ISSN: 2808-487X
Edition: Vol. 5 No.4 (2025)
https://radjapublika.com/index.php/IJERLAS/index

Non-Refoulement, Environmental Displacement, and the Limits of State Sovereignty: Legal Obligations Beyond the Refugee Convention Framework

Taty Sugiarti[1], Ihsanul Maarif[2]
[1,2]Fakultas Hukum, Universitas Pasundan, Bandung, Indonesia
e-mail: taty.sugiarti@unpas.ac.id, ihsanul.maarif@unpas.ac.id
*Corresponding Author: taty.sugiarti@unpas.ac.id

Keywords:
environmental displacement; jus cogens; non-refoulement; refugee protection; State sovereignty; sustainable development.

Article Info:
Received:
05/04/2025
Revised:
10/05/2025
Accepted:
15/06/2025
Published:
30/07/2025

ABSTRACT

The principle of non-refoulement is traditionally associated with Article 33 of the 1951 Refugee Convention, yet contemporary displacement increasingly occurs outside the classical refugee framework. In addition to persecution and armed conflict, people may be forced to move because of environmental degradation, climate-related disasters, ecological vulnerability, loss of livelihood, and conditions that threaten human dignity and survival. This article examines how non-refoulement develops beyond the Refugee Convention, particularly in relation to environmental displacement and the limits of State sovereignty. It addresses three research questions: how non-refoulement operates under customary international law and international human rights law; to what extent its core content may be linked to jus cogens; and how it limits State discretion in migration control, environmental governance, and protection of displaced persons. This study uses normative legal research with statutory, conceptual, and case-law approaches. It examines international treaties, human rights instruments, environmental law principles, peremptory norms, judicial decisions, and recent scholarship on externalized migration control and climate-induced displacement. The findings show that non-refoulement functions as a multi-source obligation through three layers: the customary baseline binding all States, the human rights non-derogability layer protecting all persons from irreparable harm, and the jus cogens core prohibiting removal to peremptory violations such as torture, genocide, slavery, and crimes against humanity. The article contributes by formulating a three-layer normative convergence test and by linking non-refoulement to environmental displacement, sustainable development, and the legal limits of sovereignty.

How to cite: Taty Sugiarti, & Ihsanul Maarif. (2025). Non-Refoulement, Environmental Displacement, and the Limits of State Sovereignty: Legal Obligations Beyond the Refugee Convention Framework. *International Journal of Educational Review, Law And Social Sciences (IJERLAS)*, *5*(4), 967–980.

DOI: https://doi.org/10.5281/zenodo.21354916

Introduction

The principle of non-refoulement occupies a foundational position in contemporary international protection law. In its basic meaning, non-refoulement prohibits a State from returning, expelling, extraditing, rejecting at the frontier, or otherwise transferring a person to a territory where there are substantial grounds to believe that the person would face persecution, torture, cruel, inhuman or degrading treatment, arbitrary deprivation of life, or other forms of serious and irreparable harm. Although this principle is most commonly associated with Article 33 of the 1951 Convention Relating to the Status of Refugees, its contemporary legal significance can no longer be confined to the Refugee Convention framework. Recent scholarship describes non-refoulement as the cornerstone of international refugee protection and a broader human rights-based standard for protecting people on the move, especially when States attempt to control migration beyond their territorial borders (Goodwin-Gill & McAdam, 2021; Hathaway, 2021; Hirst, 2024).

The contemporary relevance of this issue is evident from the changing character of forced migration. Many persons in need of international protection do not move solely because of individualized persecution in the classical sense. They may flee generalized violence, armed conflict, trafficking, statelessness, public health collapse, severe socio-economic deprivation, environmental degradation, climate-related disaster, or a combination of these factors. Vallandro do Valle (2024) argues that existing non-refoulement doctrine has generally focused on civil and political rights, while serious harm arising from deprivation of economic, social, and cultural rights has often been addressed only indirectly through the category of inhuman or degrading treatment. This indicates that contemporary displacement increasingly challenges the narrow boundaries of the Refugee Convention and requires a broader human rights-based understanding of protection.

