenan untuk ditindaklanjuti.
Terimakasih atas perhatian dan perkenannya.



Revisi 1 Artikel FXJokoP.docx

78KB

Non-Refoulment Principle and Prohibition of Entry for Refugees and Asylum Seekers in the Territory of a Country Due to the Covid-19 Pandemic

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Abstract

The principle of non-refoulement has become jus cogens which obliges every country, both ratifying and not ratifying the 1951 Refugee Convention and the 1967 Protocol not to refuse refugees and asylum seekers to enter the territory of a country and not be returned to their country of origin because their lives will be threatened, persecuted, and tortured. The right to life is a right that cannot be reduced and must be protected and respected by everyone under any circumstances. The pandemic reason cannot be used as an excuse to refuse refugees and asylum seekers on the grounds of protecting the right to health for its citizens. Efforts to quarantine asylum seekers and refugees suspected of or affected by Covid-19/Omicron is a policy that is in accordance with human rights as well as according to the principle of non-refoulement.

Keywords: non-refoulment principle, prohibition to entry, Covid-19

1. Introduction

Data from the World Health Organization (WHO) in January 2022 shows that the number of Covid-19 cases worldwide has exceeded 90 million cases, and reaching 90,054,813 on Wednesday, January 17, 2022,¹ with a death toll of 1,945,610. This data is expected to increase again in connection with the emergence of a new virus called omicron whose contribution can come from countries that are experiencing internal conflicts which result in population migration to neighboring countries due to pressures that lead to torture, rape, discrimination, persecution, and other human rights violations that threaten the lives of themselves and their families. They become refugees because they are forced, generally they are not provided with travel documents. The right to live for a person must be respected by anyone, including the country where he is displaced because there is a threat to his life in the country of origin. They may not be forced or returned to their country of origin as stipulated in Article 33 of the Convention Relating to the status of Refugees 1951 in terms of the prohibition of expulsion or refoulment. In addition, it is

¹ <https://covid19.who.int/table> , visited on January 18 2022.

also provided in Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which contains the following:

1. No state Party shall expel, return (refoul) or extradite a person to another state where there are substantially grounds for believing that he would be in danger of being subjected to torture
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant consideration including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights

The main problems faced empirically by refugees who are always ignored by the state or government are first, the protection of human rights in the country of origin which should try to prevent human rights violations, so that people are not forced to leave their country to find a better place. Second, the protection of human rights in the country of asylum by guaranteeing that those who fled because their human rights were violated are allowed to find a safe place, that they are provided with effective protection against forced repatriation (refoulment), and that their human rights are respected in the country where they seek protection. Third, the protection of human rights at the international level, namely through actions to ensure that human rights considerations are important and basic in making decisions to provide protection to refugees, such as the need to protect displaced persons in their own country, developments in international refugee law and refugee law practice, as well as programs to return refugees to their countries of origin. The Rohingya case is a bad example where the Myanmar government does not protect their human rights. They has been experiencing discrimination and persecution in their own country so they are forced to flee to other countries.

Entering the third year of the pandemic, the policies of countries to open and close for refugees or asylum seekers have fluctuated. The basic principle of the policy is based on the sovereignty of each country to avoid wide spread and protect the right to health for citizens. Then with this rationale, is someone who leaves their country of origin due to persecution, torture, rape, death threats, and is not immediately allowed to enter the destination country due to pandemic reasons and the protection of citizens' rights to health.

The right to life is the most basic right as stated in Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR). Therefore, there is no legal reason to refuse the

presence of refugees and return them to their country of origin whose lives are in danger if they are returned. This has also been emphasized in Article 33 paragraph 1 of the Convention Relating to the status of Refugees 1951 which states that the prohibition of expulsion or refoulement of refugees in any way to the borders of territories where their life or freedom will be threatened because of race, religion, nationality, membership of a particular social group or political opinion.

The problem is whether a country is justified by law to refuse refugees on the grounds of preventing the spread of Covid-19 and protecting the right to health for its citizens as stipulated in Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to health is universal both for refugees and for other citizens. Thus, which rights should take precedence among the 3 (three) provisions, namely the right to life (Article 6 paragraph 1 ICCPR) and the principle of non-refoulement (Article 33 paragraph 1 Convention Relating to the status of Refugees 1951) with protection of the right to health for citizens who are used as an excuse by the destination country. The focus in this paper is the refusal of entry done by a destination country to refugees or asylum seekers due to the COVID-19 pandemic.

3. Research Method

This research is a research library based on legal materials derived from books, journals, and other documents relevant to the non-refoulement principle, refugee law, relevant cases and policy information in the health sector and the COVID-19 pandemic. Conceptual, case, and statutory approaches are used as the basis for the analysis of all legal materials that have been qualified and systematized to answer the problems studied.

2. Results and Discussion

2.1. The Right to Life and the Principle of Non-Refoulment

The right to life and the principle of non-refoulement are two things that cannot be separated. The rationale for the non-refoulement principle is the right to life which is a human right of every individual as stated in Article 6 paragraph 1 of the International Covenant on Civil

and Political Rights² that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". Refusing the presence of refugees and asylum seekers whose lives are at risk in their countries of origin and then returning them to their countries of origin clearly violates the right to life and the principle of non-refoulement regardless of the reason.

The principle of non-refoulement has become part of international human rights and customary international law and has been strengthened in Article 33 paragraph 1 of The Refugee Convention 1951³ and the 1967 Protocol. However, according to Aoife Duffy⁴, the existence of the principle of non-refoulement which has acquired the status of jus cogens does not guarantee to be implemented practically. By using natural law approach and international law (positivism), the right to life and the principle of non-refoulement have been universally applied to all countries, both those that have and have not ratified the convention as confirmed by the 1967 Protocol.⁵

The mandatory nature of the Non-Refoulement Principle is not only contained in the international instruments, but also in the nature of customary international law norms that have been linked to the principle, which means that it is mandatory for all countries. That is why the

² The rights provided in the ICCPR are non-derogable rights, namely the right to life, freedom from acts of torture, from inhumane and degrading treatment, freedom from slavery, freedom from ex post facto laws. (applies retroactively) as well as freedom of thought, conscience and religion.

³ Article 33 paragraph 1 The Refugee Convention 1951: "*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*".

⁴ United Nations, "A/RES/51/75", 12 February 1997, para. 3, <http://www.un.org/docuPHQWVJDUHVDUHVKWP>; and United Nations "A/RES/52/132" 12 December 1997, para 12, KWWSZZZXQFKUFK+XULGRFGD+XULGRFDQVI6\PERO\$5(6(Q"2Sendocument.

⁵ The 1967 Protocol removed the temporal and geographical restrictions of the 1951 Refugee Convention so that this Convention has become universally applicable. Article 1 of the 1967 Protocol says that countries that ratify this protocol are interpreted as agreeing to comply with the 1951 Refugee Convention. For example, the United States has not ratified the Refugee Convention but has ratified the 1967 Protocol. This means that it is bound to apply the provisions of the Convention, to which it is binding. to treat refugees in accordance with internationally recognized legal and humanitarian standards. This includes respecting the principle of non-refoulement – that is, not sending refugees to places where they are at risk of persecution, or to countries that may send them there; grant refugees legal status, including rights such as access to employment, education and social security; and not punishing refugees for entering 'illegally' – that is, without a passport or visa.

convention does not contain a reservation clause.⁶ The principle of non-refoulement is a customary international law norm based on consistent practice combined with recognition from countries that the principle has a normative character.⁷ M. Alvi Syahrin⁸ gave an example that was done by the Indonesian government when handling refugees (manusia perahu) from Vietnam for humanitarian considerations while the Indonesian government had not ratified the 1951 Convention.

