Asian Journal of Law and Society (2021), **8**, 521–535
doi:10.1017/als.2021.7

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

Connecting the Obligation Gap: Indonesia's *Non-Refoulement* Responsibility Beyond the 1951 Refugee Convention

Dio Herdiawan Tobing*

ASEAN Studies Center, Universitas Gadjah Mada, Yogyakarta, Indonesia
*Corresponding author. E-mail: dio.herdiawan.t@mail.ugm.ac.id

Abstract

This article explains the extent to which Indonesia has international obligations to comply with the *non-refoulement* principle in the absence of ratification of the 1951 Refugee Convention. While Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees provides the general impression that Indonesia respects the *non-refoulement* principle, there is no specific text within Indonesian law and policy that regulates the matter. This article argues that Indonesia is legally bound by *non-refoulement* obligations under international human rights treaties to which it is a party, as well as under customary international law. It examines the extent of Indonesia's *non-refoulement* obligations under the Convention Against Torture, the International Convention on Civil and Political Rights, the Convention on the Rights of the Child, and customary international law. It concludes that the Presidential Regulation was a missed opportunity for Indonesia to reinforce its *non-refoulement* obligations, as illustrated by the recent treatment of Rohingya asylum seekers near Aceh.

Keywords: Indonesia; refugees; *non-refoulement*; international law; human rights and refugee law; humanitarianism

1. Introduction

Indonesia's non-party status to the 1951 Convention Relating to the Status of Refugees[1] (1951 Refugee Convention) and its additional protocol frequently triggers questions, such as "Does Indonesia have obligations to accept refugees?," "Is it lawful for Indonesia to return refugees to their country of origin or third countries?," or "Is it true that as a non-party to the 1951 Refugee Convention Indonesia is exempt from any refugee obligations?" When posed with questions on the topic of refugees, some, if not many, Indonesian diplomats and other officials at the relevant ministries claim that Indonesia does not have any obligations to accept refugees because the country has not signed, or even ratified, the 1951 Refugee Convention.[2] However, as I explain in this article, Indonesia does have *non-refoulement* obligations to refugees despite its status as a non-signatory to the Refugee Convention.[3]

In this article, I focus on Indonesia's *non-refoulement* obligations under international law to counter the narrative projected by the government to the public, which consistently frames Indonesia's response in allowing refugees to temporarily reside in Indonesia, on

1. Convention Relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 189 UNTS 150.
2. Conversation with Mr Dicky Komar, June 2018. As the time of this conversation, Mr Komar had already been posted in Bangkok as the Deputy Chief of Mission at the Indonesian Embassy.
3. See also Tan (2016), p. 371; Reza (2013), pp. 126–9.

© The Author(s), 2021. Published by Cambridge University Press on behalf of Asian Journal of Law and Society.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

humanitarian grounds.[4] For example, Dicky Komar, the former Director of Human Rights and Humanitarian Affairs of the Indonesian Foreign Affairs Ministry, was reported as saying:

> Indonesia is actually not a signatory to the 1951 Convention and 1967 Protocol concerning refugees, so the Indonesian government is not obliged to fulfill the rights of refugees. Even so, … the government has a humanitarian tradition of helping foreign refugees in Indonesia.[5]

While the definition of "humanitarian" is unclear,[6] one of Indonesia's national principles as set out in the Preamble to the Constitution (the *Pancasila*) is "a just and civilized humanity." Some Indonesian scholars argue that the humanitarian principle is embodied in Article 28G(2) of the amended version of the 1945 Constitution concerning "asylum rights."[7] Article 28G(2) of the Constitution is thus considered by some scholars and policy-makers in Indonesia as one of the foundations for "humanitarian protection" for refugees.[8] Furthermore, the Foreign Ministry prescribes nine basic policy stances for Indonesia's humanitarian diplomacy to define what is meant by a "humanitarian approach" towards refugees. These include, among others, to

> respect and uphold the main principles of humanity, impartiality, neutrality and independence and protection and fulfilment of the basic needs of the people affected by the humanitarian crisis, as well as the involvement and empowerment of affected people; especially vulnerable groups such as seniors, women, children and people with disabilities.[9]

On 31 December 2016, President Joko "Jokowi" Widodo signed Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees (the "PR") (described as "*pengungsi dari luar negeri*" or foreign refugees). The PR became Indonesia's first regulation to explicitly provide a definition of a "refugee," outlining Indonesia's obligations to identify, assist, and protect refugees stranded at sea or on land,[10] and task government agencies with providing standardized treatment towards refugees in Indonesia.[11] Importantly, the PR contains a definition of a "foreign refugee" that is very similar to the definition in the 1951 Refugee Convention.[12]

While the PR does not explicitly make reference to the *non-refoulement* principle, the rule is reflected through provisions for search-and-rescue operations that are followed by provisions for sheltering and the security of refugees, which generally implies that the country will accept refugees entering its territory.[13] It arguably reflects the intention of the Indonesian government to implement the *non-refoulement* principle in good faith.[14] However, the recent experience with Rohingya refugees near Aceh (discussed below)

4. Such statements are very common in Indonesian media, e.g. AntaraNews (2019); Cnnindonesia.com (2018); Merdeka (2018).
5. See Wardah (2017).
6. See the Introduction to this Special Issue.
7. Malahayati et al. (2017), p. 2.
8. Alunaza & Juani (2017), p. 2. See also discussion in Dewansyah & Nafisah's article in this Special Issue.
9. Ministry of Foreign Affairs of the Republic of Indonesia (2019).
10. See Arts 18 and 19 of the PR.
11. Missbach, Adiputera, & Prabandari (2017).
12. On this point, see Sadjad's article in this Special Issue.
13. Arts 5, 6, and 9 of the PR. See also Kneebone (2020); Malahayati et al., *supra* note 7, p. 3; Roisah, Sesutyorini, & Rahayu (2017), p. 49.
14. Charliene (2017), p. 60.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

suggests that the PR has made little difference to disembarkation practices. By contrast, the voluntary-return procedure outlined in Article 38 of the PR creates the impression that Indonesia favours voluntary return in the case of failed refugee-status determinations. Overall, the absence of a clear procedure for deportation[15] and references to Law No. 6 of 2011 on Immigration[16] creates a potential space for abuse with regard to the discretion of returning refugees to their country of origins based on security and national-sovereignty considerations.

