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Balancing The Principles of Non-Refoulement and National Security in The Protection of Refugee Rights: A Legal and Policy Analysis of Refugee Handling in Australia

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Abstract

This study examines the delicate balance between the principle of non-refoulement and national security in protecting refugee rights, focusing on Australia's approach to handling refugees. Non-refoulement, a fundamental principle of international refugee law, prohibits the forced return of individuals to countries where they may face persecution. However, ensuring national security while upholding refugee rights poses challenges, particularly in the face of global migration crises and security concerns. Through a case study of Australia's refugee policies and practices, this research explores the complexities of navigating between these principles, considering legal frameworks, policy implications, humanitarian considerations, and the impact on refugee lives. The findings contribute to understanding the intricate dynamics of balancing humanitarian obligations with national security imperatives in refugee protection efforts. The findings of this research suggest that no balancing act can be justified by international law. Turn-back measures cannot be used to balance Australia's international obligations to protect refugees. This will lead to violations of the human rights of asylum seekers who will be returned. The act of turning back is hazardous and has the potential to bring threats and persecution to asylum seekers who are returned to their country of arrival, country of origin, or third countries.

Keywords: Australia, Balancing Act, National Security, Protection, Refugees.

1. INTRODUCTION

In this era of globalization, apart from having to defend its sovereignty,[1] A country must also fulfill its international legal obligations. All independent countries have sovereignty; however, violations of Human Rights, abbreviated to HAM, have often occurred in the name of state sovereignty against other countries and their citizens.[2] In this case, countries that violate human rights claim that in the name of state sovereignty, they have the right to determine their country's national regulations, even if these violate human rights.[3] It is

1 T. H. Soeryabrata, "Juridical Review of the Refugees in Indonesia from the Human Rights Side and the Private Protection," in *International Conference on Law, Economics and Health (ICLEH 2020)* (Atlantis Press, 2020), 271–76, https://doi.org/10.2991/aebmr.k.200513.055.

2 Adwani Adwani, Rosmawati Rosmawati, and M. Ya'kub Aiyub Kadir, "The Responsibility in Protecting the Rohingya Refugees in Aceh Province, Indonesia: An International Refugees Law Perspective," *IIUM Law Journal* 29, no. (S2) (2021): 1–21, https://doi.org/10.31436/iiumlj.v29i(s2).677.

3 E. R. Itasari, "The Role of The ASEAN Intergovernmental Commission Of Human Rights In Giving Protection To The Ethics Rohingya Of The Spirit In Southeast Asia," *Jurnal IUS Kajian Hukum Dan Keadilan* 8, no. 3 (2020): 569–83, https://doi.org/http://dx.doi.org/10.29303/ius.v8i3.803.

 DOI: http://dx.doi.org/10.29303/v12i2.1391

also possible that a country can commit violations in the name of sovereignty under the pretext of human rights to cover its interests. One concrete example related to human rights violations committed in the name of sovereignty is the actions of countries in preventing asylum seekers from entering their territory.

Some countries take action to protect their sovereign territory by returning asylum seekers to maintain the security of their country from asylum seekers who have the potential to pose a danger to the security of their country.[4] Countries anticipate the entry of a terrorist in a group of refugees, and countries also want to curb criminal activities like human trafficking by deceitful ship crews preying on asylum seekers.[5]

One example of a famous case is the Tampa Case, where the MV Tampa attempted to save asylum seekers who were adrift in a wooden boat while en route to Australia. The asylum seekers needed urgent medical attention. The MV Tampa then continued its journey to the nearest port, on Christmas Island. Tampa stopped at the Australian territorial sea border (twelve nautical miles off the coast) to request permission to enter Australian waters and disembark the asylum seekers, but permission was denied.

The Australian Government implemented a policy called the Pacific Solution. The Pacific Solution policy issued by John Howard was an effort by the Australian Government to distribute asylum seekers to Pacific countries such as Nauru and Manus. The regulation, called the Pacific Solution, began to be implemented in September 2001. This regulation is contained in the Australian Government law called the Migration Act of 1958.

This regulation was formed to stem the number of refugees entering Australian territory by sea. This Pacific solution consists of three main strategies, namely, excluding several islands from the Australian migration zone, intercepting ships carrying asylum seekers, and transferring asylum seekers to detention centers in Nauru and Papua New Guinea while waiting for confirmation of their refugee status. The regions of Nauru, Papua New Guinea, and Christmas Island are very close to Australia, as seen in the following map:

Figure 1: Location Map of Australian migration zones

4 A. K. (Afriansyah, A., Purnama, H. R., & Putrac, "Asylum Seekers and Refugee Management:(Im) Balance Burden Sharing Case between Indonesia and Australia," *Sriwijaya Law Review* 6, no. 1 (2022): 70–100, https://doi.org/10.28946/slrev.Vol6.Iss1. 1145.pp70-100.

5 Z Hafrida, H., Herlina, N., & Adamy, "The Protection of Women and Children as Victims of Human Trafficking in Jambi Province," *Jambe Law Review* 1, no. 2 (2018): 207–30, https://doi.org/https://doi.org/10.22437/jlj.1.2.207-230.

Australia detained the MV Tampa, and the Australian Government intercepted and expelled boats entering its territory. First, one of the ships en route to Australia was forced to return to Indonesian waters as it was chased away by the Australian navy, causing the ship to sink in Cianjur waters and resulting in the deaths of 15 people, including six children. A similar incident occurred in the waters of Cidaun Java, where approximately 100 individuals were rescued, yet an estimated 170 people had embarked on the perilous journey. Most recently, four individuals lost their lives when a vessel carrying 150 asylum seekers sank near Christmas Island.