Referring to this rationale, both from the aspect of natural law, positive international law and customary international law, the rejection of a country against refugees and asylum seekers whose lives are threatened if they are returned to their country of origin is a violation of human rights, especially the right to life and the principle of non-refoulment. Returning them to their countries of origin can be analogous to do indirectly persecution, torture to refugees and asylum seekers whose executor is the authority of the country of origin. It is recognized that at the ideological level, human rights law and refugee law are two things that cannot be separated. However, in practical terms it is not as ideal as it is in the human rights system. This problem can be answered by examining the failure of international refugee law and human rights in cases (practice). The settlement approach is also very different from the character or nature of each of them towards the settlement of refugees, even though both are rooted in law. Human rights law is not only rooted in positive law but also, most importantly, rooted in natural law. The concept of human rights as values rooted in natural law is often used as a way to evaluate practices that suppress and reject human rights. This is also often the case for countries' non-compliance with human rights instruments against refugees and asylum seekers.

2.1. Prohibition of Entry with the Reason of Covid-19

The emergence of Covid-19 in 2019, known as the delta virus to the new omicron virus attack, has caused almost all countries to issue restrictions on the presence of foreign nationals,

⁶ The principle of non-refoulement also applies at sea. Look Trevisanut, S., 2008. The Principle of Non-Refoulement at Sea and the. *Human Rights*, 12, pp.205–246. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1798756

⁷ “UNHCR Note on the Principle of Non-Refoulement”, November 1997, <http://www.refworld.org/docid/438c6d972.html>. Look Fernandez Arribas, Gloria, Asilo y refugio en la Unión Europea. Granada, España, Comares, 2007, p. 155.

⁸ M. Alvi Syahrin, 2017. The Implementation of Non-Refoulement Principle to the Asylum Seekers and Refugees in Indonesia, *Sriwijaya Law Review*, Faculty of Law, Sriwijaya University, page 170.

including the arrival of refugees and asylum seekers. There is concern that they have the potential to spread the COVID-19 virus, which as a result could become a pandemic in society and have an impact on all aspects of life such as health, economic, educational and social aspects. Citizens also have the right to health which must be protected by the state. Health is a basic right that carries the consequence that every human being has the right to health and the state is obliged to fulfill that right. Efforts to fulfill rights that can be carried out by the Government, namely by means of healing and prevention efforts (including having a correlation with the obligation for the Government to protect, respect and fulfill).⁹ So, with the right to health, can it be used as a reason to refuse refugees and asylum seekers to enter the territory of the destination country? while the right to life for refugees and asylum seekers whose lives are threatened is a basic and primary human right. Is there a right that must be prioritized between the right to life and the right to health?

The right to health is part of the economic, social and cultural rights as regulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). From the historical development of international human rights regulations, the ICCPR is categorized as the first generation of human rights, while the ICESCR is the second generation of human rights. Therefore, the ICCPR requires states to respect recognized rights and guarantees those rights to all individuals within its territory and subject to its jurisdiction,¹⁰ the ICESCR on the other hand, only requires that states “promise to take steps ... to the maximum extent of their available resources, in order to fully realize the recognized rights progressively.”¹¹

At the level of pragmatism, making a distinction between the two is a far-fetched thing. We can't make it black and white or prioritize the right to life (ICCPR) over the right to health (ICESCR). Making a distinction between the two will not provide any real benefit. Whether the right is civil, political, economic, social, and cultural in orientation does not have much effect on its qualitative status as a right, but it can affect the state implementation of the right quickly. Both complement each other and do not sacrifice rights on either level. The important thing is

⁹ Sholahuddin Al-Fatih, Felinda Istighfarisna Aulia, 2021. The State's Responsibility in the Case of COVID-19 As a Realization of the Protection of Human Rights, Jurnal HAM, Volume 12, No 3, December 2021, page 351.

¹⁰ Article 2 paragraph 1.

¹¹ I b I d.

not to sacrifice the right to life of refugees and asylum seekers by being returned to their country of origin (refoulement) where they will be persecuted, tortured, and threatened. As the *jus cogens* norm, the state has an obligation to protect and accept them as well as take anticipatory steps for the risk of the spread of COVID-19 and protect the rights to health of its citizens. The use of Article 12 (1) of the ICESCR (right to health) as an excuse for not applying the non-refoulement principle is baseless and a violation of human rights. As van Bowen said that because it bears a *jus cogens* norm, the rights mentioned above are binding on states even if there are no obligations required by the convention or no statement of approval or any specific comments.¹²

In the context of a pandemic, the State shall respect and protect them from the threat of torture as regulated in the Convention Against Torture (CAT), Article 7 ICCPR (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No one shall be subjected without his free consent to medical or scientific experimentation) and customary international law. States can protect public health rights and respect non-refoulement by, for example, using quarantine measures for refugees and asylum seekers and conducting online asylum interviews. This means that there is no legal reason for a country not to apply the principle of non-refoulement during this pandemic, unless a refugee is declared to be endangering the security of the host country as stated in Article 33 paragraph 2 of the 1951 Convention.

The question that arises related to that is whether Covid-19 can be categorized as an element of endangering state security? The Article 33 paragraph 2 should be understood as provisions or clauses that are individual in nature, meaning that there must be reasonable reasons to suspect that a particular refugee has caused. Even if a refugee has COVID-19, this is by no means a danger to the security of the country nor is it a major loss to the interests of the host country. There is no such threat posed by a refugee infected with COVID-19. The problem of entry and exit for both citizens and non-citizens can actually be solved by requiring everyone who enters the country to be quarantined. For citizens who want to go out (outbound) can be overcome with less disturbing measures such as requiring all travellers to be tested before departure.

¹² van Bowen, Distinguishing Criteria of Human Rights, in Vasak, Volume 1, p. 48. Quoted by Scott Davidson, 1994. Human Rights History, Theory, and Practice in International Association, Graffiti, Jakarta, p. 57.

It is acknowledged that in recent months, many governments have violated the principle of non-refoulement by closing their borders completely and halting asylum processing. The United Nations High Commissioner for Refugees (UNHCR) estimates that “167 countries have partially or completely closed their borders to contain the spread of the virus” and that 57 of those countries “are no exception to people seeking asylum.”¹³ In the United States, for example, the Centers for Disease Control and Prevention issued an order on March 20, 2021, suspending asylum processing for people “traveling from Canada or Mexico.” The order applies to road trips from Mexico and Canada and covers non-citizens arriving without valid travel documents. The CDC has since indefinitely extended the March 20 order, which will be in effect until the Director has determined that “the danger of COVID-19 to the United States is no longer a serious hazard to public health.” The real aim of the policy appears to be to quickly expel asylum seekers. Experts note that the policy is too broad and debate whether there is a credible reason to categorically ban all asylum seekers.¹⁴

The Indonesian government has also officially closed the door of arrival for foreigners who have visited eight countries in Africa. This policy was carried out following the emergence of the Covid-19 variant B.1.1.529 or Omicron which had triggered several other countries to limit flights to their territory. However, towards refugees and asylum seekers, the Indonesian government is still careful despite the fact that it is recognized that some refugees from Rohingya have been accepted into Indonesian territory and have been treated humanely and have not been returned to their country of origin (Myanmar).

Does a public health emergency give the government the right to deviate from the principle of non-refoulement? The application of Article 33 paragraph 2 requires “individual determination by the country where the refugee is located and whether there are indicators of endangering security”.¹⁵ This determination is very subjective and one-sided. However, Article

¹³ Covid-19 and International Law: Refugee Law and The Principle of Non-Refoulement, <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/> , visited on December 2021.