Thus, because of the ambiguous guidance provided by the PR, and the absence of a strict textual *non-refoulement* obligation in the PR and other Indonesian laws,[17] it is necessary to turn to the international treaties to which Indonesia is a party that embody the *non-refoulement* principle. This is important, as the extent to which the *non-refoulement* principle is consistent with Indonesia's sovereignty and applies within its territory is subject to debate in Indonesia.[18] This article takes international law as the key source underpinning an assessment of Indonesia's law and policy on refugees.

In this article, I focus on the extent to which Indonesia has international obligations to protect refugees under international law, particularly derived from the *non-refoulement* principle under the Convention Against Torture (CAT),[19] the International Covenant on Civil and Political Rights (ICCPR),[20] and the Convention on the Rights of the Child (CRoC).[21] I chose these instruments because they contain commitments to key *non-refoulement* norms,[22] such as protection against torture and inhuman and degrading treatment. Additionally, *non-refoulement* is binding on Indonesia as part of international customary law. Recently, Alvi Syahrin, Head of Research and Community Service Center at the Polytechnic of Immigration, Indonesian Law and Human Rights Ministry, claimed that "*Non-refoulement* is not 'absolute' in the application … especially, to Indonesia, which until now, is not a party to the 1951 Refugee Convention."[23] On the contrary, in this article, I reach the conclusion that, even though Indonesia has not ratified the 1951 Refugee Convention and its additional protocol, it is bound by the prohibition of *refoulement* derived from treaties that it has ratified and international customary law. A comparison will be made with the *non-refoulement* obligation in 1951 Refugee Convention, Article 33 of which provides that

> [n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

15. See Arts 29 and 43 of the PR.

16. Law No. 6 (2011) on Immigration provides too much flexibility, which could lead to deportation being conducted in an "arbitrary" manner. Art. 75 of the Immigration Law provides that Immigration Officers are entitled to deport an individual if the person in question conducts "hazardous activities" or is "reasonably suspected to endanger public security and orderliness … or [does not] observe applicable laws and regulations." Where the elements have been satisfied, people may be subject to the Immigration Officer's discretion.

17. Roisah, Sesutyorini, & Rahayu, *supra* note 13, p. 44; Tan, *supra* note 3, p. 367.

18. Malahayati et al., *supra* note 7, p. 3.

19. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85.

20. International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 993 UNTS 171.

21. Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3.

22. Tan, *supra* note 3, p. 382.

23. Syahrin (2018), p. 12.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

I clarify that my argument is not with respect to whether it is necessary or not for Indonesia to ratify the 1951 Refugee Convention. My argument is based on the current international-law instruments that Indonesia has ratified, the content of which is defined by international customary law and which are more substantial than the concept of discretionary humanitarian norms promoted by some policy-makers and scholars in Indonesia.

2. Indonesia's *non-refoulement* obligation under CAT

This section and the following are dedicated to identifying Indonesia's *non-refoulement* obligations under international law starting with CAT. The examination will centre on three issues that affect legal responsibility for Indonesia, namely: *ratione temporis* (temporal jurisdiction, reflected through ratification), *ratione personae* (personal scope or who benefits from the treaty), and *ratione loci* (territorial and extraterritorial application). This last issue is important, as the recent arrival of Rohingya refugees in Aceh illustrates.

The prohibition on *refoulement* is expressly codified in Article 3 of CAT as follows:

> 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 subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[24]

First, Indonesia ratified CAT on 28 October 1998 with a declaration and a reservation, but no reservation was made with respect to Article 3, in which the prohibition on *refoulement* is embodied. Second, Article 3 is binding and the limitation of personal scope[25] is absent in the Article, meaning that, irrespective of nationality or legal status, protection shall be provided for all individuals, including aliens or the stateless.

Third, with respect to territorial scope, it is imperative that the threshold of territoriality be established because an act of *refoulement* may bring different legal consequences, depending on the geographical location of those claiming protection. For example, an act of *refoulement* may have different legal consequences under international law if it is directed at those who have entered or resided within a state's territory, if it comprises rejection at the frontier, or if it takes place outside a state's territory (in another state's territory or on the high seas with effective control by state agents).[26] In the context of CAT, there is no further explanation as to what extent Article 3 applies territorially. But a general obligation is embodied in Article 2, which compels state parties to prevent acts of torture in any territory under its jurisdiction. Moreover, the wording used in Article 3 prohibits states "to expel," "return" (*refouler*), or extradite a person—similar to the provision on *non-refoulement* under Article 33 of the 1951 Refugee Convention (other than the prohibition on extradition). If we look at the words of Article 33 of the 1951 Refugee Convention, similarly, there are no specific geographical limitations.[27]

24. Convention Against Torture (1984).

25. In the absence of any contrary expression, this means that the treaty applies to all individuals.

26. The *non-refoulement* principle also entails human rights consequences in which states' human rights obligations apply extraterritorially: see Hathaway et al. (2011).

27. Wouters (2009), p. 49. It is accepted that it covers both non-admission and rejection at the border of a state into which a refugee seeks entry.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

Regarding the word "expel" in CAT, it may have a territorial consequence, as it literally means "to force or drive out" or "forced to leave."[28] In order for a person to be driven out of a state's territory, he or she must already be within a state's territory. The word "return" brings more confusion, as a person may be able to be returned without having to have first entered a state's border. However, the word "return" must be contextualized with the French word "*refouler*" that refers to the removal of a person or refusal to allow him or her to enter a state's territory.[29] The combination of words therefore implies the territorial and extraterritorial application of both Article 33 of the 1951 Refugee Convention and Article 3 of CAT.