A country cannot return refugees who are in a state of fear resulting from persecution in their country of origin because it could threaten their lives.[6] This principle is known as the principle of non-refoulement, a fundamental principle of international law.[7] This principle provides a person with protection from being returned to a place where they are at risk of abuse, torture, or other ill-treatment. The prohibition of non-refoulement is recognized in *The 1951 Refugee Convention (Art.33 (1)), UNHCR Basic Legal Documents on Refugees 1999, the United Nations Declaration on Territorial Asylum, Article VIII of the Asian-African Legal Consultative Committee, Bangkok Principles, Art.II (3), OAU Convention 1969, Article 22 (8), American Convention on Human Rights Convention, 1969.*

UNHCR believes that the Australian Government's actions, in the name of state sovereignty, in restricting ships carrying asylum seekers who wish to enter their territory violate the principle of non-refoulement in international law. Every country has a general duty to provide international protection as an obligation based on international law, including the principle of non-refoulement as a norm that must be respected and obeyed by all countries.[8] However, in practice, many countries are reluctant to accept asylum seekers and ignore their right to life; many countries even violate the principle of prohibition of expulsion or return (non-refoulement) in international law. The principle of non-refoulement is a fundamental principle in international law, which protects individuals from being returned to their country where they are at risk of persecution, torture, or other ill-treatment.[9]

The threats posed by the increasing number of refugees seeking to enter Australian territory make it difficult for the Australian Government to determine what position to take. Given the global threats posed by refugees, such as terrorism, many countries implement a "balancing act" between the interests of refugees and national security concerns. Countries like the United States, New Zealand, and the United Kingdom follow this approach. The UNHCR allows a balancing approach through Article 33, Paragraph (2) of the 1951 Refugee Convention. However, this method is rejected by the *International Covenant on Civil and Political Rights, the United Nations Human Rights Committee,* and the *European Court of Human Rights.*

The meaning of the words rejected is that the 1951 Refugee Convention can still provide exceptions to the application of the non-refoulment principle through Article

6 Ninin Ernawati, "The Legal Consequences of the Application of Two Australian Policies as Members of the 1951 Refugee Convention Reviewed from the VCLT 1969," *Jurnal IUS* 7, no. 1 (2019).

7 C. M. Sudrajat, T., Jati, B. K. H., & Gupta, "Questioning Indonesia's Role in Addressing Rohingya Refugees: A Legal, Humanitarian, and State Responsibility Perspective," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 7, no. 1 (2024): 1–19, https://doi.org/10.24090/volksgeist.v7i1.10506.

8 F. Fitriyadi, A. A., & Latukau, "Diferensiasi Pengungsi Dan Pencari Suaka Dalam Hukum Pengungsi Internasional Dan Hubungannya Dengan Prinsip Non-Refoulement," *Jambura Law Review* 2, no. 2 (2020): 120–38, https://doi.org/https://doi.org/10.33756/jlr.v2i2.5400.

9 Seline Trevisanut, "The Principle of Non-Refoulement and the de-Territorialization of Border Control at Sea," *Leiden Journal of International Law* 27, no. 3 (2014): 661–75, https://doi.org/https://doi.org/10.1017/S0922156514000259.

33, Paragraph (2) of the 1951 Convention, which explains that the application of the non-refoulment principle does not apply if the refugee's presence threatens national security or disrupts public order in the country where they seek refuge.[10]

In line with the international community's increasing attention to developing human rights protection, incorporating the principle of non-refoulement into international human rights legal instruments has become one method for applying the provisions contained therein. For example, in the International Covenant on Civil and Political Rights (from now on referred to as "ICCPR"), the principle of non-refoulment is a method for ensuring the fulfillment of the right to life and the right to be free from cruel, inhuman, and degrading acts and punishments.[11] The same principle was also adopted by the European Convention on Human Rights (hereinafter referred to as "ECHR") and the Convention Against Torture (hereinafter referred to as "CAT") in including the principle of non-refoulement as an explicit or implicit state obligation.

The principles of non-refoulement and national security make it difficult for the Australian Government to determine its position; Australia is also a country that has ratified the 1951 Refugee Convention. Therefore, Australia must accept all asylum seekers who seek protection within its borders. However, in practice, Australia is progressively imposing stricter national regulations and criteria for asylum seekers attempting to enter its territory.

The Australian Government argues that its actions in protecting their country's sovereignty are legitimate and based on national security. However, here the big question arises: What are the limits of a country in implementing national security when it collides with international obligations to protect the lives of refugees? The concept of national security in refugee law is security aimed comprehensively at the state and society. The crime that many countries fear will arise from the mass arrival of asylum seekers is the presence of a terrorist or a group of terrorists. Therefore, a country must provide strict terms and conditions for granting refugee status to every asylum seeker. National interests must also be accompanied by fulfilling Australia's international obligations towards refugees. The international obligation referred to here is the obligation of the Australian state to protect the lives of refugees whose lives are threatened on the high seas if they are not permitted to enter Australian territory.

The right to life is a non-derogable right. Therefore, the Australian Government is obliged to save the lives of asylum seekers. Data related to the number of immigrants entering Australia and the number of victims who lost their lives as a result of regulations established by Australia based on national security principles shows that in 2018, there were more than 60.000 refugees who had applied for asylum in Australia and are still waiting for confirmation. The following is data released by the Australian Immigration Minister regarding the number of asylum seekers entering Australian territory.

10 G. A. Putri, E. A., Wahyuni, W. S., Syaputra, M. Y. A., Paramesvari, A. J., & Pratama, "Legal Protection of Rohingya Citizens Related to The Conflict in Myanmar," *Jambura Law Review Law Review* 5, no. 1 (2023): 60–75, https://doi.org/https://doi.org/10.33756/jlr.v5i1.16722.

11 Ellen F. D'Angelo, "Non-Refoulement : The Search for a Consistent Interpretation of Article 33," *Vanderbilt Journal of Transnational Law* 42, no. 1 (2009): 279–316, https://doi.org/https://heinonline.org/HOL/LandingPage?handle = hein.journals/vantl42&div = 9&id = &page = .