¹⁴ I b I d.

¹⁵ Indonesia has already issued Presidential Regulation No. 125 of 2016 for handling refugees that have experienced emergency. It does not elaborate its scope to cover health emergency. Armed Forces, Police, and other relevant department will handle to the refugee. Look Yanuar Sumarlan, 2019. Political economy of pragmatic refugee

33 paragraph 2 does not “affect the non-refoulement obligations of the host country under international human rights law, and there are no exceptions.” In other words, the host State must make an individual decision based on Article 33 paragraph 2 that a refugee poses a danger to the security of the State. If the host State finds the refugee posing a danger, then the host State has the right to refuse entry to the refugee, as long as the State does not violate its non-refoulement obligation.

3. Conclusion

1. The purpose of Article 33 of the 1951 Refugees Convention is to protect the right of life for asylum seekers and refugees and is in accordance with Article 6 (1) of the ICCPR. This right is the most basic right in Human Rights Law. There is no authority from anyone, including the state, to deny the right to life of a human being, even if it takes one's life. Violations against it constitute a crime against humanity. Meanwhile, Article 12 paragraph 1 of the ICESCR, namely the right of everyone to obtain a standard of health, is a right of the second generation whose degree is lower than Article 6 (1) of the ICCPR. The right to life is the main right. The application of Article 12 paragraph 1 of the ICESCR is the responsibility of the state. From the aspect of legal philosophy, it can be said that Article 33 of the 1951 Refugees Convention, especially concerning the principle of non-refoulement, is consistent with Article 6 paragraph 1 of the ICCPR. Asylum seekers and refugees have their right to life which must be protected by all countries in any condition, which is also a reflection of the right to life as stipulated in Article 6 paragraph 1 of the ICCPR. The right to life and the right to health (Article 12 paragraph 1 ICESCR) must go hand in hand without violating the principle of non-refoulement.

2. Countries are allowed to apply criteria for citizens and non-citizens who enter or leave their territory, but the country concerned has an obligation not to return asylum seekers or refugees to their country of origin who will be persecuted and tortured. Countries must come

together in the name of humanity to fight the Covid-19 pandemic that is experienced not only by citizens but also non-citizens so that there is no legal reason for a country to refuse asylum seekers or refugees. The limitation of these criteria must not conflict with the most basic human rights principles, namely the right to life, especially for asylum seekers and refugees. Efforts to quarantine asylum seekers and refugees suspected of or affected by Covid-19/Omicron is a policy that is in accordance with human rights and the principle of non-refoulement as well.

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van Bowen, T., Distinguishing Criteria of Human Rights, in Vasak, Volume 1.



[Dilrev] Revisions Required 2

1 message

Ro'fah Setyowati <diponegorolawreview@gmail.com>

Feb 15 2022 at 10:00 AM

To: fransiscus joko <fransiskusjoko893@gmail.com>

Dengan Hormat,

Bersama ini kami kirimkan kembali paper Bapak/Ibu/Saudara dengan judul:

"Non-Refoulment Principle and Prohibition of Entry for Refugees and Asylum Seekers in the Territory of a Country Due to the Covid-19 Pandemic "

dengan harapan agar segera diperbaiki sesuai dengan catatan/masukan yang diberikan editor pada artikelyang bersangkutan.

Artikel perbaikan harus dikembalikan ke email diponegorolawreview@gmail.com paling lambat

Selasa, 22 Februari 2022 (jam 24.00).

Demikian pemberitahuan kami, atas perhatian dan kerjasamanya kami mengucapkan terima kasih.

Salam,

Redaksi Jurnal Dilrev

Non-Refoulment Principle and Prohibition of Entry for Refugees and Asylum Seekers in the Territory of a Country Due to the Covid-19 Pandemic

Abstract

The principle of non-refoulement has become jus cogens which obliges every country, both ratifying and not ratifying the 1951 Refugee Convention and the 1967 Protocol not to refuse refugees and asylum seekers to enter the territory of a country and not be returned to their country of origin because their lives will be threatened, persecuted, and tortured. The right to life is a right that cannot be reduced and must be protected and respected by everyone under any circumstances. The reason for the pandemic cannot be used as an excuse to refuse refugees and asylum seekers on the grounds of protecting the right to health for citizens of the host country. Efforts to quarantine asylum seekers and refugees suspected of or affected by Covid-19/Omicron is a policy that is in accordance with human rights as well as according to the principle of non-refoulement.

Keywords: non-refoulment principle, prohibition to entry, Covid-19

1. Introduction

Data from the World Health Organization (WHO) in January 2022 shows that the number of Covid-19 cases worldwide has exceeded 90 million cases, and reaching 90,054,813 on Wednesday, January 17, 2022,¹ with a death toll of 1,945,610. This data is expected to increase again in connection with the emergence of a new virus called omicron whose contribution can come from countries that are experiencing internal conflicts which result in population migration to neighboring countries due to pressures that lead to torture, rape, discrimination, persecution, and other human rights violations that threaten the lives of themselves and their families. They become refugees because they are forced, generally they are not provided with travel documents. The right to live for a person must be respected by anyone, including the country where he is displaced because there is a threat to his life in the country of origin. They may not be forced or returned to their country of origin as stipulated in Article 33 of the Convention Relating to the Status of Refugees 1951 in terms of the prohibition of expulsion or refoulment. In addition, it is also provided in Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which contains the following:

¹ <https://covid19.who.int/table>, visited on January 18 2022.

Commented [MH21]: In this part, you should clearly stated aim of the study, the method, and the conclusion

Commented [MH22]: In this part you should add some data concerning state's policy that forbid or close their border for refugee due to covid 19
You also should describe some study or article that stated the importance of non-refoulment principle

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The main problems faced empirically by refugees who are always ignored by the state or government are first, the protection of human rights in the country of origin which should try to prevent human rights violations, so that people are not forced to leave their country to find a better place. Second, the protection of human rights in the country of asylum by guaranteeing that those who fled because their human rights were violated are allowed to find a safe place, that they are provided with effective protection against forced repatriation (refoulement), and that their human rights are respected in the country where they seek protection. Third, the protection of human rights at the international level, namely through actions to ensure that human rights considerations are important and basic in making decisions to provide protection to refugees, such as the need to protect displaced persons in their own country, developments in international refugee law and refugee law practice, as well as programs to return refugees to their countries of origin.

Entering the third year of the pandemic, the policies of countries to open and close for refugees or asylum seekers have fluctuated. The basic principle of the policy is based on the sovereignty of each country to avoid wide spread and protect the right to health for citizens. Then with this rationale, is someone who leaves their country of origin due to persecution, torture, rape, death threats, and is not immediately allowed to enter the destination country due to pandemic reasons and the protection of citizens' rights to health.

The right to life is the most basic right as stated in Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR). Therefore, there is no legal reason to refuse the presence of refugees and return them to their country of origin whose lives are in danger if they are returned. This has also been emphasized in Article 33 paragraph 1 of the Convention Relating to the status of Refugees 1951 which states that the prohibition of expulsion or refoulement of refugees in any way to the borders of territories where their life or freedom will be threatened because of race, religion, nationality, membership of a particular social group or political opinion.

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² The rights provided in the ICCPR are non-derogable rights, namely the right to life, freedom from acts of torture, from inhumane and degrading treatment, freedom from slavery, freedom from ex post facto laws. (applies retroactively) as well as freedom of thought, conscience and religion.

