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Article

Juridical argumentation in limiting the non-refoulement principle for refugees: A study of immigration policy and Indonesian state sovereignty

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Abstract: Indonesia has experienced problems with refugees in recent years. Despite not being a state party to the 1951 Refugee Convention, Indonesia is still subject to the principle of non-refoulement as a norm that binds all states (jus cogens). This principle is regulated in Presidential Regulation Number 125 of 2016 and Regulation of the Director General of Immigration of 2016 as basic regulations for handling refugees. However, the principle of non-refoulement is not applied absolutely to refugees in Indonesia. The government is in a difficult situation and seems hesitant in taking a legal political stance, to accept or expel the presence of refugees. This research article aims to evaluate the application of the principle of non-refoulement in Indonesian national law. The findings of this research show that the state cannot apply the principle of non-refoulement to refugees in an absolute manner as it will have an impact on national security stability. The legal position of the Presidential Regulation and the Regulation of the Director General of Immigration contradict other regulations, potentially leading to norm conflicts and legal uncertainty. This regulation cannot be applied in all situations. Although this regulation is binding, its application is highly dependent on the needs and urgency of the country. The principle of non-refoulement does not apply to refugees if their presence threatens national security or disturbs public order in transit countries, especially for Indonesia, which has not ratified the 1951 Refugee Convention. Normatively, the application of this principle can be limited by the Constitution, Immigration Law, the theory of state sovereignty, the theory of primordial monism of national law, the principle of selective immigration policy, the principle of immigration essence, and the principle of immigration traffic control. This provision emphasizes that the application of this principle is relative and can be limited based on state sovereignty and national security interests.

Keywords: non-refoulement; refugees; immigration; sovereignty; Indonesia

1. Introduction

A type of population movement known as displacement differs from other types of population mobility in several ways (Aleshkovski, 2016). These traits set refugees apart from other migration groups and have an impact on the safety nets used to safeguard them (Malmberg, 2021). Population movement, both within a nation's borders and beyond international boundaries, is a phenomenon that has existed for a very long time in human history and is occurring more frequently today (Long, 2013). From a receiving country's perspective, the influx of refugees is not only a

humanitarian issue but also affects the stability of the social, political, and economic systems in the countries they seek refuge (Missbach and Stange, 2021). As a result of domestic problems within a country and declining international funding for migrants, more and more countries are closing their borders due to the massive influx of refugees (Fitzgerald and Arar, 2018).

According to UNHCR's Global Trends Report 2022, the number of people displaced by persecution, conflict, violence, human rights violations and events that disrupt public order increased by 21 percent and is expected to reach 108.4 million by the end of the year. This figure includes refugees (including refugees not covered by UNHCR's mandate), asylum seekers, internally displaced persons, and other persons in need of international protection. More than 1 in 74 people worldwide are still forcibly displaced, nearly 90 percent of whom are in low- and middle-income countries. This year-end total represents an increase of 19 million compared to the end of 2021—more than the population of Ecuador, the Netherlands (Kingdom of the Netherlands) or Somalia. It is also the largest increase ever between years according to UNHCR statistics on forced displacement. More than half of the increase is due to the record number of refugees, asylum seekers and other people in need of international protection who were forced to flee during 2022. During the first five months of 2023, forced displacement continued to increase and UNHCR estimates that the global figure is likely to exceed 110 million people by the time this report is written, which is May 2023 (UNHCR, 2023).

The increasing number of refugees is also influenced by the Russian Federation's massive invasion of Ukraine in February 2022. This event has created the fastest and one of the largest displacement crises since the Second World War. In the early days of the war, more than 200,000 refugees per day sought safety across the border, initially in Ukraine's neighboring countries. By the end of 2022, 11.6 million Ukrainians will still be displaced, 16 including 5.9 million within the country, and 5.7 million who have fled to neighboring countries and beyond (UNHCR, 2023).

The 1951 Convention and 1967 Protocol, respectively, have extended the suffering of refugees through their expulsion from countries that have ratified them (Millican et al., 2019). A significant number of signatories to the 1951 Convention have even deported refugees on the grounds that they were disruptive of peace or a threat to national security (Khairiah et al., 2021). The deportation of refugees by state parties to the 1951 Convention violates the prohibition on expulsion outlined in Article 33 of the 1951 Convention. Indonesia even acted in a different way (Ryo and Peacock, 2018). For humanitarian considerations, Indonesia seems compelled to implement the non-refoulement provision despite not having ratified the 1951 Convention (Gammeltoft-Hansen et al., 2015). This phenomenon is being debated whether Indonesia should obey or ignore this principle like other convention countries (Gil-Bazo, 2015).

A significant development in international law is the ban on expelling, often known as the non-refoulement concept (Peters, 2019). According to the article, state parties to the convention are not allowed to deport or send a refugee back to its territory in any way if doing so would endanger the refugee's life or freedom due to their race, religion, nationality, affiliation with a specific social group, or political convictions (Kim, 2017). Article 33, which is non-reservable, contains the notion of non-

refoulement (Fine, 2020). It is applicable to countries that have not ratified the 1951 Convention.

The idea of non-refoulement, which is described in Article 33 paragraph (1) of the 1951 Convention, is the foundation of international refugee protection (Goodwin-Gill, 2011). A state party is effectively guaranteed not to send a refugee back to his native country if doing so would put his life or freedom at risk by the non-refoulement principle. A person cannot be officially removed from refugee status for breaking the rules set forth in Article 31 and Article 33 paragraph (1) of the 1951 Convention if they enter the country illegally or fail to report to the relevant authorities within the required time period (Lang and Nagy, 2021).

No state party may, in any manner, expel or return refugees to places where their lives and freedom are in danger because of their race, religion, nationality, membership in a particular social group, or political convictions (Trevisanut, 2014), according to Article 33 paragraph (1) of the 1951 Convention. Non-refoulement, which forbids a host government from returning refugees to a location where they would probably face persecution due to their race, religion, nationality, membership in a particular social group, or political opinions, is a fundamental component of international law (Allain, 2001). In contrast to political asylum, which is granted to those who can demonstrate a legitimate fear of persecution due to their membership in a particular category, non-refoulement is the general repatriation of individuals, including refugees, into conflict areas and other disaster-prone areas (Moran, 2021). It is a principle of customary international law because it applies to states that are not parties to the 1951 Convention and the 1967 Protocol (Lang and Nagy, 2021). It is also a tenet of the international law (Mathew, 2008).

Every refugee has the right to remain in their current country and not be deported, mainly to nations where their freedom or lives could be in danger (Hilpold, 2020). The fundamental entitlement recognized as the principle of non-refoulement serves as a foundation for legally binding international law that is applicable to every nation on the planet (Gammeltoft-Hansen et al., 2015). State parties to the 1951 Convention are required to respect the non-refoulement principle of Article 33 independently of the requirement that foreign nationals fulfill official immigration requirements, even in cases when an individual enters the country illegally (Çelik and White, 2022).

The contempt that both circumstances have for the fundamental rights of refugees and internally displaced people is another feature of the connection between them (Fine, 2020). The number of persons who experience constraints that prohibit them from entering safe locations while applying for asylum is rising. Refugees may occasionally be imprisoned before being forcibly sent back to unsafe environments (Khanna, 2020). Some have experienced attacks from armed organizations or have been enlisted into the military and coerced into fighting for one side or the other during civil wars. Refugees are also the targets of racial invasions (Adhaniah et al., 2021). Before, during, and after the asylum-seeking process, refugee's rights must be upheld. For the current refugee influx issue to be prevented and solved, respect for human rights is a requirement (Palmer and Missbach, 2019).