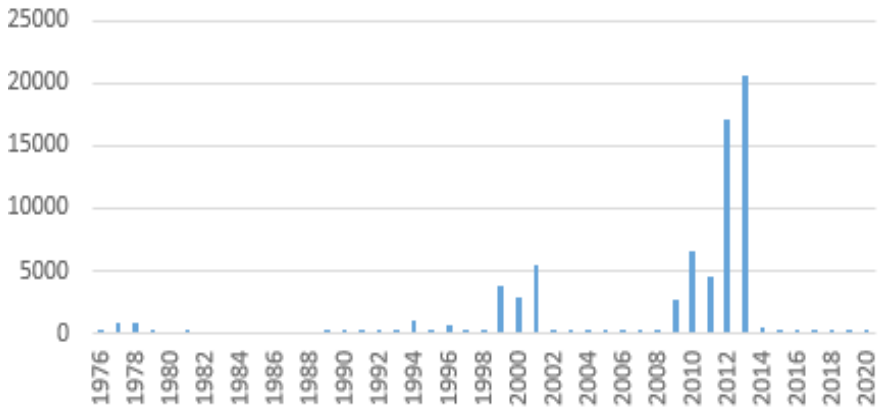

Diagram 1.1 Number of Asylum Seekers Entering Australian Territory

The graph highlights two significant peaks in the arrival of asylum seekers, notably in 2001 and 2013. The decrease in asylum seekers from 2002 to 2007 seems to have slowed down following the implementation of the Pacific Solution policy. The number of refugees entering Australia surged to 300,000 immigrants 2009 after the Pacific Solution policy was abandoned. According to the latest data from The Refugee Council of Australia, in 2012, the number of boat arrivals reached 17,202 people, and in 2018, the Australian Government accepted 12,706 refugees.

This decline reflects that Australia's forced ship return policy has been successful, so since 2018-2021, it can be said that the number of asylum seekers has begun to decrease. The decline in the number of incoming asylum seekers, over several years reaching a percentage of more than 100%, has increasingly influenced the reform of immigration regulations implemented by Australia. Australia can reduce the number of asylum seekers coming to its territory because it has implemented continuous return measures when boats enter its territory.

When a group of asylum seekers enters Australian territory, the Australian Government will first carry out a fast-tracking process on the asylum seekers to ask for details about the documents from each individual. Suppose that during the fast-tracking process, nothing suspicious is found among the asylum seekers. In that case, they will be placed in an Australian immigration holding camp to await the determination of their refugee status.

Australian government authorities always prioritize national security because the Australian Government feels that several individuals who claim to be asylum seekers are a group of terrorists who want to disrupt the security of the Australian state. The Australian Government's reasons are very well founded because they are motivated by several cases of terrorism that have occurred.

The legal basis used by the Australian Government to maintain national security is Article 1 (f) of the 1951 Refugee Convention. This article states that every person who has committed a crime can be an exception in protecting asylum seekers. After receiving a decision that a person is part of the contents of Article 1 (f), the asylum seeker will be deported from Australian territory.

Apart from using Article 1 (f), the Australian authorities also use Article 33 Paragraph (2) of the 1951 Refugee Convention and are equipped with Australian national regulations, specifically Article 36 of the Migration Act 1958, in determining someone who meets the requirements as an asylum seeker. Once an asylum seeker meets the

qualifications of Article 36 of the Migration Act 1958, they can only apply for a refugee protection visa. In Article 36, a definition is given regarding someone considered to be disturbing the security of the Australian state. The article states that a person deemed to have committed a crime against peace, a person who has committed a non-political crime before entering Australian territory and has committed an act contrary to UN principles, can be excluded from the type of person who must be given protection by Australia.

Several scholars have explored the delicate balance between enforcing the principle of non-refoulement and safeguarding national security interests. Li, Hanxiao's thesis, " Non-refoulement and national security: A comparative study of UK, Canada and New Zealand",[12] delves into this balance from a comparative perspective, focusing on the practices and policies of the UK, Canada, and New Zealand. This study employs a legal and policy analysis approach to examine how each country interprets and implements the principle of non-refoulement amid national security concerns. In contrast, W.W.Burke-White's article, "Human rights and national security: The strategic Correlation," adopts a broader lens, exploring the overall relationship between human rights and national security.[13] This article is likely theoretical, providing a strategic framework to understand the interplay between these domains. Ahmed A.'s article,"Individual Protection versus National Security: A Balancing Test Concerning the Principle of Non Refoulement."[14] Specifically addresses the tension between individual protection under the principle of non-refoulement and national security interests. It likely discusses a legal or ethical balancing test to reconcile this conflicting interest, focusing strictly on the principle of non-refoulement. V. Stefanovska's work, "The principle of Non Refoulement and Its Reflection on National Security," examines how non-refoulement impacts national security considerations, possibly through case studies or legal interpretations to understand its reflection on national security policies.[15]

In contrast to these articles, the work titled "Balancing The Principle of Non Refoulement and National Security in The Protection of Refugee Rights: A case study of refugee handling in Australia" provides a specific case study focusing on Australia. This article likely uses a detailded case study methodology to analyze how Australia balances non-refoulement with national security in the context of refugee handling. The key differences among these works lie in their geographical scope, breadth of focus, and methodological approaches. Li Hanxiao's comparative study spens three countries, offering a broader perspective, while the Australian case study offers an in-depth look at a single country's practices. Burke-White's article addresses a wider range of human rights issues beyond non-refoulement, whereas Ahmed A. and Stefanovska V. focus more narrowly on the principle itself, albeit from different angles. These distinctions highlight how each scholar uniquely contributes to the discourse on non-refoulement

12 Hanxiao Li, "Non-Refoulement and National Security: A Comparative Study of UK, Canada and New Zealand" (Te Herenga Waka-Victoria University of Wellington), 2014), https://doi.org/https://doi.org/10.26686/wgtn.17007880.v1.

13 W. W. Burke-White, "Human Rights and National Security: The Strategic Correlation," *Harv. Hum. Rts. J* 17 (2004): 249, https://doi.org/https://heinonline.org/HOL/LandingPage?handle = hein.journals/hhrj17&div = 12&id = &page = .

14 Arif Ahmed, "Individual Protection versus National Security: A Balancing Test Concerning the Principle of Non-Refoulement," *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* 21, no. 5 (2016): 30–40, https://doi.org/10.9790/0837-2105053040.