The issue becomes more urgent in the context of environmental displacement. Environmental displacement refers to movement caused or intensified by environmental degradation, climate-related disaster, sea-level rise, water scarcity, land degradation, ecological vulnerability, and loss of livelihood. Although the 1951 Refugee Convention does not expressly recognize "environmental refugees" or "climate refugees" as a separate legal category, persons displaced by environmental harm may still require international protection where return would expose them to serious and irreparable harm. McAdam (2016) explains that climate change, disasters, and displacement create complex legal protection gaps because affected persons often fall outside conventional refugee law. Similarly, McAdam (2020) shows that the principle of non-refoulement may become relevant where climate-related conditions threaten life, dignity, or survival.

This issue is closely connected to the development of environmental law, human rights law, and sustainable development. Environmental degradation may create conditions in which access to water, food, housing, health, and a safe environment becomes severely compromised. In such circumstances, return may not amount merely to ordinary economic hardship but may reach the threshold of inhuman or degrading treatment, arbitrary deprivation of life, or other irreparable harm. Ammer and Mayrhofer (2023) show that cross-border disaster displacement may raise non-refoulement questions under Article 3 of the European Convention on Human Rights where return exposes individuals to serious harm. Pijnenburg (2023) also demonstrates that migration arrangements must be examined through economic, social, and cultural rights because deprivation of basic rights can shape the legality of removal.

The problem becomes more complex because not all States are parties to the 1951 Refugee Convention or the 1967 Protocol. In non-party States, asylum seekers and refugees often depend on temporary humanitarian arrangements, administrative discretion, immigration tolerance, or cooperation with international organizations rather than a comprehensive domestic asylum system. Even in States that are parties to the Refugee Convention, persons who do not satisfy the Convention definition of "refugee" may still face a real risk of serious harm if returned. Costello and Foster (2016) note that non-refoulement has been widely supported by State practice and opinio juris as a norm of customary international law, even though its precise status as jus cogens remains contested. This means that the absence of treaty ratification does not automatically remove a State's international responsibility.

This situation creates a fundamental legal problem concerning the relationship between protection and sovereignty. The question is not only whether a person qualifies as a refugee under Article 1A(2) of the 1951 Refugee Convention, but whether a State may rely on sovereignty, treaty non-ratification, national security, migration control, environmental emergency, or third-country arrangements to transfer a person to a place where fundamental harm is foreseeable. States do have sovereign authority to regulate admission, residence, expulsion, border management, and national security. However, sovereignty is not absolute. The International Law Commission (2022) affirms that peremptory norms of general international law are norms from which no derogation is permitted. Therefore, where return would expose an individual to torture, slavery, genocide, crimes against humanity, arbitrary deprivation of life, or comparable fundamental harm, the exercise of sovereignty must be assessed against the hierarchy of international legal obligations.

The connection between non-refoulement and environmental displacement demonstrates that State sovereignty over migration control must be understood within the broader framework of environmental responsibility and human protection. States retain authority to regulate borders and determine immigration policy, but such authority cannot be exercised in a way that disregards foreseeable ecological harm and severe human vulnerability. Where environmental degradation, climate-related disaster, or ecological collapse creates a real risk of serious and irreversible harm, the principle of non-refoulement may operate as a legal limit on removal. In this sense, non-refoulement is not only a refugee-law principle but also part of a broader protective framework linking human dignity, environmental justice, and sustainable development (McAdam, 2020; Vallandro do Valle, 2024).

Existing literature demonstrates that non-refoulement has developed beyond the narrow Refugee Convention framework. UNHCR (2018) affirms that protection against refoulement applies under international human rights law and prevents removal where there is a real risk of serious human rights violations. UNHCR (2024) further emphasizes that non-refoulement remains applicable even when States characterize migration movements as security threats or as the "instrumentalization" of migrants and asylum seekers. These institutional positions strengthen the view that non-refoulement applies to State conduct, not only to formal refugee recognition.

Recent scholarship also shows that the scope of non-refoulement is being tested by extraterritorial migration control. Hirst (2024) argues that the extraterritorial scope of non-refoulement becomes crucial when States exercise migration control beyond their territorial borders. Nicolosi (2024) explains that externalisation of migration controls refers to practices through which States manage migration beyond their borders, often by collaborating with third countries or non-State actors. Such practices include outsourcing border control functions, implementing agreements with neighbouring or transit countries, intercepting migrants before they reach the State's territory, and providing incentives for other countries to prevent migration flows. These developments show that migration control is no longer limited to territorial borders but increasingly operates through networks of cooperation, delegation, and indirect control.