Now more than ever, the refugee problem must be handled globally (Schimmel, 2022). The resolve of the international community to denounce crimes against humanity, war crimes, and genocide, among other heinous human rights violations

(De Coninck, 2023). Throughout history, persecution, brutality, and armed conflict have always forced people to flee their homes; nevertheless, it wasn't until the early 20th century that governments realized that international cooperation was required to preserve refugees (Polychroniou, 2021).

International law, exceptionally customary international law, and international human rights legislation, mandates that all nations offer international protection (Bauer and Zimmermann, 2018). Therefore, all countries that have ratified the 1951 Convention and the 1967 Protocol are bound by the terms of these international legal accords (Taylor and Neumann, 2021).

The discourse on the implementation of the principle of non-refoulement is a juridical consequence of the ratification of the UN Convention against Torture (UNCAT). These two international legal instruments play an important role in protecting individuals from torture and other forms of ill-treatment. In the Indonesian context, the principle of non-refoulement and UNCAT are relevant in protecting individual rights. Indonesia is a party to the 1951 Convention and the 1967 Protocol, which means that Indonesia is committed to upholding the principle of non-refoulement regarding refugees and asylum seekers. In addition, Indonesia ratified UNCAT in 1998, thereby legally binding itself to its provisions. In practical terms, this means that Indonesia is obliged to ensure that individuals within its jurisdiction are not subjected to torture or ill-treatment, and Indonesia cannot repatriate or deport such individuals to countries where they may face similar treatment. This obligation extends to all individuals, regardless of their citizenship or immigration status. However, it is important to note that human rights challenges and concerns regarding the implementation of these principles may exist in various countries, including Indonesia. Law enforcement, awareness and capacity building efforts are essential to ensure that the rights contained in these international instruments are effectively enforced in practice (Syahrin, 2021).

As a matter of fact, many countries handle refugees who don't follow the 1951 Convention and the 1967 Protocol or even those who break the principle of non-refoulement, which forbids repatriation and has become an accepted standard of international law (Fine, 2020). As a matter of fact, a great deal of countries handles refugees who don't follow the 1951 Convention and the 1967 Protocol or even who break the principle of non-refoulement, which forbids repatriation and has become an accepted standard of international law (Robb, 2022).

As indicated in **Figure 1**, the non-refoulement principle is not being applied correctly to refugees in Indonesia (Missbach, 2019). The government is in a difficult situation and seems cautious in adopting a legal and political posture (Legido-Quigley et al., 2020). Therefore, this paper will discuss how the application of these principles is consistent with the influence of international law morality and immigration selectivity in Indonesia (Sumarlan, 2019).

Numerous scholars have examined the issue of refugees in Indonesia. In his paper titled "The status of asylum seekers and refugees in Indonesia," Tan (2016) notes that despite the lack of a national asylum system and the numerous local laws that govern refugees' rights, Indonesia has ratified several vital human rights agreements. This article looks at their legal standing in Indonesia under both international and domestic law, highlighting some of the fundamental rights that those requesting international

protection in Indonesia face (Tan, 2016).

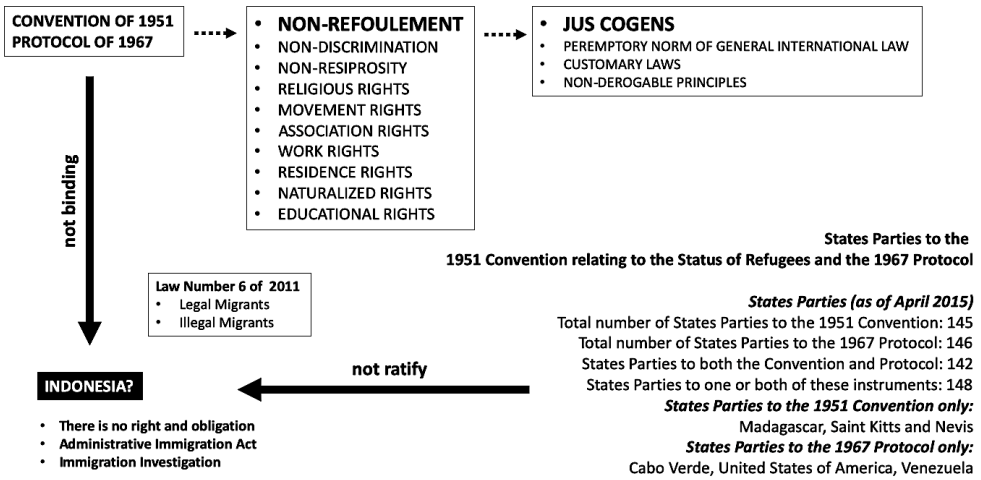

Figure 1. Indonesia's position in the implementation of the non-refoulement principle.

A similar point was made by Rizka et al. (2019) in their paper, "Indonesia and the international refugee crisis: The politics of refugee protection." Understanding the rhetoric surrounding security and protection in relation to Indonesia's refugee policies and practices, she clarified that international refugee protection politics are necessary in Indonesia's domestic setting. It is crucial to comprehend this in order to get insights into this kind of defense. Gaps in the Asia-Pacific area as a result of Indonesia's significant role in advancing the region's refugee protection regimes (Rizka et al., 2019).

Human rights perspectives were used to explore refugee issues in the two earlier studies. Scholars examine Indonesia's legal responsibility to develop humane laws and policies concerning the presence of refugees (Missbach et al., 2018). The discussion presented lacks dialectics from the interests of state security. The difference between this research and previous research lies in the problem, which focuses on the implementation of state sovereignty-related non-refoulement principles (Mutaqin, 2018). In this research, the author will explain the impact of the non-refoulement principle on refugees and its legal restrictions in the national legal framework from the perspective of state security and sovereignty.

2. Research methods

This research uses normative and empirical legal research methods with a qualitative approach. In conducting research, the author using primary data sources in tracing and collecting materials from interviews directly related to this study and using secondary data in collecting data obtained through literature materials (Efendi and Ibrahim, 2018). The process of finding legal doctrines, rules, and principles to address the current legal questions is known as legal research. In this study, the author employs three approaches to legal analysis: statutory, legal source, and conceptual. The latter involves researching legal ideas including legal sources, legal functions, and legal institutions (Marzuki, 2015).

3. Results and discussion

3.1. Regulatory conflicts on the principle of non-refoulement in Indonesia

On 19 April 2016, the Directorate General of Immigration (DGI) issued DGI Regulation Number IMI-0352.GR.02.07 of 2016 (DGIR of 2016) and Presidential Regulation Number 125 of 2016 (PR Number 125 of 2016). The existence of this regulation tries to offer consistency in handling in an integrated and sustainable manner so that vulnerabilities in the political, legal, economic, socio-cultural, and security fields to the presence of refugees (Missbach, 2017). Based on this article, Indonesia applies the non-refoulement principle to refugees. The mechanisms and procedures for handling refugees according to the DGIR of 2016 have been explained in **Figure 2** below.