15 V. Stefanovska, "The Principle Of Non-Refoulement And Its Reflection On National Security," in *International Scientific Conference "Security, Political and Legal Challenges of the Modern World*, 2018, https://doi.org/https://repository.ukim.mk/bitstream/20.500.12188/21981/1/Conference % 20Proceedings % 20vol.1 % 20Bitola % 20okt % 202018.pdf#page = 159.

and national security, whether through comparative studies, theoretical frameworks, or specific country case studies.

The national security limit that a country can implement is to continue to provide international protection to refugees, provided that they tighten their country's national laws to screen every asylum seeker who wants to enter their country's territory. National security is as diverse as economic security, politics, and social order.

Based on the background above, research is needed to answer whether Australia's actions can be categorized as violations of the non-refoulement principle and whether there is a balancing act that Australia can carry out to accommodate its national interests and international obligations.

2. ANALYSIS AND DISCUSSION

2.1. Overview of Refugees, Asylum Seekers, Illegal Immigrants

Several terms are often used in discussions of refugees, such as refugees, asylum seekers, and illegal immigrants. After reviewing these terms, they have similar meanings.

1. Refugees

   Refugees are individuals who have been forced to flee their home country due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political opinion. They are unable or unwilling to return to their home country because of this fear.

   The definition of a refugee according the 1951 Refugee Convention is as follows:[16]

   1. owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.
   2. Is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or
   3. who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

2. Asylum seekers

   James Hathaway describes asylum seekers as individuals who seek refugee in another country by applying for protection from persecution in their home country. They are individuals who assert that they qualify for refugee status but whose claims have not yet been evaluated. Hathaway emphasizes the legal processes involved in determining refugee status and the importance of procedural fairness in asylum adjudication.

3. Illegal Immigrants

   James Hollifield defines illegal migrants as individuals who enter or reside in a country without proper legal authorization. This can include entering without inspection, overstaying a visa or violating the term of legal entry. Hollifield emphasizes the socio-conomic and political context that drive illegal migration, highlighting the complexities of immigration policies and the challenges of managing undocumented migration within the globalized economy.

16 D Yatani, V. G., Safrin, M., & Wagian, "Exclusion of the Principle of Non-Refoulement in Article 33 Paragraph 2 of the 1951 Refuge Convention.," *Ex Aequo Et Bono Journal Of Law* 1, no. 1 (2023): 53–65, https://doi.org/https://doi.org/10.61511/eaebjol.v1i1.2023.108.

In addition, Doyglas Massey describes illegal migrants as people who cross international borders in a manner that violates the immigration laws of the destination country. They lack the necessary documentation and legal permission to enter or remain in that country.

2.2 Balancing Act Practices Carried Out in Various Countries

2.2.1. Canada

Canada is a state party to the 1951 Refugee Convention and follows a balancing act process. The 2002 Suresh v Canada (MCI) decision is a significant case related to this process. In this case, the Supreme Court of Canada stated that in exceptional circumstances, the return of an asylum seeker who may face torture in their home country could be justified.[17] The international community has widely criticized this decision. Material for consideration by the Supreme Court of Canada was the opinion of Canadian Security Intelligence, which suspected Suresh of being a member and perpetrator of fundraising for the Sri Lankan terrorist group, The Liberation Tigers of Tamil Eelem, an organization also active in Canada.

The Supreme Court of Canada found that torture is inherently unjust under Canadian law, and torture is also prohibited in international law despite security concerns. However, they reject the idea that the Canadian Government might never deport someone to face such treatment elsewhere. In these cases, there must be a balance between considerations of the individual seeking protection and the security of the Canadian state. The state's interest in fighting terrorism to protect its population must be balanced with the particular circumstances of asylum seekers whom the Canadian Government will return.

This is related to the proportionality between the threat of danger to national security and the danger that asylum seekers will face when deported. The court held that deportation potentially subject to torture may be justified in certain exceptional cases as a consequence of the balancing process.

The Convention Against Torture formation committee criticized the 'Suresh exception.' They expressed concern about Canada's failure to recognize the absolute and irreducible nature of Article 3 CAT. Likewise, the Human Rights Commission (HRC) found that the type of balancing act adopted by the Canadian Courts could in no way justify deportation in the face of torture or cruel, inhuman, or degrading treatment.

Many parties oppose the balancing act taken by the Canadian Supreme Court, including the Human Rights Commission. They found that the type of balancing act adopted by the Canadian Court in Suresh's case in no way justifies deportation that is subject to potential torture or cruel, inhuman, or degrading treatment of a person's human rights. The HRC rejects the idea that anyone can be deported if they are deemed to have posed a danger to a country's security, regardless of any emergency circumstances. HRC considers that Canada has failed to uphold Article 3 of the Convention Against Torture, which states that:

1. *No State Party shall expel, return ("refouler"), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being*

17 Ingrid Holm, "Non Refoulement and National Security" (Lund University, 2015).

subjected to torture.

2. *To determine whether such grounds exist, the competent authorities shall consider all relevant considerations, including, where applicable, the existence of a consistent pattern of gross, flagrant, or mass human rights violations."*

The international community, including human rights organizations and the UN Committee Against Torture, expressed strong disapproval of the Suresh decision, arguing that it set a dangerous precedent that could weaken global human rights protections. While Canada's approach aims to balance national security with ist international obligations, the Suresh case highlights the difficulties in maintaining this balance without compromising fundamental rights. The decision remains controversial and serves as a critical example of the challenges face by countries in reconciling security concerns with the need to uphold international norms.

2.2.2 United Kingdom

A balancing act was also applied in the case of Chahal v the United Kingdom. The UK Government argued that protection under Article 3 was not absolute in expulsion cases. In this case, foreigners who pose a real threat to the country's national security can be expelled even if there is a real risk to be faced. The UK Government refers to Article 33(2) of the 1951 Refugee Convention as a guide and limitation in implementing countervailing measures.