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⁶ “UNHCR Note on the Principle of Non-Refoulement”, November 1997,

<http://www.refworld.org/docid/438c6d972.html>. Look Fernandez Arribas, Gloria, Asilo y refugio en la Unión Europea. Granada, España, Comares, 2007, p. 155.

⁷ M. Alvi Syahrin, 2017. The Implementation of Non-Refoulement Principle to the Asylum Seekers and Refugees in Indonesia, Sriwijaya Law Review, Faculty of Law, Sriwijaya University, page 170.

rights, especially the right to life and the principle of non-refoulment. Returning them to their countries of origin can be analogous to do indirectly persecution, torture to refugees and asylum seekers whose executor is the authority of the country of origin. It is recognized that at the ideological level, human rights law and refugee law are two things that cannot be separated. However, in practical terms it is not as ideal as it is in the human rights system. This problem can be answered by examining the failure of international refugee law and human rights in cases (practice). The settlement approach is also very different from the character or nature of each of them towards the settlement of refugees, even though both are rooted in law. Human rights law is not only rooted in positive law but also, most importantly, rooted in natural law. The concept of human rights as values rooted in natural law is often used as a way to evaluate practices that suppress and reject human rights. This is also often the case for countries' non-compliance with human rights instruments against refugees and asylum seekers.

2.1. Prohibition of Entry with the Reason of Covid-19

The emergence of -Covid-19 in 2019, known as the delta virus to the new omicron virus attack, has caused almost all countries to issue restrictions on the presence of foreign nationals, including the arrival of refugees and asylum seekers. There is concern that they have the potential to spread the COVID-19 virus, which as a result could become a pandemic in society and have an impact on all aspects of life such as health, economic, educational and social aspects. Citizens also have the right to health which must be protected by the state. Health is a basic right that carries the consequence that every human being has the right to health and the state is obliged to fulfill that right. Efforts to fulfill rights that can be carried out by the Government, namely by means of healing and prevention efforts (including having a correlation with the obligation for the Government to protect, respect and fulfill).⁸ So, with the right to health, can it be used as a reason to refuse refugees and asylum seekers to enter the territory of the destination country? while the right to life for refugees and asylum seekers whose lives are threatened is a basic and primary human right. Is there a right that must be prioritized between the right to life and the right to health?

⁸ Sholahuddin Al-Fatih, Felinda Istighfararisna Aulia, 2021. The State's Responsibility in the Case of COVID-19 As a Realization of the Protection of Human Rights, Jurnal HAM, Volume 12, No 3, December 2021, page 351.

The right to health is part of the economic, social and cultural rights as regulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). From the historical development of international human rights regulations, the ICCPR is categorized as the first generation of human rights, while the ICESCR is the second generation of human rights. Therefore, the ICCPR requires states to respect recognized rights and guarantees those rights to all individuals within its territory and subject to its jurisdiction,⁹ the ICESCR on the other hand, only requires that states “promise to take steps ... to the maximum extent of their available resources, in order to fully realize the recognized rights progressively.”¹⁰

At the level of pragmatism, making a distinction between the two is a far-fetched thing. We can't make it black and white or prioritize the right to life (ICCPR) over the right to health (ICESCR). Making a distinction between the two will not provide any real benefit. Whether the right is civil, political, economic, social, and cultural in orientation does not have much effect on its qualitative status as a right, but it can affect the state implementation of the right quickly. Both complement each other and do not sacrifice rights on either level. The important thing is not to sacrifice the right to life of refugees and asylum seekers by being returned to their country of origin (refoulement) where they will be persecuted, tortured, and threatened. As the *jus cogens* norm, the state has an obligation to protect and accept them as well as take anticipatory steps for the risk of the spread of COVID-19 and protect the rights to health of its citizens. The use of Article 12 (1) of the ICESCR (right to health) as an excuse for not applying the non-refoulement principle is baseless and a violation of human rights. As van Bowen said that because it bears a *jus cogens* norm, the rights mentioned above are binding on states even if there are no obligations required by the convention or no statement of approval or any specific comments.¹¹

In the context of a pandemic, the State shall respect and protect them from the threat of torture as regulated in the Convention Against Torture (CAT), Article 7 ICCPR (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No one shall be subjected without his free consent to medical or scientific experimentation) and customary

⁹ Article 2 paragraph 1.

¹⁰ *Ibid.*

¹¹ van Bowen, *Distinguishing Criteria of Human Rights*, in Vasak, Volume 1, p. 48. Quoted by Scott Davidson, 1994. *Human Rights History, Theory, and Practice in International Association*, Graffiti, Jakarta, p. 57.

Commented [MH24]: *Jus cogens* is one of the controversial legal issue in international law, therefore, to strengthen your argumentation, you shall mention not just one writer opinion, but you should find other opinion from writer, or court decision that stated non refoulment principle is a *jus cogens* norm.

You can add the Executive Committee of the High Commissioner's Programme, *General Conclusion on International Protection No. 79 (XLVII) - 1996*, 11 October 1996, No. 79 (XLVII), available at: <https://www.refworld.org/docid/3ae68c430.html> [access ed 19 April 2022]

You can also add Costello and foster concept concerning non refoulment as *jus cogens* (<https://www.rsc.ox.ac.uk/publications/non-refoulement-as-custom-and-jus-cogens-putting-the-prohibition-to-the-test>)

international law. States can protect public health rights and respect non-refoulement by, for example, using quarantine measures for refugees and asylum seekers and conducting online asylum interviews. This means that there is no legal reason for a country not to apply the principle of non-refoulement during this pandemic, unless a refugee is declared to be endangering the security of the host country as stated in Article 33 paragraph 2 of the 1951 Convention.

The question that arises related to that is whether Covid-19 can be categorized as an element of endangering state security? The Article 33 paragraph 2 should be understood as provisions or clauses that are individual in nature, meaning that there must be reasonable reasons to suspect that a particular refugee has caused. Even if a refugee has COVID-19, this is by no means a danger to the security of the country nor is it a major loss to the interests of the host country. There is no such threat posed by a refugee infected with COVID-19. The problem of entry and exit for both citizens and non-citizens can actually be solved by requiring everyone who enters the country to be quarantined. For citizens who want to go out (outbound) can be overcome with less disturbing measures such as requiring all travellers to be tested before departure.

It is acknowledged that in recent months, many governments have violated the principle of non-refoulement by closing their borders completely and halting asylum processing. The United Nations High Commissioner for Refugees (UNHCR) estimates that “167 countries have partially or completely closed their borders to contain the spread of the virus” and that 57 of those countries “are no exception to people seeking asylum.”¹² In the United States, for example, the Centers for Disease Control and Prevention issued an order on March 20, 2021, suspending asylum processing for people “traveling from Canada or Mexico.” The order applies to road trips from Mexico and Canada and covers non-citizens arriving without valid travel documents. The CDC has since indefinitely extended the March 20 order, which will be in effect until the Director has determined that “the danger of COVID-19 to the United States is no longer a serious hazard to public health.” The real aim of the policy appears to be to quickly expel asylum seekers. Experts note that the

¹² Covid-19 and International Law: Refugee Law and The Principle of Non-Refoulement, <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/> , visited on December 2021.

policy is too broad and debate whether there is a credible reason to categorically ban all asylum seekers.¹³

The Indonesian government has also officially closed the door of arrival for foreigners who have visited eight countries in Africa. This policy was carried out following the emergence of the Covid-19 variant B.1.1.529 or Omicron which had triggered several other countries to limit flights to their territory. However, towards refugees and asylum seekers, the Indonesian government is still careful despite the fact that it is recognized that some refugees from Rohingya have been accepted into Indonesian territory and have been treated humanely and have not been returned to their country of origin (Myanmar).