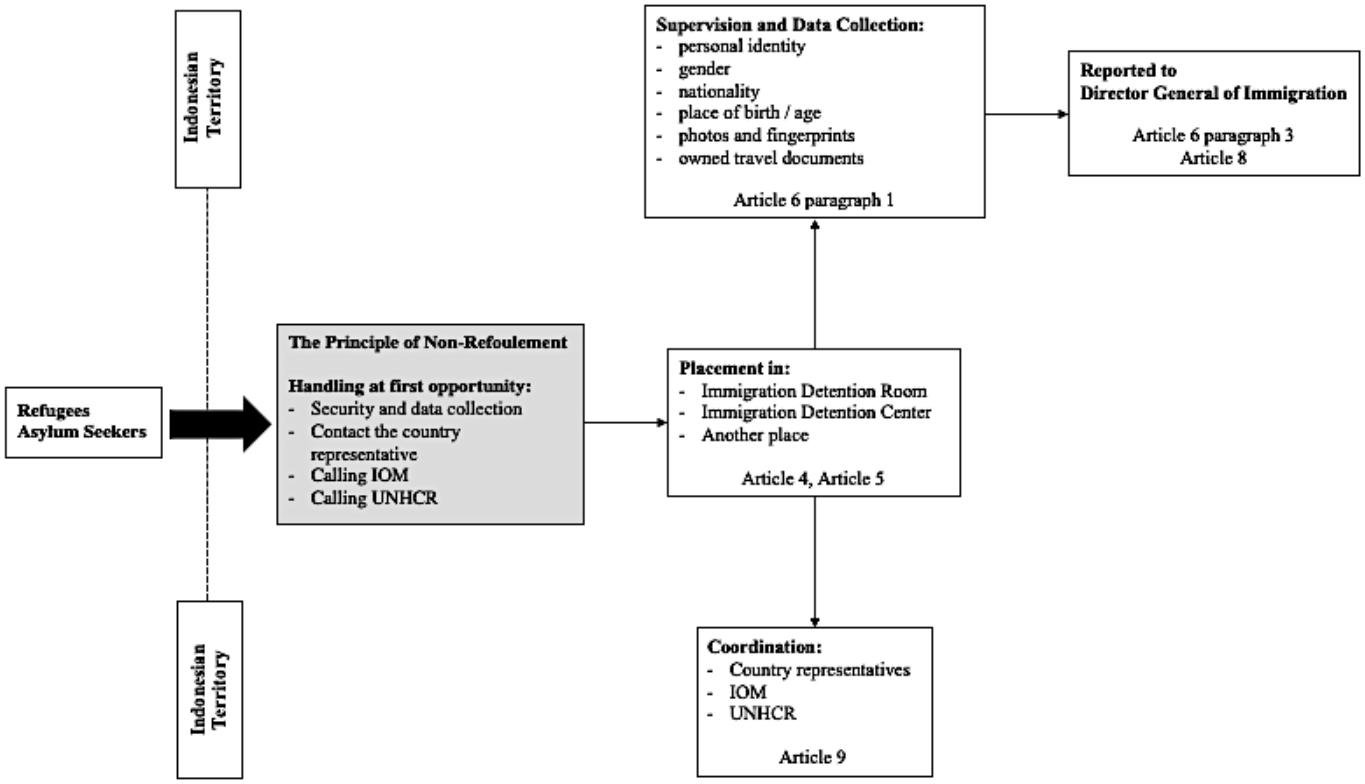

Figure 2. Process for handling asylum seekers and refugees according to DGIR of 2016.

The principle of non-refoulement is regulated in Article 2 of the DGIR of 2016, which states that:

(1) All foreign visitors entering Indonesian territory are required to abide by the rules and regulations in place.

(2) When foreigners enter Indonesian territory and declare themselves to be refugees or asylum seekers, they are dealt with right away.

(3) The handling at the earliest opportunity mentioned in paragraph (2) comprises:
   a) implement security and data gathering;
   b) get in touch with the foreign national in question's representative;
   c) get in touch with IOM regarding temporary holding facilities;
   d) get in touch with UNHCR to find out its status.

Regarding the problem of handling refugees, there has been a discrepancy between the DGIR of 2016 and Law Number 6 of 2011. This is due to the fact that the DGIR of 2016 was not established on Law Number 6 of 2011. According to Hans Kelsen's theory of legal norms (Raz, 2006), a lower norm applies, is derived from, and is based on a higher norm in order to create conformity between the legal norms that are now in place.

DGIR of 2016 has a lower position than Law Number 6 of 2011. The legal regulations that come before it shouldn't clash with this one. The Indonesian government appears to have a duty to handle refugees in accordance with this regulation, much like the nations who have accepted the 1951 Convention and the 1967 Protocol. In actuality, the Government of Indonesia is not one of the countries that has ratified the 1951 Convention and the 1967 Protocol. The author will contrast the DGIR of 2016 with Law Number 6 of 2011 and other higher rules in the ways listed in **Table 1** below.

Table 1. Conflict of legal norms regulation of the DGIR of 2016 with other higher regulations.

No	Comparison	DGIR of 2016	The 1945 Constitution	Law Number 6 of 2011	GR Number 31 of 2013	MLHRR of 2009	PR Number 125 of 2016
1	Discovery	Article 2 paragraph (2)	-	Article 8 Article 9 Article 13	Article 2 Article 3 Article 20 Article 23	Article 3	Article 5 Article 9 letter d Article 12 Article 13 Article 14 Article 15 Article 18 Article 19 Article 20 Article 21 Article 22
2	Existence of Refugees and Asylum Seekers (no obligation to have residence permit)	Article 3	Article 28J	Article 8 Article 9 Article 10 Article 13 Article 43 Article 48	Article 112 Article 214	-	Article 2
3	Immigration Detention Center (IDC) Function	Article 4, Article 5	-	Article 1 paragraph (33) Article 14 paragraph (3) Article 83 Article 85 Article 87	Article 208 Article 209 Article 210 Article 221	Article 4	Article 24 Article 25 Article 28 Article 29
4	Immigration Control	Article 6	-	Article 68	Article 172 paragraph (4)	-	Article 33 Article 34
5	Funding	Article 15	-	-	-	-	Article 40
6	Penalty	Article 14	-	Article 75 Article 113 Article 119	Article 25	-	Article 30 Article 43

The author will compare the DGIR of 2016 with Law Number 6 of 2011 along with other derivative regulations as follows:

1) Conflicting legal norms between DGIR of 2016 and the 1945 Constitution
   a) Presence

   Article 3 DGIR of 2016 contradicts Article 28J of the 1945 Constitution.

2) Conflicting legal norms between DGIR of 2016 and Law Number 6 of 2011

a) Discovery

Article 2 point 2 DGIR of 2016 contradicts Article 8, Article 9, and Article 13 of Law Number 6 of 2011.

b) Presence

Article 3 DGIR of 2016 contradicts Article 8, Article 9, Article 10, Article 13, Article 43, and Article 48 of Law Number 6 of 2011.

c) Functions of Immigration Detention Centers

Article 4 and Article 5 of the DGIR of 2016 contradict Article 1 number 33, Article 14 paragraph (3), Article 83, Article 85, and Article 87 of Law Number 6 of 2011.

d) Immigration control

Article 6 Regulation of the DGIR of 2016 contradicts Article 68 of Law Number 6 of 2011.

e) Sanctions

Article 14 DGIR of 2016 contradicts Article 172, paragraph (4) of Law Number 6 of 2011.