Thus, the rights under Article 3 are absolute and not relative. However, judgments about what constitutes "torture," "inhumane," and "degrading" may be relative as they depend on the circumstances of the case. As the ECtHR noted in Ahmad v the United Kingdom, life imprisonment potentially violates Article 3 CAT if the punishment is disproportionate to the crime committed. This approach has led some experts to interpret that the rights under Article 3 of the CAT are still relative.

2.3. Balancing The Principles of Non-refoulement and National Security in The Protection of Refugee Rights in Australia

2.3.1. The Legality of Australia's Turn-Back, Take-Back, and Assisted Return Measures Under International Law

The Australian Government carried out several actions: Turn-Back, Take-Back, and Assisted Return. This action was taken to reduce the number of asylum seekers entering Australian territory. The Australian Government asked the navy to carry out screening measures before granting entry permits to asylum seekers or returning them.

The Australian Government applies this screening process to all asylum seekers who are returned to Indonesia in turn-back operations. They have no opportunity to file a claim for protection. Those who were returned to Sri Lanka and Vietnam in take-back operations also underwent a basic screening process at sea. The screening process for boat people who are caught entering Australian territory has the potential to raise concerns regarding the results of their examination. Concerns could arise from the screening process not being carried out through asylum procedures reasonably and efficiently, resulting in a violation of the principle of non-refoulement,[18] where asylum seekers have not been processed but have been immediately returned to their area of

18 Susan Kneebone, Antje Missbach, and Balawyn Jones, "The False Promise of Presidential Regulation No. 125 of 2016?," *Asian Journal of Law and Society* 8, no. 3 (2021): 431–50, https://doi.org/10.1017/als.2021.2.

origin without being allowed to express their opinions at all, regarding the reasons for coming to Australia.

The Australian Government has the right to carry out eligibility determination, they are determining whether someone meets the requirements to be called a refugee. From a legal perspective, both international refugee law and human rights law.[19] The Australian Government's actions are an effort to uphold humanity due to the persecution experienced by refugees and asylum seekers. However, the problem this time is whether it is true that these asylum seekers have experienced persecution because elements of refugees seeking asylum have left the territory of their country, not for economic reasons, but more for reasons of persecution.

Therefore, countries granting asylum must be able to carefully consider decisions when granting asylum to asylum seekers. A country like Australia that will grant asylum and refugee status must seek accurate information about whether the asylum seekers feel severe anxiety because they have received persecution for racial, religious, or other reasons.

Regardless of the interests between the country receiving asylum and the country where the asylum seeker comes from, the authority of a country to grant refugee status to asylum seekers is generally intended to be peaceful and humanitarian. This is in line with the issue of upholding human rights with humanitarian characteristics; granting asylum from a country is not intended as an unfriendly action towards the country of origin of the asylum seeker and, as far as possible, can avoid tensions between countries. This is by the fifth paragraph of the Preamble to the 1951 Refugee Convention, which reads:

"Expresses the desire that all countries, recognizing the social and humanitarian nature of the refugee problem, will do everything within their power to prevent this problem from becoming a cause of tension between countries."

The inspection process through the screening process carried out by the Australian Government is also legalized by Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, which states that in the contiguous zone, coastal States can carry out the necessary supervision to:

a. Prevent violations of regulations regarding customs, fiscal, immigration, or sanitary matters within its territory or territorial sea;
b. Punish violators of the above regulations committed within the territory or the territorial sea.

The above regulations aim to maintain the national security of a country. This regulation must be enforced in order to maintain Australia's sovereignty. A state's sovereignty is its authority over its territory or territorial boundaries.[20] This kind of sovereignty is possessed by a state within the framework of exercising jurisdiction in the territory under its authority. In this position, the state can also implement its

19 Deborah E. Anker, "Refugee Law, Gender, and the Human Rights Paradigm," *International Refugee Law* 25 (2017): 237–58, https://doi.org/10.4324/9781315092478-11.

20 Seunghwan Kim, "Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context," *Leiden Journal of International Law* 30, no. 1 (2017): 49–70, https://doi.org/doi:10.1017/S0922156516000625.

national laws. Every person residing in the territory of a country is subject to the legal authority of the country that owns that territory. For this reason, the adage qui in territorio meo est, etiam meus subditus est applies (if someone is in my territory, he is also subject to me).

In connection with the regulations above, various countries apply different laws, such as in Belgium. At the reception stage, an asylum seeker who arrives without the necessary documents can be detained at specific locations at the border for two months. Article 31 of the 1951 Refugee Convention is manifested in Article 74/5 of the Aliens Act. The average length of detention is 14 days. A detention center is at Zaventem airport, where people without documents can enter Belgium or the destination country.

Australia also implemented the same thing as Belgium, namely establishing a detention center as a processing place for granting refugee status to asylum seekers. However, some who did not pass the screening were directly returned by the Australian Government, either by turn-back, take-back, or assisted return.

The regulation governing this return action is Article 197C Migration Act 1958, which stipulates that Australia does not have a non-refoulement obligation relating to the return (turn-back) process for asylum seekers. The following is a quote from Article 197 C Migration Act 1958:

1. *For section 198, it is irrelevant whether Australia has non-refoulement obligations concerning an unlawful non-citizen.*
2. *An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.*

By the legal basis of Article 197 C Migration Act 1958, the Australian Government states that they have no obligation to uphold the principle of non-refoulement against unlawful non-citizens. Asylum seekers are also included in the unlawful non-citizen category, so the Australian Government can legally expel asylum seekers who arrive by boat illegally.

The Australian Government still argues that it is feared that these unlawful non-citizens will threaten their country's national security, so they must be returned if they do not have valid travel documents. Interpretation of threats to national security is the authority of local state authorities as the holder of sovereignty. However, assessments of threats to national security by local countries due to the presence of refugees, which are carried out on a case-by-case basis, must be based on good faith. The Australian Government can be said to need to comply with the norms of international law when they force the return of asylum seekers.