Does a public health emergency give the government the right to deviate from the principle of non-refoulement? The application of Article 33 paragraph 2 requires "individual determination by the country where the refugee is located and whether there are indicators of endangering security". This determination is very subjective and one-sided. However, Article 33 paragraph 2 does not "affect the non-refoulement obligations of the host country under international human rights law, and there are no exceptions." In other words, the host State must make an individual decision based on Article 33 paragraph 2 that a refugee poses a danger to the security of the State. If the host State finds the refugee posing a danger, then the host State has the right to refuse entry to the refugee, as long as the State does not violate its non-refoulement obligation.

3. Conclusion

1. The purpose of Article 33 of the 1951 Refugees Convention is to protect the right of life for asylum seekers and refugees and is in accordance with Article 6 (1) of the ICCPR. This right is the most basic right in Human Rights Law. There is no authority from anyone, including the state, to deny the right to life of a human being, even if it takes one's life. Violations against it constitute a crime against humanity. Meanwhile, Article 12 paragraph 1 of the ICESCR, namely the right of everyone to obtain a standard of health, is a right of the second generation whose degree is lower than Article 6 (1) of the ICCPR. The right to life is the main right. The

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¹³ I b I d.

application of Article 12 paragraph 1 of the ICESCR is the responsibility of the state. From the aspect of legal philosophy, it can be said that Article 33 of the 1951 Refugees Convention, especially concerning the principle of non-refoulement, is consistent with Article 6 paragraph 1 of the ICCPR. Asylum seekers and refugees have their right to life which must be protected by all countries in any condition, which is also a reflection of the right to life as stipulated in Article 6 paragraph 1 of the ICCPR. The right to life and the right to health (Article 12 paragraph 1 ICESCR) must go hand in hand without violating the principle of non-refoulement.

2. Countries are allowed to apply criteria for citizens and non-citizens who enter or leave their territory, but the country concerned has an obligation not to return asylum seekers or refugees to their country of origin who will be persecuted and tortured. Countries must come together in the name of humanity to fight the Covid-19 pandemic that is experienced not only by citizens but also non-citizens so that there is no legal reason for a country to refuse asylum seekers or refugees. The limitation of these criteria must not conflict with the most basic human rights principles, namely the right to life, especially for asylum seekers and refugees. Efforts to quarantine asylum seekers and refugees suspected of or affected by Covid-19/Omicron is a policy that is in accordance with human rights and the principle of non-refoulement as well.

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- International Covenant on Civil and Political Rights, Adopted by the General Assembly of the United Nations on 19 December 1966.

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Add reference from books or journal that discuss about refugee, non-refoulment principle.

International Covenant on Economic, Social, and Cultural Rights, adopted by the United Nations General Assembly (GA) on 16 December 1966.

Protocol 1967 Relating to the Status of Refugee

Refugee Convention 1951 Relating to the Status of Refugee

Syahrin, M.Alvi, 2017. The Implementation of Non-Refoulment Principle to the Asylum Seekers and Refugees in Indonesia, Sriwijaya Law Review, Faculty of Law, Sriwijaya University

Tempo, 27 December 2021

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van Bowen, T., Distinguishing Criteria of Human Rights, in Vasak, Volume 1.



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1	Title	good	
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4	Method (If Any)		



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5	Result (If any) and Discussion	<p>Since principle of Non-Refoulment is the connerstone of refugee law, and this study mainly base on this principle, you should describe what is Non-refoulment principle.</p> <p>Page 6 : Jus cogens is one of the controversial legal issue in international law, therefore, to strengthen your argumentation, you shall mention not just one writer opinion, but you should find other opinion from other writer, or court decision or international organization resolutions that stated non refoulment principle is a jus cogens norm.</p> <p>You can add the Executive Committee of the High Commissioner's Programme, <i>General Conclusion on International Protection No. 79 (XLVII) - 1996</i>, 11 October 1996, No. 79 (XLVII), available at: https://www.refworld.org/docid/3ae68c430.html [accessed 19 April 2022]</p> <p>You can also add Costello and foster concept concerning non refoulment as jus cogens (https://www.rsc.ox.ac.uk/publications/non-refoulement-as-custom-and-jus-cogens-putting-the-prohibition-to-the-test)</p>	
6	Conclusion	<p>The conclusion should answer the legal issue on the introduction,</p> <p>Does a state entitle to forbid refugee on the reasons of Covid-19?</p> <p>which rights should take precedence among the right to life, right to health and non refoulment principle</p> <p>however this article seem not clearly stated the answer of those legal problems</p>	
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Non-Refoulment Principle and Prohibition of Entry for Refugees Due to the Covid-19 Pandemic

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Abstract

The principle of non-refoulement has become jus cogens which obliges every country, both ratifying and not ratifying the 1951 Refugee Convention and the 1967 Protocol not to refuse refugees and asylum seekers to enter the territory of a country and not be returned to their country of origin because their lives will be threatened, persecuted, and tortured. The right to life is a right that cannot be reduced and must be protected and respected by everyone under any circumstances. The pandemic reason cannot be used as an excuse to refuse refugees and asylum seekers on the grounds of protecting the right to health for its citizens. Efforts to quarantine asylum seekers and refugees suspected of or affected by Covid-19/Omicron is a policy that is in accordance with human rights as well as according to the principle of non-refoulement.

Keywords: non-refoulment principle, Covid-19

1. Introduction

The World Health Organization (WHO) data of January 2022 shows that the number of Covid-19 cases worldwide has exceeded 90 million cases, and reaching 90,054,813 on Wednesday, January 17, 2022 with a death toll of 1,945,610. This data is expected to increase again in connection with the emergence of a new virus called omicron whose contribution can come from countries that are experiencing internal conflicts which result in population migration to neighboring countries due to pressures that lead to torture, rape, discrimination, persecution, and other human rights violations that threaten the lives of themselves and their families. They become refugees because they are forced, generally they are not provided with travel documents. The right to live for a person must be respected by anyone, including the country where he is displaced because there is a threat to his life in the country of origin. They may not be forced or returned to their country of origin as stipulated in Article 33 of the Convention Relating to the status of Refugees 1951 in terms of the prohibition of expulsion or refoulment. This problem is actually not only health but also resettlement matter (Brickhill-Atkinson and Hauck 2021).

The main problems faced empirically by refugees who are always ignored by the state or government are first, the protection of human rights in the country of origin which should try to

prevent human rights violations, so that people are not forced to leave their country to find a better place. Second, the protection of human rights in the country of asylum by guaranteeing that those who fled because their human rights were violated are allowed to find a safe place, that they are provided with effective protection against forced repatriation (refoulment), and that their human rights are respected in the country where they seek protection. Third, the protection of human rights at the international level, namely through actions to ensure that human rights considerations are important and basic in making decisions to provide protection to refugees, such as the need to protect displaced persons in their own country, developments in international refugee law and refugee law practice, as well as programs to return refugees to their countries of origin. The Rohingya case is a bad example where the Myanmar government does not protect their human rights. They have been experiencing discrimination and persecution in their own country so they are forced to flee to other countries.

Entering the third year of the pandemic, the policies of countries to open and close for refugees or asylum seekers have fluctuated. The basic principle of the policy is based on the sovereignty of each country to avoid wide spread and protect the right to health for citizens. Then with this rationale, is someone who leaves their country of origin due to persecution, torture, rape, death threats, and is not immediately allowed to enter the destination country due to pandemic reasons and the protection of citizens' rights to health.