The responsibility of a state to make a sufficient assessment of the risk of torture or ill-treatment regarding an act of *refoulement* within its territory and rejection at the border can lead to "indirect" or "constructive" *refoulement*: an act to expel a deportee to another state or territory without the benefit of a sufficient assessment of the risk of torture or ill-treatment present in the final destination state.

The Committee Against Torture (ComAT)'s Concluding Observations on the US's country report in 2006 stated that

> [t]he State party should recognise and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.[30]

This means that responsibility is attributable to a state for *refoulement* when it exercises effective control over its officials or those acting on behalf of the state wherever it occurs.[31] The principle of *non-refoulement* applies regardless of whether the relevant acts occur "beyond the national territory of the State ..., at border posts or other points of entry, [or] in international zones."[32]

Additionally, in *Mutombo v. Switzerland*,[33] the ComAT held that the prohibition of *refoulement* extends to the *refoulement* of persons to third countries in which they would face a real risk of being tortured or being returned to a country where they might be in danger. Adhering to the United Nations High Commissioner for Refugees (UNHCR)'s key interpretation of the 1951 Refugee Convention, the ComAT follows the standard as "personal, real and foreseeable risk" on whether or not a country violates the principle of *non-refoulement*, be it returning a person to their place of origin or removal to third countries.[34] This means that, if there is evidence that the returned or removed person will be likely to experience a "personal, real and foreseeable risk," then the host country that has done the act of *refoulement* will violate the prohibition-of-*refoulement* provision contained in CAT. Nils Melzer, the Special Rapporteur on Torture, also stated in his report prepared for the 37th Session of the Human Rights Council that "[f]or the purposes of *non-refoulement*, any torture or ill-treatment which the concerned persons or their families were exposed to in the

28. Oxford University (2009).

29. Wouters, *supra* note 27, p. 51.

30. ComAT (2006), para. 15; see also ComAT (2004), para. 4(ii)(b).

31. Lauterpacht & Bethlehem (2003), p. 111, para. 67: "persons will come under the jurisdiction of a State party to the 1951 Refugee Convention [or CAT] when under the 'effective control' of the state, 'wherever this occurs' [as the Concluding Observations recognize]."

32. *Ibid.*

33. *Balabou Mutombo v. Switzerland*, CAT/C/12/D/013/1993, ComAT (1994), para. 10.

34. As established by CAT, General Comment No. 1 (1998) on the Implementation of Article 3 of the Convention in the Context of Article 22, para. 6: "The risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable."

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

past or would be exposed to upon deportation" would constitute an indication that the person is in danger of being subjected to torture.[35]

Another important aspect of the prohibition of *refoulement* under Article 3 of CAT is that the provision is absolute and derogation is not permitted. By contrast, Article 33(2) of the 1951 Refugee Convention states that *non-refoulement*

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

This means that, if an alien or refugee posed security threats towards the national security and community of the host country, an exception can be made in relation to this person. However, there is no provision under CAT that recognizes an exception to the state obligations enshrined in Article 3. Further, Article 2(2) of CAT stipulates that there are "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Article 2 of CAT clearly reaffirms that *refoulement* is not allowed under any circumstances whatsoever under this treaty. This view is also supported by the jurisprudence of the ComAT in the case of *Gorki Ernesto Tapia Paez v. Sweden.* The Committee affirmed that "[t]he Committee considers that the test of article 3 of the Convention is absolute,"[36] with no derogation permitted.[37]

From this explanation, there are at least three important points that are relevant to Indonesia's obligation on the prohibition of *refoulement* under CAT. First, the application of Article 3 is to all persons and not exclusively to Indonesian citizens. Second, Article 3 applies both within Indonesian territory, rejection at the border that constitutes indirect *refoulement*, and extraterritorially wherever *refoulement* occurs when a state has effective control over its officials.[38] Lastly, the specific *non-refoulement* principle under CAT contains an absolute and non-derogable prohibition of *refoulement*, in contrast to the Refugee Convention (see Article 33(2)). At the same time, it should be noted that the meaning of "torture" is narrower than the test for "persecution" under the Refugee Convention, Article 1A(2).[39]

3. Indonesia's *non-refoulement* obligation under the ICCPR

In addition to CAT, Indonesia is a state party to the ICCPR, having ratified it on 23 May 2006. Within the ICCPR framework, there are two relevant articles that relate indirectly to the *non-refoulement* principle. First, Article 6 guarantees the right to life. Paragraph 1 of the Article states as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

The Article imposes obligations on states not to transfer any individual to another country if it would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life.[40] It can therefore be argued that, if the *refoulement* act exercised by states led to the serious human rights violations, especially deprivation of life, *refoulement* in itself is also prohibited. Second, the prohibition of *refoulement* is

35. UNHCR (2018), p. 12.
36. *Gorki Ernesto Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, ComAT (1997), para. 14(5).
37. Weissbrodt & Hortreiter (1999), p. 16.
38. With respect to extraterritoriality, it has the same scope as the 1951 Refugee Convention.
39. Goodwin-Gill & McAdam (2007), p. 306.
40. UNHCR (2007), para. 17.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

embedded under Article 7, which prohibits torture: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 7 contains an implicit obligation not to conduct *refoulement* against an individual to a place where he or she may experience torture or inhuman or degrading treatment or punishment.