The 1951 Refugee Convention also states that refugees have the right to enter the territory of a party country illegally as long as they immediately report their arrival.[21] Australia should return refugees more quickly. A person who has obtained official status as a refugee should be able to seek asylum protection in another country because Article 14 of the 1948 Universal Declaration of Human Rights guarantees everyone's

21 Emily Howie, "Sri Lankan Boat Migration to Australia: Motivations and Dilemmas," *Economic and Political Weekly* 48, no. 35 (2013): 97–104, https://doi.org/http://www.jstor.org/stable/23528760.

right to obtain asylum.[22] A person with legal status as a refugee shows that he or she has been recognized and assessed as an individual who needs international protection because his or her life is at risk. So, the arrival of refugees in order to obtain protection in Australia should not be rejected by the Australian Government. Asylum seekers who have not yet obtained refugee status should also not be subject to refouler treatment before a valid hearing regarding their reasons for seeking asylum. Asylum seekers should at least be able to claim protection before being returned to their country of origin. The claim submission process must be done, at a minimum, through clear, fair, and transparent procedures. This is because violations of the non-refoulement principle can increase the occurrence of various detrimental actions for asylum seekers, such as torture, inhumane treatment, the death penalty, or arbitrary deprivation of their lives.

The turn-back process is only carried out on ships from Indonesia, while ships returning to Vietnam or Thailand often use the take-back process. This is because the Indonesian Government does not want to accept asylum seekers at all. The Thai and Vietnamese Governments agreed to return asylum seekers and formed a commitment between the two countries. The Australian Government does not monitor asylum seekers who are returned to Indonesia because the Indonesian Government does not approve of this. This also contradicts Article 33 Paragraph 1 of the 1951 Refugee Convention, which states that:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

The principle contained in this article is known as the principle of non-refoulement and is often referred to as a cornerstone of international protection for refugees.[23] The principle of non-refoulement is an essential aspect of refugee law and has been developed into international legal practice. This principle is binding on every country even though it has yet to become a signatory to the 1951 Refugee Convention. This principle is built based on impartiality and non-discrimination. Humanitarian aid to refugees must not be diverted for political or military reasons, and the first to have authority regarding the principle of non-refoulement are recipient countries such as Australia, Austria, Belgium, the Netherlands, France, and many others. The application of customary international law is also stated in Article 38 of the 1969 Vienna Convention, which stipulates that customary international law is binding on all countries.

Moreover, Australia is a member country of the 1951 Refugee Convention. If Australia ignores international agreements they have ratified, this can be classified as violating international law. It can also be said that Australia no longer has good

22 Antje Missbach, "Waiting on the Islands of 'Stuckedness'. Managing Asylum Seekers in Island Detention Camps in Indonesia from the Late 1970s to the Early 2000s.," *ASEAS - Austrian Journal of South-East Asian Studies* 6, no. 2 (2013): 281–306, https://doi.org/https://doi.org/10.4232/10.ASEAS-6.2-4.

23 James C Simeon, "What Is the Future of Non-Refoulement in International Refugee Law?," in *Handbook Chapter on International Refugee Law* (Edward Elgar Publishing, 2019), 183–206, https://doi.org/https://doi.org/10.4337/9780857932815.00020.

intentions in implementing these international agreements, giving rise to much criticism from the international community, especially since the 1951 Refugee Convention contains principles relating to Human Rights that constitute Ius Cogens, which the entire international community cannot ignore.

Suppose Australia ignores the law or its national interests, of course. In that case, this will have an internal impact on Australia itself, such as the welfare of the Australian people being given less attention and the fear of criminal acts that refugees from other countries will bring. In Article 27, which discusses explicitly (internal law and observance of treaties) the 1969 Vienna Convention on the Law of Treaties clearly states that:

"A party may not invoke the provisions of its internal law to justify its failure to perform a treaty. This rule is without prejudice to article 46".

A country cannot justify its internal actions just to protect its internal state but sacrifice the lives of thousands of international refugees adrift on the high seas.[24] In order to maintain and maintain order in international society, and in order to maintain the noble values and objectives of international agreements, and also so that countries do not efficiently use their national laws as an excuse to set aside an international agreement, the international law commission or countries in The Vienna Convention on international treaty law was agreed upon so that national law cannot be used as an excuse for justification or violation or failure to implement the provisions of international treaties.

As for the provisions of Article 46 VCLT (Vienna Convention on the Law of Treaties),

Reads:

"A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."

From the above formulation, Article 46 of the Vienna Convention on the Law of Treaties1969 contains the principle of boil sic stantibus. The principle referred to in Article 46 of the Vienna Convention on the Law of Treaties is the provision that parties to an agreement cannot use their national law as a justification for not implementing the provisions of an international agreement, even if there is state authority to conclude an international treaty because it profoundly violates its important national laws. It should be noted that in Article 46, paragraph (2), it is determined that this authority arises only if the country's national law is violated by an international agreement that binds it can be seen objectively as standard practice and good faith.

For the international community in general or other participating countries, it would undoubtedly be better if international agreements were prioritized in their

24 Ines. Cerović, "Is It Permitted To Strike A Balance Between The Interests Of National Security Of A State And The Rule Of Non-Refoulement In The Context Of Article 3 Of The European Convention Of Human Rights And Fundamental Freedoms?," *Strani Pravni Život* 4 (2015), https://doi.org/https://www.ceeol.com/search/article-detail?id = 575919.

implementation to realize an orderly international community. You can imagine what would happen if each participating country refused or violated the provisions of an international agreement or failed to carry out international obligations originating from an international agreement because the agreement conflicted with its national laws or regulations. This could bring about international anarchy, which would be detrimental to all parties. This will also undermine the noble values and objectives of international agreements.

Based on articles 27 and 46 of the 1969 Vienna Convention, Australia is strictly bound by the agreements in the 1951 Refugee Convention, so this turn-back action cannot be justified. The Australian Government should have permitted asylum seekers to explain their data in detail. If it is for national security reasons, then this turn-back action can be categorized as a violation of the principle of non-refoulment because national security reasons should be explained very narrowly in Article 33 Paragraph 2 of the 1951 Refugee Convention which states that:

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a grave crime, constitutes a danger to the community of that country."