The legal significance of externalisation lies in its potential to create accountability gaps. Nicolosi (2024) argues that externalisation practices are often used to shift the burden of migration management away from receiving States and onto other actors or territories, frequently on the assumption that human rights obligations apply only territorially. Ghezelbash and McDonnell (2024) also observe that externalised migration controls have generated serious human rights concerns, including through containment, pullbacks, offshore processing, and safe-country arrangements. These practices show that States often do not directly deny non-refoulement; instead, they restructure migration control so that responsibility appears legally distant. This article conceptualizes such conduct as a sovereignty-distance strategy.

The relationship between non-refoulement and jus cogens further complicates this debate. Allain (2001) famously argued that non-refoulement has acquired the character of jus cogens because it protects fundamental human values and permits no derogation in its essential content. However, later scholarship adopts a more cautious position. Costello and Foster (2016) argue that the status of non-refoulement must be examined through a "custom plus" methodology, distinguishing the evidence required for customary international law from the additional requirements for peremptory status. This debate reveals that it may be too broad to claim that every application of non-refoulement automatically has jus cogens status. At the same time, it is too narrow to treat non-refoulement merely as a treaty obligation under Article 33 of the Refugee Convention.

The central research gap addressed by this article lies in the limited integration between non-refoulement doctrine and environmental displacement. Existing scholarship has examined non-refoulement under the Refugee Convention, international human rights law, customary international law, and jus cogens. Other studies have discussed externalisation of migration control and the accountability gaps created by offshore processing, pushbacks, and safe-third-country arrangements. However, fewer studies connect these doctrinal debates with environmental displacement, particularly where ecological degradation, climate-related disaster, or severe environmental vulnerability creates risks that fall outside the classical refugee definition. This gap is significant because environmental displacement challenges the traditional boundaries of refugee protection and requires a broader legal framework based on human rights, environmental justice, sustainable development, and the limits of State sovereignty (McAdam, 2016; Ammer & Mayrhofer, 2023; Vallandro do Valle, 2024).

The academic contribution of this article is therefore not merely to restate the general proposition that non-refoulement applies beyond the Refugee Convention or that it may be connected to jus cogens. Such arguments have already appeared in prior scholarship (Allain, 2001; Costello & Foster, 2016). The specific contribution of this article lies in developing a more operational doctrinal framework through two original concepts: the three-layer normative convergence test and the sovereignty-distance strategy. The first concept clarifies the source, scope, and intensity of non-refoulement obligations, while the second concept explains how States maintain factual control over migration while attempting to create legal distance from responsibility. By integrating environmental displacement into this framework, the article offers a more contextually relevant contribution to legal scholarship on human protection, environmental law, and State responsibility.

Based on the above background, this article formulates three research questions. First, how has the principle of non-refoulement developed beyond the 1951 Refugee Convention framework under customary international law, international human rights law, and environmental displacement discourse? Second, to what extent can the core content of non-refoulement be characterized as part of jus cogens? Third, how does the principle of non-refoulement limit State sovereignty in the context of border control, national security, environmental displacement, and extraterritorial migration governance?

The purpose of this article is to analyze the legal obligations of States outside the Refugee Convention framework by examining the relationship between non-refoulement, environmental displacement, jus cogens, and the limits of sovereignty. More specifically, this article aims to clarify that State sovereignty over migration and border control remains legally valid only insofar as it does not expose individuals to serious and irreparable harm, including harm arising from environmental degradation, climate-related disaster, ecological collapse, or severe deprivation of basic human needs. The article also aims to develop a doctrinal framework that can be used to assess the responsibility of non-party States, transit States, and States using externalized migration-control mechanisms in situations involving environmentally displaced persons.