3) Conflicting legal norms between DGIR of 2016 and Government Regulation Number 31 of 2013 (GR Number 31 of 2013)

a) Discovery

Article 2 paragraph (2) DGIR of 2016 contradicts Article 2, Article 3, Article 3, Article 20, and Article 23 of GR Number 31 of 2013.

b) Presence

Article 3 DGIR of 2016 contradicts Article 112 and Article 214 of GR Number 31 of 2013.

c) Functions of Immigration Detention Centers

Article 4 and Article 5 of the DGIR of 2016 contradict Article 208, Article 209, Article 210, and Article 221 of GR Number 31 of 2013.

d) Immigration control

Article 6 DGIR of 2016 contradicts Article 172, paragraph (4) of GR Number 31 of 2013.

e) Sanctions

Article 14 DGIR of 2016 contradicts Article 25 of GR Number 31 of 2013.

4) Conflicting legal norms between DGIR of 2016 and PR Number 125 of 2016

a) Discovery

Article 2 paragraph (2) DGIR of 2016 contradicts Article 5, Article 9 letter d, Article 12, Article 13, Article 14, Article 15, Article 18, Article 19, Article 20, Article 21, and Article 22 of PR Number 125 of 2016.

b) Presence

Article 3 DGIR of 2016 contradicts Article 2 of PR Number 125 of 2016.

c) Functions of Immigration Detention Centers

Article 4 and Article 5 of the DGIR of 2016 contradict Article 24, Article 25, Article 28, and Article 29 of PR Number 125 of 2016.

d) Immigration control

Article 6 DGIR of 2016 contradicts Article 33 and Article 34 of PR Number 125 of 2016.

e) Funding

Article 15 DGIR of 2016 contradicts Article 40 of PR Number 125 of 2016.

f) Sanctions

Article 14 DGIR of 2016 contradicts Article 30 and Article 43 of PR Number 125 of 2016.

5) Conflicting legal norms between DGIR of 2016 and Minister of Law and Human Rights Regulation Number M.HH-11.OT.01.01 of 2009 (MLHRR of 2009)

a) Discovery

Article 2 paragraph (2) DGIR of 2016 contradicts Article 3 of MLHRR of 2009.

b) Functions of Immigration Detention Centers

Article 4 and Article 5 of DGIR of 2016 contradict Article 4 of MLHRR of 2009.

Regarding the issue of handling refugees, there has been a discrepancy between PR Number 125 of 2016 and Law Number 6 of 2011. This is because Law Number 6 of 2011 is not the source or basis for the formation of the Presidential Decree. Based on the theory of legal norm levels, Hans Kelsen states that a lower norm applies (Kelsen, 2007), sourced and based on a higher norm in order to create conformity between legal norms that are currently in force.

PR of 2016 has a lower position than Law Number 6 of 2011. The enforceability of the Presidential Decree should not conflict with Law Number 6 of 2011. According to that regulation, the Government of Indonesia ostensibly has an obligation to handle asylum seekers and refugees like countries that ratified the 1951 Convention and the 1967 Protocol on the status of refugees. In fact, the Government of Indonesia is not one of the countries that ratified the 1951 Convention and the 1967 Protocol relating to the status of refugees.

Provisions governing the entry and exit of people from/to the territory of Indonesia are regulated in Law Number 6 of 2011. Everyone who wants to enter and exit must go through immigration checks at the Immigration Checkpoint. The author will compare PR Number 125 of 2016 with Law Number 6 of 2011, along with other derivative regulations, as follows in **Table 2**.

Table 2. Legal comparison between PR Number 125 of 2016 and higher legal regulations.

No	Comparison	PR Number 125 of 2016	The 1945 Constitution	Law Number 6 of 2011	GR Number 31 of 2013	MLHRR of 2009
1	Definition of Rudenim	Article 1 paragraph (6)	-	Article 1 paragraph (33)	Article 1 paragraph (24)	Article 1 paragraph (1)
2	Definition of Detainee	Article 43	-	Article 1 paragraph (35)	Article 1 paragraph (26)	Article 1 paragraph (2)
3	Refugee management	Article 4		Article 8 Article 9 Article 13	Article 2 Article 3 Article 20 Article 23	Article 4
4	UNHCR and IOM authorities in handling refugees	Article 2	Article 28J	Article 8 Article 9 Article 10 Article 13 Article 43 Article 48	Article 112 Article 214	-

Table 2. (*Continued*).

No	Comparison	PR Number 125 of 2016	The 1945 Constitution	Law Number 6 of 2011	GR Number 31 of 2013	MLHRR of 2009
5	Discovery	Article 5 Article 9 letter d Article 12 Article 13 Article 14 Article 15 Article 18 Article 19 Article 20 Article 21 Article 22	-	Article 8 Article 9 Article 13	Article 2 Article 3 Article 20 Article 23	-
6	Shelter	Article 24 Article 25 Article 28 Article 29	-	Article 14 paragraph (3) Article 83 Article 85 Article 87	Article 208 Article 209 Article 210 Article 221	Article 3
7	Immigration Control	Article 33 Article 34	-	Article 68	Pasal 172 ayat (4)	-
8	Funding	Article 40	-	-	-	-
9	Penalty	Article 30 Article 43	-	Article 75 Article 113 Article 119	Article 25	-

The author will compare PR Number 125 of 2011 with Law Number 6 of 2011 along with other derivative regulations as follows.

1) Conflict of legal norms between PR Number 125 of 2016 and the 1945 Constitution UNHCR and IOM Authority in Refugee Management

Article 2 of the PR Number 125 of 2016 contradicts Article 28J of the 1945 Constitution.

2) Conflict of legal norms between PR Number 125 of 2016 and Law Number 6 of 2011

a) Definition of Immigration Detention Center

Article 1, paragraph (6) of PR Number 125 of 2016, contradicts Article 1, number 33 of Law Number 6 of 2011.

b) Definition of detainee

Article 43 paragraph (1) of PR Number 125 of 2016 contradicts Article 1 number 35 of Law Number 6 of 2011.

c) Handling of refugees and asylum seekers

Article 4 of PR Number 125 of 2016 contradicts Article 8, Article 9, and Article 13 of Law Number 6 of 2011.

d) UNHCR and IOM Authority in Refugee Management

Article 2 of PR Number 125 of 2016 contradicts Article 8, Article 9, Article 13, Article 43, and Article 48 of Law Number 6 of 2011.

e) Discovery of refugees and asylum seekers

Article 5, Article 9 letter d, Article 12, Article 13, Article 14, Article 15, Article 18, Article 19, Article 20, Article 21, and Article 22 of PR Number 125 of 2016 contradict Article 8, Article 9, and Article 13 of Law Number 6 of 2011.

f) Refugee and asylum seeker shelters

Article 24, Article 25, Article 28, and Article 29 of PR Number 125 of 2016 contradict Article 14 paragraph (3), Article 83, Article 85, and Article 87 of Law Number 6 of 2011.

g) Supervision of refugees and asylum seekers

Article 33 and Article 34 of PR Number 125 of 2016 contradict Article 68 of Law Number 6 of 2011.

h) Threat of punishment (legal sanctions) that have been regulated

Article 30 and Article 43 of PR Number 125 of 2016 contradict Article 75, Article 113, and Article 119 of Law Number 6 of 2011.