Exceptions to the non-refoulement principle are narrowly defined. Exceptions may only be applied in certain circumstances, as Article 33 Paragraph 2 of the 1951 Convention states. The conditions in this article may only be applied if the refugee in question poses a serious threat to the security of the country where he is seeking asylum or if an appropriate court has adjudicated the person. It is not possible to appeal again for crimes that are very serious and pose a threat to society in the country where he is seeking asylum.

Applying this exception article requires implementing procedures that ensure a strict inspection process is followed. However, Article 33, paragraph 2 of the 1951 Convention cannot be applied if the transfer of the person concerned results in cruel, inhuman, or extremely degrading persecution or punishment.[25] The prohibition on the implementation of refoulement is an inseparable part of the prohibition on torture and various ill-treatment by Article 3 of the 1984 UN Convention on Anti-Torture, Article 7 of the 1966 International Law on Civil and Political Rights, and regional human rights law.

Australia cannot use the pretext of Article 33 Paragraph 2 to legalize the turn-back actions taken. Returning asylum seekers to Indonesian maritime territory or the high seas will cause danger to all asylum seekers on board the ship. Moreover, the turn-back action is not fully monitored in the return process. The Australian Government asked the crew to return to Indonesian waters.

This is different from the take-back action. The take-back action was carried out after the Australian Government coordinated and entered into an agreement with the

25 M. Costello, C., Foster, "Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test," in *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?*, 2016, 273–327, https://doi.org/ttps://doi.org/10.1007/978-94-6265-114-2_10.

receiving country authorities that the Australian Government would send back the ship containing asylum seekers. So that the security and safety of asylum seekers is guaranteed. So far, the take-back action has only been carried out by the Australian Government with Vietnam and Thailand.

The principle of non-refoulement emphasizes that every country cannot return asylum seekers who come to its territory to seek protection. If we review it again, this take-back action has guaranteed that asylum seekers are returned to their country of arrival and their country of origin but provided that both the country of arrival and country of origin have committed to Australia that they will guarantee the safety of the asylum seeker. So, it can be concluded that this take-back action does not violate the non-refoulement principle.

The latest action taken by the Australian Government is assisted return. Assisted Voluntary Return (AVR) is an international migration service designed by IOM on behalf of governments to help eligible migrants make informed and voluntary choices about returning to their country of origin. Individuals eligible for IOM AVR assistance include Those living in Australia on a temporary or other non-substantive visa, Those living in Australia without a visa or whose visa has expired, or Non-refugees at the Regional Processing Center on Nauru.

If deemed eligible by the Department of Home Affairs, IOM can assist you in developing an individualized, jointly planned, safe, and dignified return option at no cost to you. Since the start of the IOM program, it has helped more than 8,000 migrants return home safely and with dignity.[26]

In addition to repatriation services, Maritime Irregular Arrivals (IMA) may also be eligible to receive reintegration assistance upon returning to their home country. Since 2010, IOM has helped more than 3,000 families successfully reintegrate into their communities after returning home by assisting them with, among other things, setting up businesses, finding accommodation, and engaging in vocational training.

2.2.2. Balancing Measures for National Security and Refugees' Rights in Obtaining Protection

The Australian Government has established the Migration Act 1958 regulations for protecting refugees. These regulations often change, along with changes in Australia's government bureaucracy. The Australian Government forms regulations on immigration to maintain the country's national security. Apart from maintaining national security, Australia also must protect asylum seekers who come to the country to seek protection.

The Australian Government took this turn-back action to balance its international obligations. The Australian Government has long resolved thousands of refugee cases. However, the Australian Government is balancing the obligation to protect asylum seekers and maintain national security.

If we refer to international law, especially Article 33 Paragraph 2 of the 1951 Refugee Convention, it is inappropriate for the Australian Government to use turn-back measures as a balancing act to maintain national security. The condition for the fulfillment of expulsion of refugees in Article 33, paragraph 2 is that there must be

26 Missbach, "Waiting on the Islands of 'Stuckedness'. Managing Asylum Seekers in Island Detention Camps in Indonesia from the Late 1970s to the Early 2000s."

a risk of loss that can be measured objectively, including not only immediate danger but also possible long-term threats.[27]

The above conditions must be fulfilled by an asylum seeker who will be returned through the turn-back policy. Firstly, the harm caused by asylum seekers still needs to be visible, and the Australian Government cannot prove the harm that asylum seekers can cause. Second, the direct harm that asylum seekers may pose is also something that the Australian Government cannot prove but simply sends them back. These losses must refer to the nation, namely the country as a whole.

The danger or threat that is feared by the Australian Government that will arise from the influx of asylum seekers is the introduction of terrorism into their country. This was motivated by the attack in the United States on September 11, 2001, in New York, United States, or what is often known as the 9-11 (Nine Eleven) incident, making all countries in the world fearful of terrorist crimes. This incident involved 19 members of Al-Qaeda terrorism and caused 2,977 deaths in 93 countries.[28] Terrorism is not a new phenomenon in the international world, but it remains a form of crime that can have a significant impact on countries in the world. This tragedy then triggered the United States Government to carry out the Global War on Terror campaign, and this was followed by all countries in the world, including Australia.

After the terrorist attacks on September 11, 2001, the question arose whether it was permissible to balance between the national security of a State and the obligation to protect refugees in the fight against terrorism,[29] This option seemed open to discussion. Although there is no uniform or single definition of terrorism in international law, it is clear that perpetrators, planners, or facilitators need to be prosecuted. If they escape prosecution, no haven should be provided. A person's membership in a terrorist organization cannot qualify as a terrorist act. However, membership alone is sufficient for exclusion from refugee status or protection against refoulement.

The European Commission has stated in its Working Document that The European Court of Human Rights should reconsider the decision in which the absolute character of Article 3 ECHR was established. In the Suresh case, the Supreme Court of Canada considered the decision to expel to be possible even though there was a possibility that the alien would become a victim of human rights violations, as provided for in Article 3 of the Convention Against Torture. Suppose there are reasonable grounds to consider a refugee to be a danger to the national security or community of the country of refuge. In that case, he or she is not protected from return under Article 33(1) of the Refugee Convention.