Method

This article employs normative legal research to examine the legal obligations of States outside the 1951 Refugee Convention framework, particularly in relation to non-refoulement, environmental displacement, jus cogens, and State sovereignty. Normative legal research is appropriate because the central issue of this article concerns the interpretation, systematization, and evaluation of legal norms governing forced migration, environmental harm, human rights protection, and the limits of sovereign discretion. The research does not aim to measure empirical refugee flows or assess State practice through quantitative data. Instead, it analyzes how international legal norms operate, interact, and limit the exercise of sovereign power in the context of migration control, removal, extradition, interception, externalized border governance, and environmental displacement.

The research uses four main approaches: the statutory approach, conceptual approach, case-law approach, and environmental-human rights approach. The statutory approach is used to examine relevant international legal instruments, including the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture, the International Covenant on Civil and Political Rights, and relevant regional human rights instruments. This approach is also used to examine the International Law Commission's 2022 Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law. These instruments are important because they provide the normative basis for assessing whether non-refoulement operates only as a treaty-based refugee-law obligation or as a broader obligation under customary international law, human rights law, and peremptory norms (International Law Commission, 2022; UNHCR, 2018).

The conceptual approach is used to analyze the key concepts of non-refoulement, environmental displacement, jus cogens, sovereignty, customary international law, non-derogability, extraterritorial jurisdiction, irreparable harm, and international responsibility. This approach is necessary because the article does not treat non-refoulement as a single, undifferentiated legal rule. Rather, it examines non-refoulement as a multi-source obligation with different levels of normative force. Through this conceptual approach, the article develops the three-layer normative convergence test, consisting of the customary baseline, the human rights non-derogability layer, and the jus cogens core. The same approach is also used to formulate the concept of sovereignty-distance strategy, which explains how States may preserve factual control over migration while attempting to create legal distance from responsibility (Costello & Foster, 2016; Nicolosi, 2024).

The case-law approach is used to examine relevant international and regional jurisprudence concerning removal, expulsion, extradition, maritime interception, extraterritorial migration control, and protection against serious harm. Cases such as Soering v United Kingdom, Chahal v United Kingdom, Hirsi Jamaa and Others v Italy, and climate-related non-refoulement debates following the UN Human Rights Committee's reasoning in Teitiota v New Zealand are used to illustrate how courts and human rights bodies have developed the prohibition of removal to a real risk of torture, inhuman treatment, arbitrary deprivation of life, or other serious harm. These cases are not used merely as historical examples, but as doctrinal materials for identifying the legal reasoning through which non-refoulement limits State discretion (McAdam, 2020; Hirst, 2024).

The environmental-human rights approach is used to explain how ecological degradation, climate-related disaster, sea-level rise, drought, loss of livelihood, lack of access to essential resources, and severe environmental vulnerability may create conditions relevant to non-refoulement analysis. This approach recognizes that environmental displacement often occurs in legal grey zones. Affected persons may not qualify as refugees under Article 1A(2) of the Refugee Convention, but their removal may still raise legal issues where environmental harm threatens life, dignity, health, food, water, shelter, or survival. This approach is supported by scholarship linking climate change, disaster displacement, human rights, and the principle of non-refoulement (McAdam, 2016, 2020; Ammer & Mayrhofer, 2023; Vallandro do Valle, 2024).

The legal materials used in this article consist of primary and secondary legal materials. Primary legal materials include international treaties, customary international law, general principles of law, resolutions, authoritative interpretations by international bodies, and judicial decisions. Secondary legal materials include journal articles, academic books, institutional reports, commentaries, and recent scholarship on non-refoulement, jus cogens, environmental displacement, climate-induced migration, externalization, and migration governance. Particular attention is given to recent scholarship from reputable international law, refugee law, environmental law, and human rights journals.

The analysis is conducted through qualitative legal reasoning. First, the article identifies the legal sources of non-refoulement under refugee law, human rights law, customary international law, environmental displacement discourse, and jus cogens. Second, it compares the normative content of non-refoulement across these legal regimes to determine whether they impose different thresholds, exceptions, and consequences. Third, it evaluates how these obligations apply to States outside the Refugee Convention framework, including non-party States, transit States, and States using externalized migration-control arrangements. Fourth, it constructs a doctrinal model through the three-layer normative convergence test to determine the source and intensity of State obligations in different legal contexts.