3) Conflict of Legal Norms between PR Number 125 of 2016 and Government Regulation Number 31 of 2013 (GR Number 31 of 2013)

a) Definition of Immigration Detention Center

Article 1, paragraph (6) of PR Number 125 of 2016, contradicts Article 1 number 24 of GR Number 31 of 2013.

b) Definition of detainee

Article 43 paragraph (1) of PR Number 125 of 2016 contradicts Article 1 number 26 of GR Number 31 of 2013.

c) Handling of refugees and asylum seekers

Article 4 of PR Number 125 of 2016 contradicts Article 2, Article 3, Article 20, and Article 23 of GR Number 31 of 2013.

d) UNHCR and IOM Authority in Refugee Management

Article 2 of PR Number 125 of 2016 contradicts Article 112 and Article 214 of GR Number 31 of 2013.

e) Discovery of refugees and asylum seekers

Article 5, Article 9 letter d, Article 12, Article 13, Article 14, Article 15, Article 18, Article 19, Article 20, Article 21, and Article 22 of PR Number 125 of 2016 contradict Article 2, Article 3, Article 20, and Article 23 of GR Number 31 of 2013.

f) Refugee and asylum seeker shelters

Article 24, Article 25, Article 28, and Article 29 of PR Number 125 of 2016 contradict Article 208, Article 209, Article 210, and Article 221 of GR Number 31 of 2013.

g) Supervision of refugees and asylum seekers

Article 33 and Article 34 of PR Number 125 of 2016 contradict Article 172, paragraph (4) of GR Number 31 of 2013.

h) Threat of punishment (legal sanctions) that have been regulated

Article 30 and Article 43 of PR Number 125 of 2016 contradict Article 25 of GR Number 31 of 2013.

4) Conflict of Legal Norms between PR Number 125 of 2016 and Minister of Law and Human Rights Regulation Number M.HH-11.OT.01.01 of 2009 (MLHRR of 2009)

a) Definition of Immigration Detention Center

Article 1 point 6 of PR Number 125 of 2016 contradicts Article 1 point 1 of MLHRR of 2009.

b) Definition of detainee

Article 42 point 1 of PR Number 125 of 2016 contradicts Article 1 point 2 of MLHRR of 2009.

c) Handling of refugees and asylum seekers

Article 4 of PR Number 125 of 2016 contradicts Article 4 of MLHRR of 2009.

d) Refugee and asylum seeker shelters

Article 24, Article 28, and Article 29 of PR Number 125 of 2016 contradict Article 3 of MLHRR of 2009. The changes in the function of the Immigration Detention Center are explained in **Table 3** below.

Table 3. Changes in duties and functions of Immigration Detention Center after the enactment of PR Number 125 of 2016 state and implementation of the non-refoulement principle for refugees.

Minister of Law and Human Rights Regulation Number M.01.PR.07.04 of 2004	**Minister of Law and Human Rights Regulation Number MM.HH-11. OT.01.01 of 2009**	**Presidential Regulation Number 125 of 2016**
1) Performing suppression tasks; 2) Carry out the task of isolation; 3) Carry out duties of repatriation and expulsion/deportation.	1) Implement tension; 2) Performing isolation; 3) Carry out deportations; 4) Perform return tasks; 5) Propose deterrence; 6) Facilitate the placement of foreigners to third countries; 7) Carry out administrative management	1) Receive refugee handover from the Immigration Detention Center/Indonesian Police; 2) Registering foreigners suspected of being refugees; 3) Conducting minutes of examination against refugees; 4) Coordinate with UNHCR; 5) Coordinate with the Local Government/City Government in terms of placement of refugees in shelters and outside shelters; 6) Provide a data collection letter or special identity card for refugees; 7) Receive mandatory monthly refugee reports; 8) Supervision and completion of the administration of departure and escort of refugees admitted to third countries; 9) Surveillance and administrative settlement of departures and control of refugees within the framework of voluntary returns. 10) Supervision and completion of the administration of placement and escort of refugees denied refugee status and preparing for the administration of deportation.

This regulatory conflict will refer to situations where there are differences or conflicts between the various rules or regulations that apply to immigration law and refugee protection in Indonesia (Pijnenburg, 2023). The consequences of regulatory disputes can be very diverse and can affect various aspects of people's lives. Some expected consequences of regulatory conflicts include (1) Legal uncertainty: Regulatory conflicts can create legal uncertainty, where governments, communities, and refugees are not sure how they should comply with applicable regulations. This uncertainty can hinder leadership decision-making in determining policies for dealing with refugees in Indonesia; (2) weaknesses in the legal system: Regulatory conflicts can reveal weaknesses in the existing legal and regulatory system. If regulations are not mutually coherent or inadequate, this can reduce public trust in legal and government institutions; (3) law enforcement difficulties: Regulatory conflicts can also cause law enforcement difficulties, as law enforcement may have difficulty determining how rules should be applied; (4) disruption of international relations: Regulatory conflicts between states can affect international relations. Disagreements regarding immigration and refugee regulations can cause tension between countries and international institutions. It is crucial to respond to regulatory conflicts with a careful and collaborative approach by involving various stakeholders, such as government, academia, and society, to seek balanced solutions and support sustainable development (Syahrin, 2018).

3.2. Several refugee policies that threaten Indonesian sovereignty

Refugee and state conservation policies are complex issues and often require a careful balance between humanitarian obligations and state sovereign rights (Liliansa and Jayadi, 2015). The following are some general considerations regarding refugee policy and state sovereignty: (1) Humanitarian obligations: States have a moral and legal obligation to provide protection to people who experience incidents or violence in their countries of origin. This principle is regulated in international conventions that define refugee status and their rights; (2) non-refoulement principle: According to this principle, nations are not allowed to send someone back to a place where they run the risk of suffering grave harm or danger. This is a fundamental principle in international refugee law; (3) obligations of oversight: States have the sovereign right to regulate immigration matters and control their own borders. This includes the right to determine who can enter and stay in their territory; (4) policy balance: It is essential to strike a balance between humanitarian obligations and sovereign rights. Countries can develop immigration and refugee policies in accordance with international norms while taking national security, social stability, and other factors into account; (5) international cooperation: The refugee problem is often a global issue that requires international cooperation. Countries often work together to address refugee issues, including in terms of resettlement, humanitarian assistance, and support for countries receiving large numbers of refugees; (6) case-by-case assessment: Decisions about recognizing refugee status should be based on a case-by-case assessment and available information about the individual's situation; (7) integration and long-term development: As well as providing protection, it is also important to consider integration of refugees in receiving communities and programs that support the long-term development of refugees, if they are unable to go back to where they were born (Syahrin, 2021).

Each country has a different context and situation, so policies regarding refugees and state sovereignty will differ from one country to another (Adhaniah et al., 2021). However, humanitarian principles and international law generally provide an essential framework for guiding policy in this area. Indonesia, as a country that has not ratified the 1951 Convention, still provides protection for refugees based on humanitarian considerations. This policy was implemented in the Director General of Immigration Decree of 2016, which was signed on 19 April 2016. These regulations have complicated the dispute about how refugees should be handled. Implicitly, this law complies with the non-refoulement principle, which states that individuals from outside Indonesia who claim to be refugees must be dealt with as soon as possible (Taylor and Neumann, 2021). The DGI's selective immigration policy, which is clearly violated by this, is clearly in conflict with it. It appears that Indonesia is compelled to acknowledge its obligations under international law and to disregard the relevance of domestic law (Briskman and Fiske, 2016).