These rules need to be interpreted restrictively and applied with extreme caution. Hazard assessments must be individualized. Article 33(2) of the Refugee Convention allows for refoulement if there is a demonstrable danger to national security. Restitution is prohibited if it carries the risk of an individual being subjected to torture or inhuman or degrading treatment or punishment. In such cases, refoulement action is prohibited. Human rights, compared to a country's national security, can never be balanced because the proportionality of the danger posed by an individual will not possibly pose a very

27 Kees Wouters Bruin, Rene, "Terrorism and the Non-derogability of Non-refoulement," *International Journal of Refugee Law* 15, no. 1 (2003): 5–29, https://doi.org/https://doi.org/10.1093/ijrl/15.1.5.

28 Cerović, "Is It Permitted To Strike A Balance Between The Interests Of National Security Of A State And The Rule Of Non-Refoulement In The Context Of Article 3 Of The European Convention Of Human Rights And Fundamental Freedoms?"

29 Erik Gartzke and Matthew Kroenig, "A Strategic Approach to Nuclear Proliferation," *Journal of Conflict Resolution* 53, no. 2 (2009): 151–60, https://doi.org/10.1177/0022002708330039.

significant danger to a country. On the contrary, when a refugee is deported, he will face persecution and will face direct threats to his life in the destination country.

Carrying out a balancing act is familiar to a country's national courts. UNHCR also accepts this approach used by national courts. By the travaux preparations of the 1951 Refugee Convention, the principle of proportionality must be observed when applying Article 33 Paragraph (2) of the 1951 Refugee Convention. This means that the danger posed by refugees who will be deported must be balanced with the threat posed by refugees to the security public.

This balancing act (Balancing Act) is a manifestation of the exception to the principle of non-refoulement. It is hoped that the balancing act will not harm asylum seekers and also not harm a country. Based on Article 33 Paragraph (2) of the 1951 Geneva Convention, two reasons can be used as a basis for a country to take action, which can be considered to negate the obligation to implement the non-refoulement principle formulated in Article 33 Paragraph (1). First, refugees or asylum seekers in a country can threaten national security.

The Australian Government can only indirectly prove this requirement when it conducts a short screening process on ships carrying asylum seekers. The category of danger referred to is also still absurd or unclear, so under any circumstances and for any reason, the return of asylum seekers through the turn-back policy cannot be justified by international law and international human rights principles.

Second, the refugee or asylum seeker has committed a serious crime, so the presence of the refugee or asylum seeker in a country has disrupted public order in that country. This second condition may be proven directly by the Australian Government by contacting the court in the asylum seeker's country of origin to confirm whether the individual is genuinely a former prisoner.

In order to carry out expulsion actions against refugees and asylum seekers in their territory, countries need to pay attention to the following restrictions.[30] First, a country's decision to expel a refugee or asylum seeker from its territory is casuistic and based on strict and accountable legal considerations and processes. The strict and accountable legal process to decide to carry out expulsion is also accompanied by respect for the general principles of human rights law. Second, in carrying out expulsion actions, a country must ensure that refugees and asylum seekers who are required to leave its territory can be accepted in a safe third country.[31]

A country must balance national security with humanitarian obligations toward refugees requires a nuanced approach grounded in clear principles. One key concept is the principle of non-refoulement, which prohibits returning refugees to places where they face persecution. Countries must respect this principle, even when addressing security concerns.

Additionally, proportionality ensures that any security measures taken are appropriate to the actual threat and do not excessively infringe on refugees' rights. In addition, individualized assessments are crucial for elevating each refugee's case based on their unique circumstances, rather than applying blanket policies. This approach, coupled with fair procedures and due process, ensures that refugees receive just treatment, including the right to appeal decisions and access legal representation. Countries should

30 Aoife Duffy, "Expulsion to Face Torture? Non-Refoulement in International Law," *International Journal of Refugee Law* 20, no. 3 (2008): 373–90, https://doi.org/https://doi.org/10.1093/ijrl/een022.

31 Dina Imam Supaat, "Escaping the Principle of Non-Refoulement," *International Journal of Business, Economics and Law* 2, no. 3 (2013): 86–97, https://doi.org/https://www.ijbel.com/wp-content/uploads/2014/07/Escaping-The-Principle-Of-Non-Refoulement-Dina-Imam-Supaat.pdf.

also engage in international cooperation and responsibility sharing to support refugee protection globally while managing security concerns effectively.

Finally, respecting refugees' human rights and dignity is essential. Policies should safeguard basic rights and promote social cohesion through integration programs that help refugees contribute positively to society. By focusing on these key areas, countries can balance the need for security with their humanitarian responsibilities toward refugees.

3. CONCLUSION

The turn-back action carried out by the Australian Government can be categorized as a violation of the principle of non-refoulement because the Australian Government has forcibly returned asylum seekers to their country of origin and country of arrival, as well as to third countries. These actions cannot be justified per Article 33 Paragraph 1 of the 1951 Refugee Convention. Australia, as a state party to the 1951 Refugee Convention, has a legal obligation to carry out the convention's mandate. When they ignore their legal obligations, the legal consequences for state parties are that Australia can be held legally responsible by countries that feel disadvantaged by their actions. Indonesia is a country that has suffered a lot from the turn-back actions taken by Australia.

No balancing act can be justified by international law. Turn-back measures cannot be used to balance Australia's international obligations to protect refugees. This will lead to violations of the human rights of asylum seekers who will be returned. The act of turning back is hazardous and has the potential to bring threats and persecution to asylum seekers who are returned to their country of arrival, country of origin, or third countries.

This study provides a detailed examination of Australia's approach to balancing the principle of non refoulement with national security concern in its refugee policies. However, to fully grasp the broader implications of these findings, it is essential to reflect on how Australia's policies might influence or set precedents for other countries facing similar challenges. The potential impact on the global refugee regime cannot be overlooked, as Australia's actions could be contribute to a shift in international norms regarding refugee protection. By examining the experiences of other countries, such as Canada and the UK, which also grapple with these issues, it becomes clear that Australia can learn valuable lessons from their approaches, and its policies should be seen in the context of global trends in refugee protection.

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