A broad interpretation of Article 7 was supported by the UN Human Rights Committee (UNHRComm). In 1992, the UNHRComm stated in its second General Comment that "[s] tates parties must not expose individuals to the danger of torture, cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[41]

The articulation of the *non-refoulement* principle in various international treaties shares a similar object and purpose: to uphold the wide notion of human rights protection and prohibit the conduct of torture against individuals. The significance of *non-refoulement* is to prevent an individual or group of people from being subject to torture and other inhuman and degrading treatment in third countries or in their countries of origin.[42]

With respect to the "embeddedness" of the *non-refoulement* principle under Articles 6 and 7, the ICCPR's *non-refoulement* provision provides a broader scope of application compared to CAT, as it extends the ban beyond torture to cruel, inhuman, and other degrading treatment or punishment. This illustrates how *non-refoulement* is not exclusively "attached" in refugee-related agreements, but is also entrenched in other international human rights provisions. For example, with respect to the treatment of refugees in Indonesia, the failure to protect their basic human rights could amount to inhuman and degrading treatment.[43]

In one of the UNHCR Human Rights Committee's early cases concerning *refoulement*, the Committee held that, if a state extradites a person within its jurisdiction where there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the *refouling* state may be in violation of the Covenant.[44] With respect to the scope of the prohibition on *refoulement* under the ICCPR, the relevant jurisdiction is territorial, which includes asylum seekers and refugees within Indonesia's territory or at the state border. It was made clear in General Comment No. 31 that

> the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.[45]

This General Comment also firmly established that rejection at a state's border would amount to *refoulement* because the act of "rejecting" a person from entering the border is constituted within or at the state's border itself—that is, subject to the host state's jurisdiction.

Additionally, the prohibition of *refoulement* in the ICCPR is non-derogable, even in times of armed conflict and in the context of counter-terrorism. In the UNHCR Human Rights Committee's General Comment No. 29, the Committee stated that

---

41. See UNHRComm (1992), para. 9; see also UNHRComm 31 (2004), para. 12.

42. Menendez (2015), p. 61.

43. See also the discussion by Dewansyah & Nafisah in this Special Issue of the rights owed to an asylum seeker through the right "to enjoy asylum."

44. *Kindler v. Canada*, CCPR/C/48/D/470/1991, UNHRComm (1993), para. 13(2).

45. UNHRComm, *supra* note 41, para. 10.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

> the proclamation of certain provisions of the Covenant as being of a non-derogable nature, in Article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g. articles 6 & 7).[46]

Moreover, in the Committee's 2006 Concluding Observation on Canada, the Committee reaffirmed that:

> [n]o person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.[47]

With the rule of *non-refoulement* implicit in the ICCPR, there are four obligations that bind Indonesia. First, Indonesia cannot neglect the fact that the *non-refoulement* obligation is implicitly embedded in Articles 6 and 7 of the ICCPR, made clear by the jurisprudence of the UNHCR Human Rights Committee and its general comments. Second, the *non-refoulement* principle in the ICCPR is directed towards all individuals, irrespective of their legal status and nationality. As long as the state has jurisdiction over the individuals, they are protected by ICCPR provisions and Indonesia has an obligation to fulfil their rights. Third, the prohibition on *refoulement* is not limited to those within Indonesia's territory or rejection at the border. Lastly, similar to CAT, the *non-refoulement* principle in the ICCPR is absolute without exception because the principle is embedded in Articles 6 and 7, where the rights provided are non-derogable.

4. Indonesia's *non-refoulement* obligation under CRoC

Regarding children's rights, Indonesia is a state party to CRoC, ratified through Presidential Decision No. 36 of 1990. With respect to the scope of CRoC, the Convention applies to all individuals, regardless of their nationality, as long as they qualify under the definition of "children" within the object and purpose of the instrument. CRoC Article 1 provides that "[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

This definition of a child does not distinguish based on nationality, territory, or geographical location, although it provides discretion to state parties to determine according to their own laws the age limits of a child. This means that state parties cannot adjust the age limit when defining who qualifies as a "child." As there is no other qualification provided under the Convention with respect to personal and territorial scope, regardless of nationality, immigration status, statelessness, or geographical location, the obligations provided under the instrument apply to all children as defined under CRoC.[48]

Similar to the ICCPR, under this Convention, the prohibition on *refoulement* is not explicitly mentioned. However, in the Committee on the Rights of the Child (CRC)'s General Comment No. 6 (2006) on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, an expansive interpretation of *non-refoulement* was elaborated. Although the rule is not embodied explicitly, the CRC's general comments are

46. UNHRComm (2001a), para. 11.
47. UNHRComm (2006), para. 15.
48. According to the UNHCR Indonesia (2020), as of April 2020, 28% of the total refugees and asylum seekers in Indonesia were children.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

authoritative interpretations of the treaty.[49] The CRC specifically provided that the prohibition on *refoulement* is embodied, but not limited to, Articles 6 (the right to life and survival) and 37 (the right to liberty and freedom from torture) as follows:

> in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.

The Committee made specific reference to Article 33 of the Refugee Convention and Article 3 of CAT when it affirmed the need to respect such obligations. However, as Indonesia is a non-party to the 1951 Refugee Convention, the specific standard that applies to Indonesia is that which is being provided within the meaning of Article 3 of CAT. In addition, because of the CRC's inclusion of Article 37 in the interpretation of *non-refoulement*, the definition of *non-refoulement* for children leads to a more expansive set of rights than other *non-refoulement* definition, as it incorporates the deprivation of liberty and detention practices covered by this specific Article.[50]

Similar to CAT and the ICCPR, no derogation can be entertained for *non-refoulement* obligations under CRoC, even in emergency situations.[51] Further, children seeking asylum are entitled to the enjoyment of rights enshrined under CRoC Article 22(1) to "receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments," which Indonesia has ratified. This provision broadens the personal scope of CRoC in line with Article 2,[52] as the CRC states that "the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party ... irrespective of their nationality, immigration status or statelessness."[53]