PR of 2016 was released by the government later that year. The philosophical, legal, and sociological significance of the immigration issue is not mentioned in the preamble to the Presidential Regulation. In actuality, the recall part does not mention Immigration Law Number 6 of 2011. The resulting standards are distant from the spirit of state sovereignty, security, and law enforcement (Liliansa and Jayadi, 2015). The

purpose of immigration, on the other hand, is to ensure that every foreign person entering and departing Indonesian territory does so in a way that helps rather than hurts the nation. The implementation of the Presidential Regulation has a significant impact because the state revenue and expenditure budget will now be responsible for supporting the implementation of the handling of refugees. The state revenue and expenditure budget will now be accountable for supporting the implementation of the processing of refugees, which means that the implementation of the Presidential Regulation will have a significant influence.

The rules governing refugees have sparked debates among academics and immigration professionals. Illegal immigrants who are refugees may be protected from immigration administrative sanction (deportation). The phrase refugee is not recognized under Law Number 6 of 2011. IDC used only to be an intermediary place for foreign nationals who faced administrative immigration actions, but now, they are tasked with handling refugees. The definition of an IDC in immigration law is violated by this function.

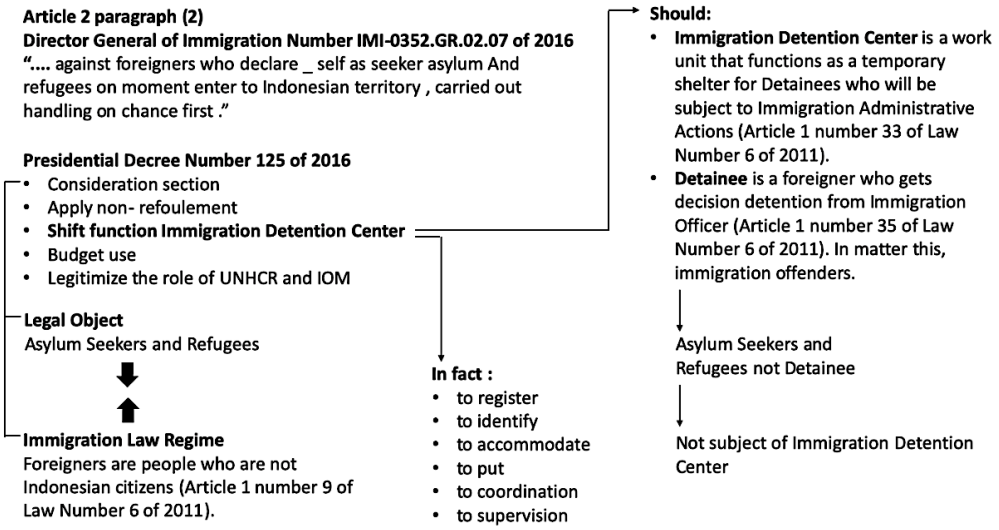

Figure 3. Inconsistency of Norms in PR Number 125 of 2016 and DGIR of 2016.

Through the application of the non-refoulement principle under these two rules, Indonesia has earned the right to become a state party to the 1951 Convention. Despite this, Indonesia has yet to ratify the convention. The existence of this Presidential Regulation has even diminished the authority of immigration as the body responsible for guarding the nation's borders. This regulation has also resulted in a conflict of norms in the substance of immigration law for foreigners in Indonesia. This explanation can be seen in **Figure 3**.

The Director General of Immigration released Official Letter Number IMI-GR.02.03-1910 of 2018 about Changes to the Policy for Handling Asylum Seekers and Refugees by IOM on 30 April 2018, which marked the culmination of this matter. The formal letter, written to the directors of the Ministry of Law and Human Rights regional offices throughout Indonesia, orders the heads of immigration offices to adapt to any modifications made to the treatment of refugees following the implementation of PR Number 125 of 2016 (The current obstacle is that each agency does not yet have technical regulations governing their authority based on PR Number 125 of 2016. This

creates a gap in function between each institution when dealing with refugee problems. Synchronization and harmonization of regulations are needed so that the implementation of this Presidential Regulation can provide legal certainty for institutions and the handling of refugees in Indonesia).

The letter highlighted that the Australian Government had changed its approach to helping the Indonesian government deal with refugees who had previously applied for protection through the International Organization for Migration by limiting or tightening financial assistance (IOM). IOM interprets the move as the withdrawal of aid, which will take effect from 15 March 2018, for:

1) asylum seekers who arrive and are discovered in Indonesian waters without a plan to travel to Australia or New Zealand;
2) asylum seekers who arrive independently and enter Indonesian territory legally before registering or reporting to UNHCR to obtain status as asylum seekers;
3) individual refugees who turn themselves in to the IDC, Immigration Office, or another government agency or who are found during regular foreigner monitoring operations conducted by the Immigration Office.

Australia has done a great job of helping Indonesian refugees. The government of Indonesia had access to an abundance of financial aid for scholarships, training programs, and operational cash for assisting refugees prior to the passing of the Presidential Regulation (Sari, 2018). Now, everything has halted abruptly. It turned out that all of them were merely political pretexts used by Indonesia to enact PR Number 125 of 2016. Following the Presidential Regulation, Australia no longer has any interest in Indonesia because Indonesia is now exclusively in charge of implementing the legal framework for handling refugees technically.

The legal structure that each nation has selected has a significant impact on the judicial restrictions that must be understood in light of the principle of non-refoulement (As a country that has not ratified the 1951 convention, the determination of refugee status in Indonesia is still under the authority of UNHCR. Indonesia is not involved in the process, unless it submits to regulate it in national law. Currently the government is still formulating the ideal mechanism for how Indonesia can be part of the process of determining refugee status). Indonesia currently operates under a selective immigration legislation policy based on practicality (Afriansyah, 2019). This policy of selective immigration is explained in Part One of the Explanation of Law No. 6 of 2011, i.e., only immigrants who are beneficial to the country may settle there.

This policy of selective immigration indicates that (Syahrin, 2017):

1) Indonesian territory only permits valid foreigners to enter and remain.
2) Indonesian territory only permits foreigners who pose no threat to public safety and order are allowed to enter and remain.
3) In Indonesia, foreigners are required to abide by the law.
4) Foreigners must comply with Indonesia's intent and purpose when they enter or remain on its territory.

This idea holds that only foreigners who do not endanger law and order, do not harbor enmity towards Indonesian nationals who choose to enter or leave the country, and do not pose a threat to the welfare of the people and the state can make a positive contribution (Asih, 2015). The mobility of these immigrants must be in line with official ideology and not jeopardize the integrity of the nation, even if one interprets

it differently (Tremblay, 2005).

All foreigners entering Indonesian territory must possess legal identification and visas. Under the guise of the concept of non-refoulement, refugees do not receive complete assurances that they will be allowed to remain in Indonesia when coupled with the principle of selective immigration policy (Afriansyah et al., 2022). Additionally, the balance between the security strategy and the prosperity approach must be taken into consideration when implementing this chosen policy (Mearsheimer, 2019). In order to fulfill its obligations and perform its functions, immigration must prioritize elements of state sovereignty and security (Gil-Bazo, 2015). How, then, can this strategy be put into practice if the reality of refugees is acknowledged and their needs are met.