The right to life is the most basic right as stated in Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR). Therefore, there is no legal reason to refuse the presence of refugees and return them to their country of origin whose lives are in danger if they are returned. This has also been emphasized in Article 33 paragraph 1 of the Convention Relating to the Status of Refugees 1951 which states that the prohibition of expulsion or refoulement of refugees in any way to the borders of territories where their life or freedom will be threatened because of race, religion, nationality, membership of a particular social group or political opinion.

The problem is whether a country is justified by law to refuse refugees on the grounds of preventing the spread of Covid-19 and protecting the right to health for its citizens as stipulated in Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to health is universal both for refugees and for other citizens. Thus, which rights should take precedence among the 3 (three) provisions, namely the right to life (Article 6 paragraph 1

ICCPR), the principle of non-refoulement (Article 33 paragraph 1 Convention Relating to the status of Refugees 1951) and protection of the right to health for citizens who are used as an excuse by the destination country.

The focus in this paper is the refusal of entry done by a destination country to refugees or asylum seekers due to the COVID-19 pandemic.

2. Research Method

This research is a research library based on legal materials derived from books, journals, and other documents relevant to the non-refoulement principle, refugee law, relevant cases and policy information in the health sector and the COVID-19 pandemic. Conceptual, case, and statutory approaches are used as the basis for the analysis of all legal materials that have been qualified and systematized to answer the problems studied.

3. Results and Discussion

3.1. The Right to Life and the Principle of Non-Refoulment

The right to life and the principle of non-refoulement are two things that cannot be separated. The rationale for the non-refoulement principle is the right to life which is a human right of every individual as stated in Article 6 paragraph 1 of the International Covenant on Civil and Political Rights that "every human being has the inherent right to life. This right is non-derogable rights, namely the right to life, freedom from acts of torture, from inhumane and degrading treatment, freedom from slavery, freedom from ex post facto laws and applies retroactively as well as freedom of thought, conscience and religion. It, therefore, shall be protected by law. No one shall be arbitrarily deprived of his life". Refusing the presence of refugees and asylum seekers whose lives are at risk in their countries of origin and then returning them to their countries of origin clearly violates the right to life and the principle of non-refoulment regardless of the reason.

The principle of non-refoulement has become part of international human rights and customary international law and has been strengthened in Article 33 paragraph 1 of The Refugee Convention 1951 and the 1967 Protocol. However, according to Aoife Duffy(Duffy 2008), the existence of the principle of non-refoulement which has acquired the status of jus cogens does not

guarantee to be implemented practically. By using natural law approach and international law (positivism), the right to life and the principle of non-refoulement have been universally applied to all countries, both those that have and have not ratified the convention as confirmed by the 1967 Protocol. It removed the temporal and geographical restrictions of the 1951 Refugee Convention so that this Convention has become universally applicable. Article 1 of the 1967 Protocol stipulates that countries that ratify this protocol are interpreted as agreeing to comply with the 1951 Refugee Convention. For example, the United States has not ratified the Refugee Convention but has ratified the 1967 Protocol. This means that it is bound to apply the provisions of the Convention, to which it is binding, to treat refugees in accordance with internationally recognized legal and humanitarian standards. This includes respecting the principle of non-refoulement – that is, not sending refugees to places where they are at risk of persecution, or to countries that may send them there; grant refugees legal status, including rights such as access to employment, education and social security; and not punishing refugees for entering 'illegally' – that is, without a passport or visa.

The mandatory nature of the Non-Refoulement Principle is not only contained in the international instruments, but also in the nature of customary international law norms that have been linked to the principle, which means that it is mandatory for all countries. That is why the convention does not contain a reservation clause (Trevisanut 2008). The principle of non-refoulement is a customary international law norm based on consistent practice combined with recognition from countries that the principle has a normative character. M. Alvi Syahrin gave an example that was done by the Indonesian government when handling refugees (*manusia perahu*) from Vietnam for humanitarian considerations while the Indonesian government had not ratified the 1951 Convention (Syahrin 2017).

Referring to this rationale, both from the aspect of natural law, positive international law and customary international law, the rejection of a country against refugees and asylum seekers whose lives are threatened if they are returned to their country of origin is a violation of human rights, especially the right to life and the principle of non-refoulment. Returning them to their countries of origin can be analogous to do indirectly persecution, torture to refugees and asylum seekers whose executor is the authority of the country of origin. It is recognized that at the ideological level, human rights law and refugee law are two things that cannot be separated.

However, in practical terms it is not as ideal as it is in the human rights system. This problem can be answered by examining the failure of international refugee law and human rights in cases (practice). The settlement approach is also very different from the character or nature of each of them towards the settlement of refugees, even though both are rooted in law. Human rights law is not only rooted in positive law but also, most importantly, rooted in natural law. The concept of human rights as values rooted in natural law is often used as a way to evaluate practices that suppress and reject human rights. This is also often the case for countries' non-compliance with human rights instruments against refugees and asylum seekers.

Such great disobedience to human rights norms is evidence of state practice which is contrary to human rights principles in international law. Although violations of human rights law are strictly prohibited, this assumption is academically not wrong, although in practice it shows the opposite. The concept of human rights is actually integrated with ethics and morals. Rights that reflect community values will be the rights most likely to be successfully implemented (Shaw 2003). In legal theory as in the view of natural law adherents, the position of values, legal principles, and justice is higher than positive law or human-made law. Therefore, the values inherent in human beings such as the right to life, the right to freedom, and the right to property are rights that cannot be revoked.

The essence of refugee protection lies in the authorities in the host country guaranteeing state protection for all persons who become refugees. Granting refugee status requires formal recognition of the asylum seeker as a worthy person and entitled to the protection of a substitute country by the host country. The process by which an asylum seeker's claim is assessed to determine whether he or she should be formally recognized as a refugee or not is called Refugee Status Determination. The RSD is only declarative and the fact that a refugee has not been declared so through the RSD process does not eliminate the right to non-refoulement. However, the RSD process remains important because a positive RSD result, in practice, provides greater reassurance and assurance that she will not be sent back to a state where she has a well-founded fear of abuse or serious harm. Denial of refugee status can result in the expulsion of a refugee to a jurisdiction where he or she is likely to face the death penalty or be subjected to torture or other cruel, degrading, or inhumane punishments.

The importance of RSD has been emphasized by UNHCR which has stated that, although the principle of non-refoulement is universally recognized, the risk of non-refoulement can only be seriously avoided if the country concerned has accepted a formal legal obligation to protect refugees. Indeed, UNHCR has stated that the most important component of determining refugee status is the protection of those who leave their country of origin on grounds of persecution. Therefore, the right to seek asylum and the right to refuse refoulement are inseparable principles for refugee protection (the twin key precepts of refugee protection).

Research done by Kapindu (Kapindu 2020) related to the principle of non-refoulement in South Africa and Malawi yielded an interesting and specific conclusion. The research refers to two decisions of the South African Constitutional Court, namely the case of *Ruta v Minister of Home Affairs* (2018) and *Saidi and Others v Minister of Home Affairs and Others* (2018) which stipulates that prospective asylum seekers in South Africa have the right to apply for asylum at any time. In *Saidi*, the Court held that the Refugee Reception Officer (RRO) had the power to extend permits issued under Article 22(1) of the Refugee Act 1998 pending finalization of the review process under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Court further stated that the RRO was obliged to extend the permit of the asylum seeker in question.