5. Indonesia's *non-refoulement* obligation under customary international law

While Indonesia is not a state party to the 1951 Refugee Convention, it is still bound by the *non-refoulement* obligation provided by the treaties outlined above, especially on the elements of obligations that have attained the status of customary law. The embodiment of the *non-refoulement* principle in multiple international treaties may "codify" or "crystallize" the principle to attain customary status in international law. In contemporary international law, it is not debatable anymore whether *non-refoulement* is regarded as an international customary law norm. In its Advisory Opinion, the UNHCR was of the view that the principle has satisfied the two elements of custom formation: state practices and *opinio juris*.[54] The practice of hosting refugees by non-signatory states of the 1951 Refugee Convention in mass influx situations has shown that these states have adhered to the principle in spite of their status as non-parties.[55] Also, the fact that states have

49. General comments are considered authoritative interpretations of a treaty; see White (2002), p. 178.
50. Farmer (2011), p. 41.
51. UNHRComm (2001b), para. 10.
52. CRoC Art. 2 stipulates that the Convention applies to each child within the state's territory and to all children subject to its jurisdiction.
53. CRC (2005), para. 12.
54. UNHCR, *supra* note 40, para. 14.
55. *Ibid.*, para. 15.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

always provided explanations or justifications in cases when they considered *refoulement* as necessary implicitly confirms their acceptance of the *non-refoulement* principle.[56]

A study by Lauterpacht and Bethlehem (2003) concluded that state participation in international agreements containing *non-refoulement* shows that 170 out 189 members of the UN at that time were party to one or more Conventions that contained *non-refoulement* as a fundamental aspect.[57] In fact, Costello and Foster (2015) argue that *non-refoulement* is nearly universal because participation equals around 90% of UN members.[58] Even though not considered as an active state practice, the number of widespread ratifications of international agreements that contain the *non-refoulement* principle shows a manifestation of "virtual" state practice, which amounts to the emergence of customary rule.[59]

The question raised with respect to the *non-refoulement* principle under customary international law is whether Indonesia is bound by this obligation. Generally, in international law, states are only bound by a certain rule if they have shown their consent and choose to be bound as such. One of the oldest views on the system of international law can be reflected from *lotus dictum*. With regard to the international-law system, the Permanent Court of International Justice (PCIJ) held that

> [i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[60]

The *dictum* puts emphasis on the free will of states regarding whether they choose to be bound by the international rule of law or not. Only if states show their consent to be bound by the rule through ratification of or accession to international agreements shall the rule be binding upon them. Similar to the rule of customary international law, if states have chosen to practise the rule since its inception, then the rule becomes binding upon them.

However, there are also exceptions to being bound by customary law rules if a state is a persistent objector. To become a persistent objector is to object against the rule since/during the formation of the rule in international relations.[61] The persistent objector rule appeared on the International Law Commission's Third Report on identification of customary international law. In Part VIII of the document, it is expressly asserted that "it is widely held that a State that has persistently objected to an emerging rule of customary international law, and maintains its objection after the rule has crystallized, is not bound by it."[62] This is problematic for late-independence countries because they may have gained independence only after some rules had already attained customary status. In spite of this problem, there is a small possibility that those states could show their disagreement and not practise the rule after they acquire

56. *Ibid.*

57. Lauterpacht & Bethlehem, *supra* note 31, p. 147.

58. Costello & Foster (2015), p. 273.

59. Crystallization of *non-refoulement* from conventional rules might occur with the embodiment of the rule in international treaties with wide participation of states, meaning that ratification may to some extent show state practices. The criteria of crystallization are found from ICJ jurisprudence; see ICJ, *North Sea Continental Shelf Cases* (Judgment) (1969).

60. See PCIJ (1927).

61. Crawford (2012), p. 28.

62. Wood (2015), p. 59.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

independence in order to opt out from the rule.[63] However, their objection must be express, as there is a rebuttable presumption of acceptance by states.[64]

The question of whether a country can opt out from the established rule is not relevant for Indonesia because, in fact, Indonesia gained independence in 1945 and entered the international system (formally the UN) in 1950, a year before the Refugee Convention came into existence. But, since Indonesia, as most Southeast Asian countries do, perceives the Convention as Eurocentric, Indonesia chose not to formally accede.[65] Its initial encounter with a refugee crisis was in the 1970s.[66] This is the starting point with respect to whether Indonesia would choose to oppose the *non-refoulement* principle or practise the international customary norm created by states at that time. But, as Indonesia's experience with refugees demonstrates (as explained in the Introduction to this Special Issue), it has not persistently objected to the *non-refoulement* principle. By contrast, Indonesia's early and subsequent practices of hosting refugees (including delegating its functions to the UNHCR and the International Organization for Migration (IOM)) confirms its adherence to the principle *non-refoulement* even without having ratified the 1951 Refugee Convention and its additional protocol.[67]

6. Indonesia's *non-refoulement* responsibilities: Rohingya refugees in Aceh

As Indonesia has not ratified the 1951 Refugee Conventions, its *non-refoulement* obligations are derived more broadly from the field of human rights law, specifically international instruments that Indonesia has ratified, and from the scope of customary law. In some respects, as I have explained, the obligations to which Indonesia has signed up under international instruments are broader or more extensive than those that would apply if Indonesia were a party to the Refugee Convention. Moreover, they are legal obligations that are distinct from humanitarian protection.[68]

In respect to the personal scope of CAT, the ICCPR and CRoC, Indonesia's *non-refoulement* obligations apply more broadly than the Refugee Convention, as their prohibitions are universally directed against any individuals, regardless of their status, including foreign nationals and the stateless.[69] By contrast, the Refugee Convention applies to refugees or asylum seekers, as defined by Article 1A(2) of the Convention. This includes those who have not formally been identified as refugees but who *are* refugees under the "declaratory theory,"[70] as they satisfy the elements of the refugee definition, namely someone who is unable or unwilling to return to their country of origin because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[71] As noted above, the PR applies to both refugees and

63. Charney (1986), p. 1.

64. Crawford, *supra* note 61.

65. Davies (2008), p. 19.

66. See the Introduction to this Special Issue.

67. Tobing (2018).

68. Goodwin-Gill & McAdam, *supra* note 39, p. 286.

69. This is consistent with ICCPR, Art. 2(1)—the obligation to respect the rights of "all individuals within its jurisdiction" without discrimination. It is also consistent with Art. 28G(2) of the Constitution, which provides a right of asylum to "everyone," and Art. 25(1) of the Law No. 37 of 1999 on Foreign Relations, which provides similar rights to "foreigners" and does not make any distinction between "foreign national" or "stateless persons." See also the Introduction to this Special Issue.