The 1951 Convention forced Indonesia to comply with binding international legal rules (jus cogens), which complicated this legal contraction (Kadarudin, 2018). However, because Indonesia is a member of the United Nations, it is indirectly bound by the non-refoulement principle, which is a universal standard for treating refugees fairly. In reality, this notion runs counter to Indonesia's policy of selective immigration, which limits foreigners' ability to enter the country to those who will be helpful. Indonesia is not required to follow the 1951 Convention's requirements because it is not a signatory to it. Scholars are concentrating on this dialectic to restrict the use of the non-refoulement principle in Indonesia by employing targeted immigration tactics (Sumarlan, 2019).

3.3. Incompatibility of the non-refoulement principle

A nation cannot be coerced into enforcing the principle of non-refoulement against refugees on a large scale. This rule cannot be applied in all situations (Al Imran, 2022). Even though the standards are binding (jus cogens), how they are used depends heavily on the urgency and necessity of the participating nations. In particular, the principle of non-refoulement does not apply if the refugee poses a threat to national security or disobeys public order in the country where he seeks sanctuary because Indonesia has not yet been added to the list of state parties to the 1951 Convention (Moran, 2021).

Article 33, paragraph (2) of the 1951 Convention governs any restrictions or deviations from the non-refoulement principle. It specifies that a refugee cannot take advantage of the current provision if there are good reasons to think that he poses a threat to national security or if he poses a danger to the community of the nation in which he is currently located after being found guilty of a grave crime by a final judgment (Ilcan, 2021).

Some groups frequently use this theory to sneak refugees into Indonesia, with Australia as the final destination. Australia, a signatory to the 1951 Convention, has yet to bar all refugees from entering the country. Indonesia, which was previously only used as a transit nation, has consequently changed its status to become a destination nation (Taylor and Neumann, 2021).

The 1951 Convention's Article 33, paragraph 2, states that the prohibition on returning refugees to countries where they might face persecution does not apply to those who are a threat to national security or who have been proven guilty and given

a final verdict for their major crimes (Lang and Nagy, 2021). This restriction, though, only applies to highly critical exceptions. This means that in order for the exemption to be used, it must be demonstrated that the presence of refugees in a country poses a direct threat to that country's security (Khairiah et al., 2021).

The implementation of the principle of non-refoulement for refugees in Indonesia, which has been the foundation for consideration, cannot be justified in its entirety on the basis of the human rights element (Shahnaz et al., 2019). The application of each nation's national law must be restricted when the non-refoulement concept is made into jus cogens that all countries must abide by (Dewansyah and Handayani, 2018).

From the perspective of national law, human rights restrictions related to the handling of refugees are basically regulated in the Indonesian Constitution. On the inclusion of human rights clauses as a constitutional guarantee, human rights practitioners and scholars continue to differ sharply. The dilemma primarily relates to two articles: Article 28I's provisions on non-derogable rights and Article 28J's provisions on human rights limitations. These sections, when interpreted literally, have inconsistent implications. Is it true that in the 1945 Constitution, there are separate restrictions on human rights provisions, including Article 28I, which at the end of the sentence reads, "... are inalienable human rights that cannot be diminished in any situation". The formulation of restrictions on human rights regulated in the 1945 Constitution is a manifestation of the application of the theory of state sovereignty which has been explained in **Figure 4**.

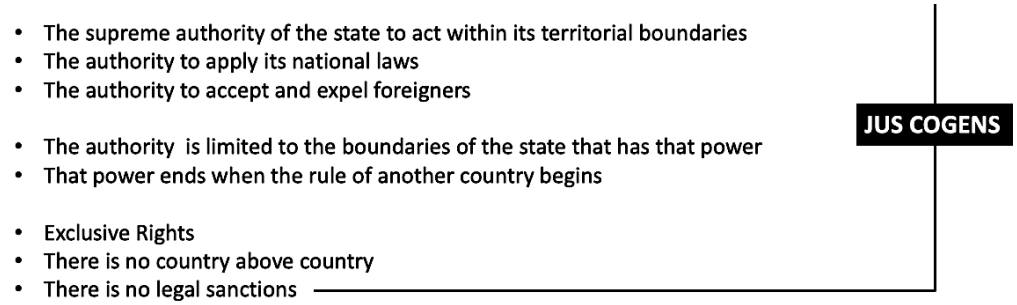

Figure 4. Limitation of non-refoulement principle according to state sovereignty theory.

The limitations of the non-refoulement principle can be analyzed by monism theory (national law primate). According to this theory, the enforceability of national law must take precedence over international law. International law can apply if there is a will from the state to implement it. Experts explain that international law and national law are legal entities that use simultaneously but separately. There is no country above the country, and all countries are in the same position. There is no international institutional intervention that can intervene and regulate the internal life of a country. This theory gave birth to two general views that see the principle of non-refoulement can be set aside if national law formulates restrictions in its regulations. The principle of non-refoulement as jus cogens can be limited if the state implements a selective immigration policy as jus dispotivium. An explanation of this argument can be seen in **Figure 5**.

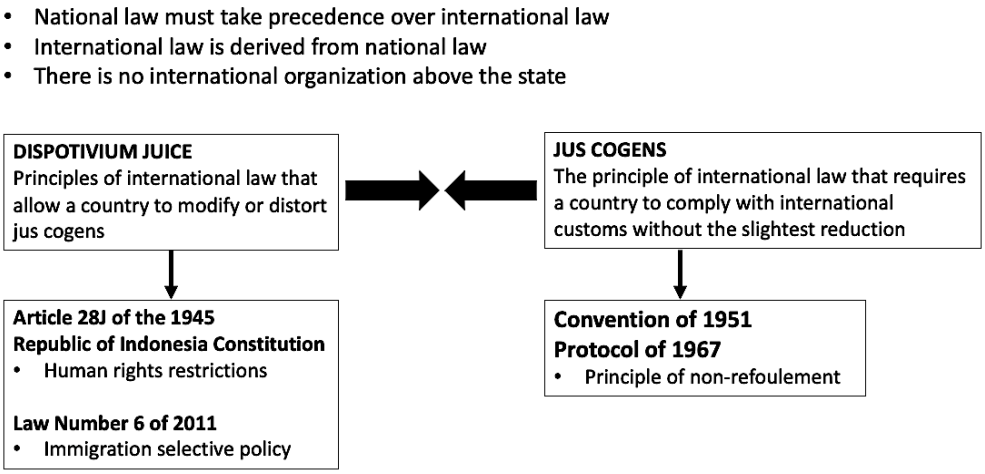

Figure 5. Limitation of non-refoulement principle according to monism theory (primate of national law).

Non-refoulement exceptions must involve a threat to national security and a disturbance of the peace in the host nation (Waslin, 2020). For Indonesia, security includes not just a nation's internal security but also the security of its food, health, financial, and commerce systems. Threats have impediments, difficulties, and diversion. Threats can be either premeditated or residual, in a strict sense. Planned threats can take the shape of invasion, sabotage, infiltration, or internal subversion or rebellion. Residual threats are a variety of social issues that create economic, social, and political weaknesses that, if adequately addressed in a timely manner, will lead to riots that subversive or rebellious elements can use for their own purposes.

A massive influx of refugees might strain an economy, alter the ethnic balance, cause conflict, and even bring about political turmoil at the local and national levels in society. A nation is in a safe position as long as it is not required to give up the ideals it regards as necessary, and if it can avoid war or is forced to do it, it can conquer. The discourse and dialectics of handling refugees from a national security and humanitarian perspective can be seen in **Figure 6**.