The existence of refugees is actually the result of the negation of the principles and ideals that determine the relationship of rights and obligations between citizens and the state. The Refugee law relies on a theory of minimal state legitimacy, namely the reciprocal relationship of rights and obligations between the two. If this cannot be realized, then the state can be said to have failed and lost its legitimacy as a protector of citizens. Furthermore, it is said that international human rights norms provide a minimum standard for the legitimacy of a state. This is called minimal legitimacy. Citizens have the right to at least ask their government to guarantee physical security, livelihoods, and political freedom. In exchange, citizens pledge allegiance to the state. No reasonable person would be satisfied with less. Beneath this threshold the social compact has no meaning. Thus, refugees must be persons whose home state has failed to secure their basic needs. There is no justification for granting refugee status to individuals who do not suffer from the absence of one or more of these needs. Nor is there reason for denying refugee status to those who do. Moreover, because all of these needs are equally essential for survival, the violation of each constitutes an equally valid claim to refugeehood.

The principle of non-refoulement have been broadened in the European Union Courts for a decade where states not only have borders, but also have effective control as provided in the article 1 of the European Convention on Human Rights. This expansion is criticized by Gammeltoft-Hansen because it is incompatible with the intention and purpose of the principle of non-refoulement in the 1951 convention (Moran 2021). This problem has been created by the adoption of non-refoulement by human rights law and the parallel development non-refoulement has then had. Some states has rejected the approach, because of the indication that non-refoulement may then lead to a claim for asylum.

However, the broader approach has been rejected by certain States, possibly because of the indication that non-refoulement may then lead to a claim for asylum. The US has instead taken a narrower approach to the principle of non-refoulement and has even ignored its relevance in pertinent cases. The narrow approach embodied in court decisions in the US is a bad practice and ignores the principle of non-refoulement as in the case of *Haitian Refugee Center v Civiletti* (503 F. Supp. 442). In this case the federal court's decision was very discriminatory and without a good understanding of the principle of non-refoulement, namely by discriminating against refugees from Haiti compared to refugees from Cuba who were accepted en masse just because Haitian refugees are poor and black people.

Referring to the two approaches done by EU and US, EU approach is better than US approach. The implementation of non-refoulment principles already applied beyond the state territory. The non-refoulement obligation found in Article 3 of the European Convention on Human Rights (ECHR) has been recognized as a legal constraint on state sovereignty in relation to migration controls on the high seas. The concept of state sovereignty has undergone a paradigm shift that places extraterritorial human rights concerns relating to external migration controls squarely within a legal rather than merely a moral framework (Kim 2017).

Indonesia has a specialty in handling refugees because of not a party to the 1951 convention, but it has carried out the principle of non-refoulement by accepting refugees for humanitarian reasons even during the COVID-19 pandemic such as Rohingya refugees. The formal approach (act of ratification) is less important than the moral approach and already done in handling refugees on humanitarian grounds as a noble value and should not be ignored.

3.2. Prohibition of Entry due to Covid-19

The trend that has occurred over the past decade has shown that countries are increasingly moving away from refugee protection, intensifying the vulnerability of refugees and asylum seekers especially during a pandemic. This reason is indeed rational but cannot be used as a reason to refuse refugees whose lives are threatened if they return to their country. Evasion from refugee protection can also be partially explained by the weakness of the normative principles governing the treatment of individuals fleeing persecution. Ambiguity, differing interpretations, and varying degrees of codification complicate efforts to hold states accountable for the complex set of human rights standards surrounding refugee and asylum protection (Coen 2021). This weakness in international refugee regimes supports norm evasion behavior in which governments intentionally minimize their obligations while claiming technical compliance.

The COVID-19 pandemic has weighed heavily on refugees around the world right now. The international Refugees Law and domestic law do not always take into account the needs of refugees living in densely populated shelters without water and sanitation facilities. The economic toll from the pandemic has disproportionately affected the poorest people, applications for asylum and resettlement have been disrupted by lockdowns, and refugees have been blamed for spreading Covid-19. It is time to consider whether the spirit of the Refugee Convention is upheld and whether refugees are getting the protection they are entitled to. In terms of receiving vaccines, refugees also experience discriminatory treatment compared to nationals of the host country. The principle of solidarity is neglected especially in poor countries. For example: Bangladesh does not prioritize refugees. Data shows 25% of Bangladesh's population has been vaccinated. In the world's largest refugee camp, non-pharmaceutical measures remain the only means of preventing a major outbreak (The Lancet 2021).

It is recognized that the protection of refugees and asylum seekers has decreased since the emergence of the COVID-19 pandemic known as the delta virus to the new omicron virus attack, has caused almost all countries to issue restrictions on the presence of foreign nationals, including the arrival of refugees and asylum seekers. There is concern that they have the potential to spread the COVID-19 virus, which as a result could become a pandemic in society and have an impact on all aspects of life such as health, economic, educational and social aspects. Citizens also have the right to health which must be protected by the state. Health is a basic right that carries the

consequence that every human being has the right to health and the state is obliged to fulfill that right. Efforts to fulfill rights that can be carried out by the Government, namely by means of healing and prevention efforts (including having a correlation with the obligation for the Government to protect, respect and fulfill) (Al-Fatih and Aulia 2021). So, with the right to health, can it be used as a reason to reject refugees and asylum seekers to enter the territory of the destination country? while the right to life for refugees and asylum seekers whose lives are threatened is a basic and primary human right. Is there a right that must be prioritized between the right to life and the right to health?

The right to health is part of the economic, social and cultural rights as regulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). From the historical development of international human rights regulations, the ICCPR is categorized as the first generation of human rights, while the ICESCR is the second generation of human rights. Therefore, the ICCPR requires states to respect recognized rights and guarantees those rights to all individuals within its territory and subject to its jurisdiction, the ICESCR on the other hand, only requires that states “promise to take steps ... to the maximum extent of their available resources, in order to fully realize the recognized rights progressively.

At the level of pragmatism, making a distinction between the two is a far-fetched thing. We can't make it black and white or prioritize the right to life (ICCPR) over the right to health (ICESCR). Making a distinction between the two will not provide any real benefit. Whether the right is civil, political, economic, social, and cultural in orientation does not have much effect on its qualitative status as a right, but it can affect the state implementation of the right quickly. Both complement each other and do not sacrifice rights on either level. The important thing is not to sacrifice the right to life of refugees and asylum seekers by being returned to their country of origin (refoulment) where they will be persecuted, tortured, and threatened. As the *jus cogens* norm, the state has an obligation to protect and accept them as well as take anticipatory steps for the risk of the spread of COVID-19 and protect the rights to health of its citizens. The use of Article 12 (1) of the ICESCR (right to health) as an excuse for not applying the non-refoulment principle is baseless and a violation of human rights. As van Bowen said that because it bears a *jus cogens* norm, the rights mentioned above are binding on states even if there are no obligations required by the convention or no statement of approval or any specific comments (scott davidson 1994).

In the context of a pandemic, the State shall respect and protect them from the threat of torture as regulated in the Convention Against Torture (CAT), Article 7 ICCPR (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No one shall be subjected without his free consent to medical or scientific experimentation) and customary international law. States can protect public health rights and respect non-refoulement by, for example, using quarantine measures for refugees and asylum seekers and conducting online asylum interviews. This means that there is no legal reason for a country not to apply the principle of non-refoulement during this pandemic, unless a refugee is declared to be endangering the security of the host country as stated in Article 33 paragraph 2 of the 1951 Convention.