70. This concept explains that the UNHCR recognizes a person to be a "refugee" prior to the time at which their refugee status is formally determined. As the UNHCR Handbook explains: "Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee;" see UNHCR (1979), para 28.

71. See Art. 1A(2) of the 1951 Refugee Convention.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

asylum seekers, and contains a definition that is similar to that in the Refugee Convention.[72] Further, I have noted above the PR's provisions on the search-and-rescue and disembarkation of refugees and asylum seekers.

On the one hand, the human rights treaties, especially CAT and the ICCPR, provide narrower protection than protection from a "well-founded fear" of "persecution" as per the Refugee Convention (e.g. from "torture" under Article 3 of CAT and Article 7 of the ICCPR). The definition of torture as provided under Article 1 of CAT refers to "severe pain or suffering;" it also requires the complicity of state officials. Further, the standard of proof requires "substantial grounds" or a "foreseeable real and personal risk."[73] Whilst "persecution" provides a higher standard of protection, "torture" potentially covers a broader range of activities. On the other hand, the ICCPR is wider in scope than CAT and the torture provisions. For example, it encompasses provisions that deal with "deprivation of life" under Article 6 of the ICCPR and "inhuman and degrading treatment" under Article 7 of the ICCPR. The ICCPR, in these respects, is broader than the Refugee Convention, which protects refugees from persecution.

Moreover, exceptions under the Refugee Convention can also be made, as stipulated under Article 33(2), if the host country finds reasonable grounds for regarding a refugee as a danger to the security of the country, whereas the *non-refoulement* obligations under CAT, the ICCPR, and CRoC are not subject to limitations—they are absolute and non-derogable. Therefore, Indonesia is responsible for fulfilling its legal obligations under these treaties for all individuals, regardless of their nationality or legal status.

Further, under CAT, the ICCPR, CRoC, the UNHCR Human Rights Committee's general comments, and subsequent jurisprudence established within the human rights monitoring regime, the extent to which *non-refoulement* is applied is not limited by the notion of "territory." In Section 2 above, it was established under CAT that, even if an act of *refoulement* occurs outside of the state's territory, it can constitute a violation of the treaty. The same goes for the ICCPR and CRoC. Additionally, if states exercise effective control over state agents abroad, *refoulement* in this context would still constitute a violation of international law and, therefore, the state could be held accountable for any acts committed by their agents. In summary, the rule of *non-refoulement* applies under the human rights instruments within Indonesia's border, at the border, and outside the border, if there is effective control by state officials.

In terms of the scope of the customary principle, Costello and Foster accept the following description of the "principle of *non-refoulement*" as one

> which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion ... or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture.[74]

Thus, it can be concluded that, because of the status of *non-refoulement* as a principle of international customary law, Indonesia's legal *non-refoulement* obligations extend to non-nationals who are included in the beneficiary class defined in the Refugee

72. See Sadjad's article in this Special Issue.

73. Goodwin-Gill & McAdam, *supra* note 39, p. 304.

74. Costello & Foster, *supra* note 58, p. 303, citing UNHCR, Executive Committee Conclusion No 82 (XLVIII), 17 October 1997, para. (d)(i); UNHCR, Executive Committee Conclusion No 79 (XLVII), 11 October 1996, para. (j); see UNHCR (1996).

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

Convention.[75] The territorial scope of application of the principle "mirrors that in respect to refugees"—that is, it applies wherever the acts may occur.[76]

The current crisis of Rohingya refugees in the Andaman Sea, which appears to be a repeat of the 2015 crisis,[77] is testing the scope of the PR and Indonesia's legal *non-refoulement* obligations. It has been suggested that the failure to carry out search-and-rescue operations during the 2015 Andaman Sea crisis was a "catalyst" for the 2016 PR.[78] In June 2020, the Indonesian Foreign Ministry's spokesperson could not provide a positive answer when asked whether Indonesia would allow Rohingya boat refugees to disembark if they arrived in Indonesian waters and shores.[79] In the end, the government did not assist in the interception and assistance provided to 99 boat people found in Aceh's waters. Only the local fishermen did.[80] In early September 2020, another 297 Rohingya boat arrivals sought refuge in Aceh and are being reluctantly hosted by the local government of Lhokseumawe. These recent experiences suggest that the PR is not the "game-changer" that it was expected to become.[81]

7. Conclusion

Although there is an absence of explicit incorporation of the *non-refoulement* principle in Indonesian law and policy, including in the PR, and Indonesia remains a non-party to the 1951 Refugee Convention, Indonesia is nevertheless bound by its legal *non-refoulement* obligations under CAT, the ICCPR, and CRoC, which apply to all foreign nationals and which are absolute and non-derogable. Further, Indonesia is bound by the principle of *non-refoulement* as a principle of international customary law, which is broader than the obligations under the human rights instruments. Thus, Indonesia's *non-refoulement* obligations are based on legal principles rather than discretionary humanitarian norms—contrary to the statements of representatives of the Indonesian Ministry of Foreign Affairs (outlined in the Introduction to this article).