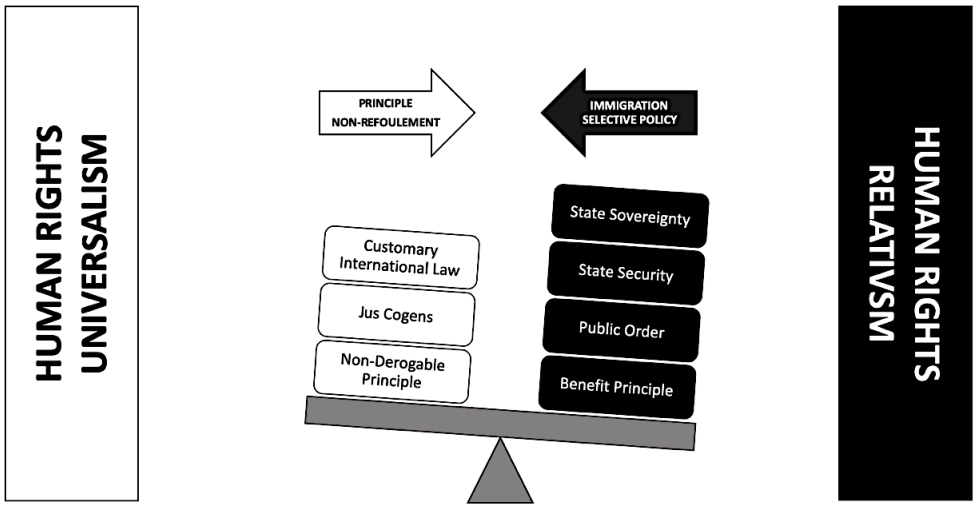

Figure 6. Dialectics of thought of human rights universalism and human rights relativism in the application of the non-refoulement principle.

The relativity of the application of the principle of non-refoulement in Indonesia can be studied from the approach to the principles of immigration law as follows.

1) The principle of selective immigration policy

One essential idea that is applicable to every nation in the world is the policy of selective immigration. State sovereignty is manifested in this notion, which demands respect. Selective immigration programs fall within positive law; part one of the explanation of Law Number 6 of 2011 clarifies this:

Regulations governing foreigners' access to Indonesian territory are predicated on a selective approach that upholds the values of human rights. Holders of permits are required to make sure that their visit to Indonesia serves the designated purpose. In compliance with the aforementioned policy and to protect national interests, only foreigners who benefit Indonesia and do not constitute a threat to public safety and order are allowed admission and stay on Indonesian territory.

This selective policy principle requires that:

a) Only foreigners who are helpful are permitted to come and remain on Indonesian soil;
b) Only foreigners permitted to come and dwell on Indonesian territory are those who do not pose a threat to public safety and order;
c) Foreigners are required to abide by Indonesian law requirements;
d) Foreigners must adhere to the goals and objectives when they come and stay on Indonesian territory.

According to this theory, only foreigners who do not jeopardize law and order are kind towards those who enter and exit Indonesian land and can contribute to the welfare of the people, nation, and state. Even according to a different interpretation, these foreigners' movements must be consistent with the philosophy of the state and must not jeopardize the integrity of the country.

Generally speaking, all international visitors to Indonesian territory are required to have current travel authorization and valid visas. Under the guise of the non-refoulement principle, refugees do not receive complete guarantees to remain in Indonesia. This is related to the selective immigration policy premise. Additionally, when implementing this chosen policy, consideration must be given to striking a balance between the security and prosperity approaches. This means that in order for immigration to fulfill its obligations and perform its functions, state sovereignty and security must come first.

2) The principle of nature of immigration

Immigration is a crucial part of the implementation of maintaining sovereignty as the nation and state strive towards a just and prosperous society based on Pancasila and the Republic of Indonesia's 1945 Constitution.

Article 1 point 1 of Law Number 6 of 2011 states that:

The movement of people into and out of Indonesian territory under official supervision to uphold state sovereignty is referred to as immigration.

Regarding the Catur function of immigration, Article 1 point 3 of Law Number 6 of 2011 explains that:

The state government's role in immigration comprises enforcing state security, facilitating community welfare and development, and offering immigration services.

3) The principle of immigration traffic inspection

The DGI is authorized to carry out immigration functions along the border. Immigration officers are tasked with guarding immigration checkpoints and cross border posts, among other immigration-related facilities, along Indonesia's borders. The DGI tightens surveillance of all persons entering and exiting Indonesian territory essential to improving the quality of immigration traffic checks.

Article 8 of Law Number 6 of 2011 states that:

(1) Valid travel documentation must be carried by everyone entering or leaving Indonesian territory.
(2) This law and international accords say otherwise, but all foreigners entering Indonesian territory must have a valid visa.

Furthermore, Article 9 of Law Number 6 of 2011 explains that:

(1) At the Immigration Checkpoint, each individual entering or leaving Indonesian territory is subject to an inspection by an immigration officer;
(2) The examination mentioned in paragraph (1) entails examining travel documents and/or legitimate forms of identification;

An immigration officer has the right to inspect a person's body and luggage and to carry out an immigration inquiry if there are any concerns regarding the validity of travel documents or the identity of the person.

Since Indonesia's present immigration law (Ryo, 2019) politics are a selective approach based on the concept of expediency, it is also necessary to understand the limits of the non-refoulement principle from the standpoint of immigration law (Peters, 2019). Meaning that only foreigners who benefit the nation can come and live there. The foreigner must possess current, valid identification documents and a visa. For this reason, under the guise of the non-refoulement principle, not all applicants for refugees even have absolute guarantees to remain in Indonesia (Micinski and Lefebvre, 2023). Thus, the non-refoulement principle in Indonesia is applied indirectly through this selected approach.

If Indonesia disobeys international law over the refugee issue, there are no written punishments imposed on it. The Indonesian legal system recognizes the principle of non-refoulement as a coercive legal norm (jus cogens), which allows for some exceptions. Naturally, nevertheless, there will be opinions from other nations that will affect Indonesia in terms of international relations.

4. Conclusion

The principle of non-refoulement regulated in Article 33 paragraph (1) of the 1951 Convention is considered a compelling legal norm for all countries, including those that have not ratified this convention. To date, Indonesia has not ratified the 1951 Convention and the 1967 Protocol because it considers national security aspects. Even though it is not a country party to the convention, Indonesia has recognized the principle of non-refoulement by issuing PR Number 125 of 2016 and Regulation of the DGIR of 2016, which regulates the handling of refugees from abroad. Handling refugees by implementing the principle of non-refoulement has the potential to trigger domestic and social problems in society. The application of this principle can also give rise to legal uncertainty and conflict between norms and national law. Normatively, the implementation of this principle can be limited by the Constitution, the

Immigration Law, the theory of state sovereignty, the theory of primate monism of national law, the principle of selective immigration policy, the principle of the nature of immigration, and the principle of immigration traffic inspection. The contribution of this research can be used as material for consideration in creating immigration legal policies that limit the application of the principle of non-refoulement for refugees from the perspective of state sovereignty with a security and humanitarian approach. In the end, the author realizes that this research still has many shortcomings. This is because this research only limits legal exceptions to the application of the principle of non-refoulement in normative studies and state sovereignty.

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