The question that arises related to that is whether Covid-19 can be categorized as an element of endangering state security? The Article 33 paragraph 2 should be understood as provisions or clauses that are individual in nature, meaning that there must be reasonable reasons to suspect that a particular refugee has caused. Even if a refugee has COVID-19, this is by no means a danger to the security of the country nor is it a major loss to the interests of the host country. There is no such threat posed by a refugee infected with COVID-19. The problem of entry and exit for both citizens and non-citizens can actually be solved by requiring everyone who enters the country to be quarantined. For citizens who want to go out (outbound) can be overcome with less disturbing measures such as requiring all travellers to be tested before departure.

There are 2 (two) ways that can be used in determining whether asylum seekers or refugees are considered a threat to national security in the asylum country. First, there must be reasonable reasons to conclude that the actions of an asylum seeker or refugee have endangered security. This first method is known as a high-level verification test. The asylum country must show that the continued presence of refugees in the country is a threat to the security of the country concerned. Second, refugees have been specifically determined by court decisions with permanent legal force for serious crimes of refugees and are considered a danger to the community in the asylum country. Serious crimes include, for example, rape, murder, armed robbery, and arson.

Another exception to the principle of non-refoulement can also be found in Article 1(F) of the 1951 Refugee Convention excluding those deemed 'unfit' to benefit from the refugee status of the Convention. The article provides that the provisions of the convention will not apply to everyone due to serious reasons to consider, namely: a. commit a crime against peace, a war crime,

or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes, b. commit a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c. be guilty of committing acts contrary to the purposes and principles of the United Nations. The exception to Article 1(F) is also in line with Article 14(2) of the Universal Declaration of Human Rights, which stipulates that the right of asylum 'cannot be used in cases of prosecution which actually arise from non-political crimes or from acts contrary to the objectives and principles of the United Nations'. Although the definition of crimes against humanity has changed in recent years, including murder, rape, torture and other degrading acts, this exception will affect a minority of asylum seekers because it means crimes against humanity must be committed as part of a widespread or systematic attack directed against civilian. Most asylum seekers, even if they have been involved in violence before seeking asylum in another country, will not meet the criteria or definition of a crime against humanity. However, if the crime committed by the asylum seeker meets the definition in the country of asylum relating to or including extraditable criminals, the principle of non-refoulement also cannot be applied under Article 1(F)(b). This pre-admission exception considers crimes committed before the asylum seeker arrives in the country of asylum (either in the country of origin or in the country of transit) so that it meets the types of crimes that can be extradited under the law in the country of origin or in the country of asylum. The elaboration of the type of crime in question may also include the crime of terrorism which has coherence with The 1997 UN General Assembly Resolution on Measures to Eliminate International Terrorism.

The exceptions to the Refugee Convention discussed above indicate that non-refoulement has not yet acquired mandatory status under refugee law. The Refugee Convention is a flexible instrument, capable of dealing with the challenges of the new world chaos including during a pandemic, but it clearly contradicts developments in the field of refugee protection, such as the 1984 Cartagena Declaration which proved the *jus cogens* nature of non-refoulement. The human rights regime governing non-refoulement has largely taken over the Refugee Convention, which is gradually becoming almost superfluous. Whatever the relevance of the 1951 Refugee Convention in international law today, discriminating against persons on the basis of crimes committed in the past and denying them protection from ill-treatment is clearly shameful for organizations entrusted with a human rights mandate. The UNHCR Executive Committee, in its

conclusions on international protection, supports the case for the application of non-refoulement universally, not only for successful asylum seekers.

How is it relevant to the Covid-19 condition for implementing the principle of non-refoulement and its exceptions? It is acknowledged that in recent months, many governments have violated the principle of non-refoulement by closing their borders completely and halting asylum processing. The United Nations High Commissioner for Refugees (UNHCR) estimates that “167 countries have partially or completely closed their borders to prevent the spread of the virus” and that 57 of those countries “are no exception to people seeking asylum.” In the United States, for example, the Centres for Disease Control and Prevention issued an order on March 20, 2021, suspending asylum processing for people “traveling from Canada or Mexico.” The order applies to road trips from Mexico and Canada and covers non-citizens arriving without valid travel documents. The CDC has since indefinitely extended the March 20 order, which will be in effect until the Director has determined that “the danger of COVID-19 to the United States is no longer a serious hazard to public health.” The real aim of the policy appears to be to quickly expel asylum seekers. Experts note that the policy is too broad and debate whether there is a credible reason to categorically ban all asylum seekers.

The Indonesian government has also officially closed the door of arrival for foreigners who have visited eight countries in Africa. This policy was carried out following the emergence of the Covid-19 variant B.1.1.529 or Omicron which had triggered several other countries to limit flights to their territory. However, towards refugees and asylum seekers, the Indonesian government is still careful despite the fact that it is recognized that some refugees from Rohingya have been accepted into Indonesian territory and have been treated humanely and have not been returned to their country of origin (Myanmar).

Does a public health emergency give the government the right to deviate from the principle of non-refoulement? The application of Article 33 paragraph 2 requires “individual determination by the country where the refugee is located and whether there are indicators of endangering security” (Sumarlan 2019). Indonesia has already issued Presidential Regulation No. 125 of 2016 for handling refugees that have experienced emergency. It does not elaborate its scope to cover health emergency. Armed Forces, Police, and other relevant department will handle to the refugee.

This determination is very subjective and one-sided. However, Article 33 paragraph 2 does not “affect the non-refoulement obligations of the host country under international human rights law, and there are no exceptions.” In other words, the host State must make an individual decision based on Article 33 paragraph 2 that a refugee poses a danger to the security of the State. If the host State finds the refugee posing a danger, then the host State has the right to refuse entry to the refugee, as long as the State does not violate its non-refoulement obligation. The problem of refugees and Covid-19 is indeed very complex and is not merely an international human rights issue but also a question of the political interests of the recipient country which has implications for the economy and national security.

4. Conclusion

The purpose of Article 33 of the 1951 Refugees Convention is to protect the right of life for asylum seekers and refugees and is in accordance with Article 6 (1) of the ICCPR. This right is the most basic right in Human Rights Law. There is no authority from anyone, including the state, to deny the right to life of a human being, even if it takes one's life. Violations against it constitute a crime against humanity. Meanwhile, Article 12 paragraph 1 of the ICESCR, namely the right of everyone to obtain a standard of health, is a right of the second generation whose degree is lower than Article 6 (1) of the ICCPR. The right to life is the main right. The application of Article 12 paragraph 1 of the ICESCR is the responsibility of the state. From the aspect of legal philosophy, it can be said that Article 33 of the 1951 Refugees Convention, especially concerning the principle of non-refoulement, is consistent with Article 6 paragraph 1 of the ICCPR. Asylum seekers and refugees have their right to life which must be protected by all countries in any condition, which is also a reflection of the right to life as stipulated in Article 6 paragraph 1 of the ICCPR. The right to life and the right to health (Article 12 paragraph 1 ICESCR) must go hand in hand without violating the principle of non-refoulement.

Countries are allowed to apply criteria for citizens and non-citizens who enter or leave their territory, but the country concerned has an obligation not to return asylum seekers or refugees to their country of origin who will be persecuted and tortured. Countries must come together in the name of humanity to fight the Covid-19 pandemic that is experienced not only by citizens but also non-citizens so that there is no legal reason for a country to refuse asylum seekers or refugees. The

limitation of these criteria must not conflict with the most basic human rights principles, namely the right to life, especially for asylum seekers and refugees. Efforts to quarantine asylum seekers and refugees suspected of or affected by Covid-19/Omicron is a policy that is in accordance with human rights and the principle of non-refoulement as well.

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