This method allows the article to answer the research questions in a structured way. The statutory and case-law approaches explain how non-refoulement has developed beyond the Refugee Convention framework. The conceptual approach clarifies the relationship between non-refoulement and jus cogens. The environmental-human rights approach explains how ecological harm may become relevant to protection against removal. The analysis of externalized migration control explains how non-refoulement limits sovereignty when States attempt to create distance between factual control and legal responsibility. By combining these approaches, the article provides a doctrinal framework for understanding non-refoulement not merely as a refugee-law rule, but as a multi-source legal obligation that operates as a structural limit on sovereign power in contemporary international migration and environmental displacement law.

Results and Discussion

Non-Refoulement Beyond the Refugee Convention Framework

The first result of this normative analysis is that *non-refoulement* cannot be understood only as an obligation arising from Article 33 of the 1951 Refugee Convention. Article 33 remains the classical and most influential treaty formulation of the principle, but contemporary international law has expanded the normative basis of *non-refoulement* through human rights law, customary international law, and the logic of peremptory norms. This development is important because the Refugee Convention does not cover all persons who face serious and irreversible harm upon return. The Convention definition focuses on persecution based on race, religion, nationality, membership of a particular social group, or political opinion. However, contemporary displacement increasingly involves mixed causes, including armed conflict, environmental degradation, public health collapse, trafficking, gender-based violence, and severe deprivation of economic and social rights. Vallandro do Valle (2024) argues that modern *non-refoulement* analysis has traditionally focused on civil and political rights, while economic, social, and cultural rights have often been treated only indirectly through the category of inhuman or degrading treatment. This confirms that the Refugee Convention framework is not sufficient to explain the full scope of protection needed in contemporary forced migration.

The expansion of *non-refoulement* beyond the Refugee Convention is also evident in the development of international human rights law. The Convention Against Torture explicitly prohibits the return of a person to a State where there are substantial grounds for believing that the person would be in danger of torture. Unlike Article 33(2) of the Refugee Convention, the prohibition under the Convention Against Torture does not recognize national security or serious criminality as exceptions. This distinction is doctrinally important because it shows that *non-refoulement* has different normative intensities depending on the legal source involved. A person may be excluded from refugee protection under the Refugee Convention, but this does not necessarily allow the State to remove that person to torture, arbitrary execution, enforced disappearance, or other irreparable harm. Costello and Foster (2016) emphasize that the status of *non-refoulement* must be assessed carefully through its multiple sources, including treaty law, customary international law, and possible peremptory status. Therefore, the obligation is not exhausted by the Refugee Convention.

The second result is that *non-refoulement* has acquired a customary dimension that is especially relevant for States outside the Refugee Convention framework. Customary international law binds States regardless of whether they have ratified a particular treaty, provided that the norm is supported by general State practice and *opinio juris*. In the context of *non-refoulement*, widespread treaty codification, national asylum practices, judicial decisions, UNHCR guidance, and regional human rights instruments support the conclusion that the prohibition of return to serious harm has become part of general international law. This does not mean that every aspect of refugee law has become customary law. Rather, the customary minimum is that States may not transfer individuals to a real and foreseeable risk of serious harm. This baseline is crucial for non-party States, transit States, and States that rely on immigration law rather than formal asylum legislation.

The customary dimension of *non-refoulement* also prevents States from using treaty non-ratification as a complete defense. A State that has not ratified the 1951 Refugee Convention may argue that it is not bound by Article 33 as a treaty provision. However, that argument does not resolve its obligations under customary international law or under other human rights treaties to which it may be a party. UNHCR (2024) affirms that *non-refoulement* remains applicable even where migration movements are framed as security concerns or as "instrumentalization" by other States. This indicates that the legal function of *non-refoulement* is preventive: it limits removal where removal would expose a person to serious harm. The obligation therefore attaches to the risk created by State action, not merely to the formal status of the individual.