To conclude, whether or not Indonesia ratifies the Refugee Convention, Indonesia is legally compelled to do whatever it takes not to return any individuals to their country of origin or any third country in contravention of the principle of *non-refoulement*. This could extend to constructive *refoulement* through failure to process a refugee's claim adequately (take, for example, the *Qaseemi* case discussed in the Introduction of this Special Issue) or it could arise from treatment that amounts to "inhuman and degrading treatment" through failure to protect basic human rights. It is also important to note that, as the PR requires rescue and voluntary return or deportation (Articles 38, 39, 42(3)(e), 43), it therefore does not endorse *refoulement*. However, as the recent experience with new arrivals of Rohingya refugees and asylum seekers off the coast of Aceh illustrates, the PR represents a missed opportunity to clearly state Indonesia's *non-refoulement* obligations.

Acknowledgements. The author thanks three anonymous reviewers for their useful comments on earlier drafts of this article and Professor Susan Kneebone, Mark Klaassen, and Ms Balawyn Jones for their guidance and assistance.

75. *Ibid.*, p. 305.

76. Lauterpacht & Bethlehem, *supra* note 31, pp. 159–69, para. 237(c)(iii); Goodwin-Gill & McAdam, *supra* note 39, p. 248.

77. Kneebone (2017), pp. 36–8.

78. Missbach et al. (2018), p. 11.

79. Septiari (2020).

80. Tahjuddin (2020); Jones & Walden (2020).

81. Kneebone, *supra* note 13.

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

References

Alunaza, Hardi, & M. Kholit Juani (2017) "Kebijakan Pemerintah Indonesia melalui Sekuritisasi Migrasi Pengungsi Rohingya di Aceh tahun 2012–2015." 2 *Indonesian Perspective* 1–17.

AntaraNews (2019) "Indonesia Luncurkan Dialog Kemanusiaan dengan Yordania," https://www.antaranews.com/berita/852073/indonesia-luncurkan-dialog-kemanusiaan-dengan-yordania (accessed 25 May 2019).

Charliene, Abrori (2017) "Challenges and Opportunities in Responding to Refugee and Asylum Seeker Entering Indonesian Territory in the Context of Implementing Presidential Regulation Number 125 Year 2016 on Handling Refugee." LL.B thesis, Faculty of Law, Universitas Gadjah Mada.

Charney, Jonathan I. (1986) "The Persistent Objector Rule and the Development of Customary International Law." 56 *British Yearbook of International Law* 1–24.

Cnnindonesia.com (2018) "Direktur HAM: Pendekatan Indonesia adalah Kemanusiaan," https://www.cnnindonesia.com/internasional/20180507045222–106–296137/direktur-ham-pendekatan-indonesia-adalah-kemanusiaan (accessed 25 May 2019).

ComAT (1994) "Balabou Mutombo v. Switzerland," https://www.refworld.org/cases,CAT,3ae6b6784.html (accessed 25 May 2019).

ComAT (1997) "Gorki Ernesto Tapia Paez v. Sweden," https://www.refworld.org/cases,CAT,3ae6b6de10.html (accessed 25 May 2019).

ComAT (2004) "Concluding Observations on the United Kingdom of Great Britain and Northern Ireland," https://undocs.org/CAT/C/CR/33/3 (accessed 25 May 2019).

ComAT (2006) "Concluding Observations on the United States of America," https://undocs.org/CAT/C/USA/CO/2 (accessed 25 May 2019).

Costello, Cathryn, & Michelle Foster (2015) "*Non-refoulement* as Custom and Jus Cogens? Putting the Prohibition to the Test." 46 *Netherlands Yearbook of International Law* 273–327.

Crawford, James (2012) *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press.

CRC (2005) "General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin," https://www.refworld.org/docid/42dd174b4.html (accessed 26 May 2019).

Davies, Sara E. (2008) *Legitimising Rejection: International Refugee Law in Southeast Asia,* Leiden: Martinus Nijhoff Publishers.

Farmer, Alice (2011) "A Commentary on the Committee on the Rights of the Child's Definition of *Non-refoulement* for Children: Broad Protection for Fundamental Rights." 80 *Fordham Law Review Res Gestae* 39–48.

Goodwin-Gill, Guy, & Jane McAdam (2007) *The Refugee in International Law*, 3rd edn, Oxford: Oxford University Press.

Hathaway, Oona A. et al. (2011) "Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?" 43 *Arizona State Law Journal* 389–426.

ICJ (1969) "North Sea Continental Shelf Cases (Judgment)," https://www.icj-cij.org/files/case-related/51/051–19690220-JUD-01–00-EN.pdf (accessed 26 May 2019).

Jones, Balawyn, & Max Walden (2020) "Why Aceh Is a Rare Place of Welcome for Rohingya Refugees," *The Conversation*, 25 August, https://theconversation.com/why-aceh-is-a-rare-place-of-welcome-for-rohingya-refugees-143833 (accessed 14 October 2020).

Kneebone, Susan (2017) "Australia as a Powerbroker on Refugee Protection in Southeast Asia: The Relationship with Indonesia." 33 *Refuge* 29–41.

Kneebone, Susan (2020) "Is the 2016 Indonesian Presidential Regulation a Potential 'Game-Changer' on Rescue of Rohingya Boat Refugees?," *Kaldor Centre*, https://www.kaldorcentre.unsw.edu.au/publication/2016-indonesian-presidential-regulation-potential-game-changer-rescue-rohingya-boat (accessed 29 September 2020).

Lauterpacht, S.E, & Daniel Bethlehem (2003) "The Scope and Content of the Principle of *Non-Refoulement*: Opinion," in E. Feller, V. Türk, & F. Nicholson, eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge: Cambridge University Press, 87–171.

Malahayati et al. (2017) "Non-Refoulement: The Legal Basis and Applied Approach in the Handling of Rohingya Refugees in Indonesia." 22 *IOSR Journal of Humanities and Social Sciences* 1–9.

Menendez, F. M. Marino (2015) "Recent Jurisprudence of the United Nations Committee Against Torture and the International Protection of Refugees." 34 *Refugee Survey Quarterly* 61–78.

Merdeka (2018) "Indonesia dilemma sebagai negara transit para pengungsi," https://www.merdeka.com/dunia/dilema-indonesia-sebagai-negara-transit-para-pengungsi.html (accessed 25 May 2019).

Ministry of Foreign Affairs of the Republic of Indonesia (2019) "Humanitarian Issues," 6 April, https://kemlu.go.id/portal/en/read/88/halaman_list_lainnya/humanitarian-issues (accessed 29 September 2020).

Missbach, Antje, Y. Adiputera, & A. Prabandari (2017) "Indonesian Cities and Regencies May Be Asked to Shelter Refugees—Will They Comply?," *The Conversation*, https://theconversation.com/indonesian-cities-and-regencies-may-be-asked-to-shelter-refugees-will-they-comply-82734 (accessed 26 May 2019).

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press

Missbach, Antje, Y. Adiputera, & A. Prabandari (2018) "Stalemate: Refugees in Indonesia —Presidential Regulation No 125 of 2016," *CILIS Policy Paper 14*, https://law.unimelb.edu.au/__data/assets/file/0006/2777667/CILIS-Paper-14_Missbach-et-al_final.pdf (accessed 9 November 2020).
Oxford University (2009) *Oxford English Dictionary*, Oxford: Oxford University Press.
PCIJ (1927) "The Case of the S.S. 'Lotus' (Judgement)," https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf (accessed 26 May 2019).
Reza, Bhatara Ibnu (2013) "The Scope and Content of the Principle of *Non-Refoulement*: Opinion," in A. Francis & M. Rowena, eds., *Protection of Refugees and Displaced Persons in the Asia Pacific Region*, Farnham: Ashgate, 117–35.
Roisah, Kholis, P. Sesutyorini, & Rahayu (2017) "Kebijakan Penerapan Prinsip Non Refoulement Dalam Rangka Penanganan Pengungsi dari Luar Negeri di Indonesia." Research Report, Faculty of Law, Universitas Diponegoro.
Septiari, Dian (2020) "Indonesia, Australia Explore Solution to Rohingya Refugee Crisis under Bali Process," *Jakarta Post*, https://www.thejakartapost.com/news/2020/05/17/indonesia-australia-explore-solution-to-rohingya-refugee-crisis-under-bali-process.html (accessed 30 September 2020).
Syahrin, Alvi (2018) "Pembatasan Prinsip Non Refoulement." 1 *Bhumiputera* 12–6.
Tahjuddin, Hidayatullah (2020) "Indonesian Fishermen Rescue Nearly 100 Rohingya Refugees in Aceh," *Reuters*, https://www.reuters.com/article/us-indonesia-rohingya/indonesian-fishermen-rescue-nearly-100-rohingya-refugees-in-aceh-idUSKBN23X0TG (accessed 29 September 2020).
Tan, Nikolas Feith (2016) "The Status of Asylum Seekers and Refugees in Indonesia." 28 *International Journal of Refugee Law* 365–83.
Tobing, D. H. (2018) "A Year of Jokowi's Refugee Decree: What Has Changed?," *Jakarta Post*, http://www.thejakartapost.com/academia/2018/01/12/a-year-of-jokowis-refugee-decree-what-has-changed.html (accessed 29 May 2019).
UNHCR (1979) *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, reissued Geneva February 2019: UNHCR, https://www.unhcr.org/en-au/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html (accessed 20 October 2020).
UNHCR (1996) "General Conclusion on International Protection No. 79 (XLVII)," https://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html (accessed 30 September 2020).
UNHCR (2007) "Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol," www.unhcr.org/4d9486929.pdf (accessed 25 May 2019).
UNHCR (2018) "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," https://undocs.org/A/HRC/37/50 (accessed 25 May 2019).
UNHCR (2020) "Pengungsi di Indonesia (April 2020)," https://www.unhcr.org/id/ (accessed 29 September 2020).
UNHRComm (1992) "General Comment 20 of Article 7 on the Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment," https://undocs.org/en/HRI/GEN/1/Rev.7 (accessed 25 May 2019).
UNHRComm (1993) "Kindler v. Canada," https://undocs.org/CCPR/C/48/D/470/1991 (accessed 26 May 2019).
UNHRComm (2001a) "General Comment 29 on Article 4: Derogation during a State of Emergency," https://www.refworld.org/docid/453883fd1f.html (accessed 26 May 2019).
UNHRComm (2001b) "General Comment 29 on State of Emergency (Article 4)," https://www.refworld.org/docid/453883fd1f.html (accessed 29 September 2020).
UNHRComm (2004) "General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant," https://undocs.org/CCPR/C/21/Rev.1/Add.13 (accessed 25 May 2019).
UNHRComm (2006) "Concluding Observations on Canada," https://www.refworld.org/docid/453777a50.html (accessed 26 May 2019).
Wardah, Fathiya (2017) "Indonesia Berkomitmen Urus Pengungsi Asing," *VOA Indonesia*, https://www.voaindonesia.com/a/indonesia-komitmen-urus-pengungsi-asing-/3956863.html (accessed 14 October 2020).
Weissbrodt, David, & Isabel Hortreiter (1999) "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties." 5 *Buffalo Human Rights Law Review* 1–73.
White, Nigel D. (2002) *The United Nations System: Towards International Justice*, Boulder: Lynne Rienner.
Wood, Michael (2015) "Third Report on Identification of Customary International Law," http://legal.un.org/docs/?symbol=A/CN.4/682 (accessed 14 October 2020) (accessed 9 November 2020).
Wouters, Kees (2009) *International Legal Standards for the Protection from Refoulement*, Cambridge: Intersentia.

Cite this article: Tobing, Dio Herdiawan (2021). Connecting the Obligation Gap: Indonesia's *Non-Refoulement* Responsibility Beyond the 1951 Refugee Convention. *Asian Journal of Law and Society* **8**, 521–535. https://doi.org/10.1017/als.2021.7

https://doi.org/10.1017/als.2021.7 Published online by Cambridge University Press