Human Rights-Based Non-Refoulement and Irreparable Harm

The third result is that human rights law has broadened *non-refoulement* from a refugee-status rule into a status-neutral protection obligation. Under human rights law, the decisive issue is not whether the individual satisfies the Refugee Convention definition, but whether removal would expose the person to a real risk of irreparable harm. This includes torture, cruel, inhuman or degrading treatment, arbitrary deprivation of life, enforced disappearance, and other serious violations of fundamental rights. Human rights-based *non-refoulement* applies to all persons under the jurisdiction or effective control of the State, regardless of nationality, legal status, mode of arrival, or criminal record. This status-neutral character is essential because many people in need of protection may not be recognized as refugees but still face serious harm if returned.

The development of human rights-based *non-refoulement* also affects the threshold of harm. Traditional refugee law focuses on persecution connected to specific Convention grounds. Human rights law, by contrast, focuses on the severity and foreseeability of harm. Vallandro do Valle (2024) provides an important recent contribution by arguing that severe deprivation of economic, social, and cultural rights can, in certain circumstances, trigger *non-refoulement* obligations. This argument is particularly relevant in situations where return would expose an individual to extreme destitution, denial of essential medical care, famine-like conditions, or conditions that destroy human dignity. Although not every form of poverty or hardship meets the threshold, severe deprivation may become legally relevant when it reaches the level of irreparable harm.

This broader approach is consistent with the preventive purpose of *non-refoulement*. The principle is designed to prevent exposure to harm before the harm occurs. Therefore, the risk assessment must be forward-looking, individualized, and based on reliable information about both personal circumstances and country conditions. A State cannot satisfy *non-refoulement* by relying only on formal diplomatic assurances, general safe-country designations, or abstract assumptions about protection in the receiving State. If there is a real risk that the individual will face torture, inhuman treatment, arbitrary deprivation of life, or chain *refoulement*, removal must be suspended. This is particularly important in cases involving vulnerable persons, including children, survivors of torture, victims of trafficking, stateless persons, persons with disabilities, and persons facing gender-based harm.

The Jus Cogens Core of Non-Refoulement

The fourth result concerns the relationship between *non-refoulement* and *jus cogens*. The analysis shows that it is doctrinally more precise to identify a *jus cogens* core of *non-refoulement* rather than to claim that every possible application of *non-refoulement* automatically has peremptory status. The International Law Commission (2022) defines peremptory norms of general international law as norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted. Examples commonly associated with *jus cogens* include the prohibitions of genocide, slavery, torture, crimes against humanity, and aggression. If removal would expose a person to a real risk of such peremptory harm, the sending State cannot rely on sovereignty, domestic law, bilateral agreement, national security, or migration control to justify the transfer.

This finding avoids two doctrinal extremes. The first extreme is to treat *non-refoulement* only as a treaty rule under Article 33 of the Refugee Convention. This position is too narrow because human rights law and customary international law clearly prohibit return to certain forms of serious harm, regardless of formal refugee status. The second extreme is to argue that all forms of *non-refoulement* have *jus cogens* status without distinguishing between different types of harm and different legal sources. This position may be too broad because *non-refoulement* operates across different legal regimes with different thresholds and consequences. Allain (2001) offers an influential argument for the *jus cogens* nature of *non-refoulement*, while Costello and Foster (2016) adopt a more cautious approach that tests the norm through custom and peremptory status. The present article builds on this debate by proposing a layered model that recognizes the peremptory core without collapsing all forms of *non-refoulement* into *jus cogens*.

The *jus cogens* core of *non-refoulement* should be understood as the preventive implication of substantive peremptory norms. If international law absolutely prohibits torture, then a State cannot lawfully send a person to a place where torture is a real and foreseeable risk. If international law absolutely prohibits genocide, slavery, or crimes against humanity, then a State cannot transfer a person into conditions where such harm is likely to occur. In this sense, *non-refoulement* functions as a protective bridge between the sending State's conduct and the receiving State's anticipated violation. The sending State may not commit the underlying violation directly, but it contributes to the risk by transferring the individual into the zone of harm. Therefore, the peremptory character of the underlying norm strengthens the non-derogable character of the removal prohibition.

The legal consequence of this finding is that certain sovereign acts become invalid when they conflict with the *jus cogens* core of *non-refoulement*. Bilateral readmission agreements, offshore processing arrangements, diplomatic assurances, or safe-third-country transfers cannot lawfully authorize removal to torture, slavery, genocide, crimes against humanity, or comparable peremptory harm. The formal legality of an agreement does not cure the substantive unlawfulness of exposing a person to peremptory harm. This is the strongest point at which *non-refoulement* limits sovereignty: the State may control migration, but it may not use migration control to participate in the production of peremptory violations.

Extraterritorial Migration Control and Sovereignty-Distance Strategy

The fifth result is that contemporary States increasingly attempt to avoid *non-refoulement* obligations through externalized migration control. Externalisation refers to practices through which States manage migration beyond their territorial borders, often by cooperating with third countries, private actors, or regional institutions. Nicolosi (2024) defines externalisation as a set of practices by which States seek to manage migration flows and enforce immigration policies outside their own territory, including through agreements with neighbouring or transit States, outsourcing of border control, offshore processing, and remote migration management. These practices are legally significant because they allow States to exercise influence over migration while claiming that responsibility lies elsewhere.

Recent scholarship confirms that externalisation creates accountability gaps. Ghezelbash (2024) argues that externalized migration control has often been analyzed through its impact on entry and access to asylum, while the human right to leave remains an underused avenue for challenging containment practices. Nicolosi (2024) similarly explains that externalisation may shift migration-management functions to third States or other actors, thereby complicating attribution, jurisdiction, and responsibility. The legal risk is that States may preserve practical control over migration routes while avoiding formal responsibility for the consequences of that control. This is precisely the pattern that this article identifies as sovereignty-distance strategy.

The concept of sovereignty-distance strategy is one of the main novelties of this article. It describes State practices that maintain factual or operational control over migration while creating legal, territorial, procedural, or institutional distance from responsibility. This strategy can operate in several forms. Territorial distance occurs when a State moves migration control outside its territory through interception at sea, transit-zone control, or offshore processing. Institutional distance occurs when the State relies on another State, international organization, or private actor to perform migration-control functions. Procedural distance occurs when access to asylum procedures is blocked before the individual can formally lodge a protection claim. Legal distance occurs when the State characterizes a transfer as a safe-third-country arrangement, voluntary return, readmission process, rescue operation, or security measure rather than a removal decision.

This concept clarifies why traditional territorial approaches to jurisdiction are insufficient. If responsibility depended only on physical territory, States could avoid *non-refoulement* by preventing individuals from reaching their borders. Hirst (2024) argues that the extraterritorial scope of *non-refoulement* is crucial because the principle would be weakened if States could evade it through maritime interception or offshore arrangements. The better approach is functional rather than purely territorial. Where a State exercises authority, effective control, decisive influence, financial support, operational coordination, legal direction, or causal participation in the transfer process, *non-refoulement* obligations should follow the exercise of State power.

The sovereignty-distance strategy also helps explain why formal safe-country designations are insufficient. A State may claim that a person is being transferred to a safe third country, but the designation must be tested against actual conditions. If the third country lacks fair asylum procedures, exposes migrants to arbitrary detention, tolerates ill-treatment, or may send the person onward to danger, the transfer can amount to indirect or chain *refoulement*. Similarly, diplomatic assurances cannot automatically eliminate risk. They must be specific, reliable, enforceable, and independently monitored. Where the receiving State has a systematic record of torture, enforced disappearance, or arbitrary detention, general assurances should not be treated as sufficient.

The Three-Layer Normative Convergence Test as the Main Novelty

The central novelty of this research is the formulation of the three-layer normative convergence test. This test is designed to determine the legal obligations of States outside the Refugee Convention framework by identifying the applicable normative layer. The first layer is the customary baseline. At this level, all States, including non-parties to the Refugee Convention, are prohibited from returning individuals to a real risk of serious harm where *non-refoulement* has crystallized as customary international law. This layer is important for non-party States and for situations where domestic law does not provide formal refugee status. It establishes that non-ratification of the Refugee Convention does not create a legal vacuum.

The second layer is the human rights non-derogability layer. At this level, *non-refoulement* applies when return would expose any person to torture, cruel, inhuman or degrading treatment, arbitrary deprivation of life, enforced disappearance, or similarly irreparable harm. This layer is status-neutral and applies regardless of whether the person is a refugee, asylum seeker, migrant, stateless person, criminal suspect, or person excluded from refugee status. This layer is strongly supported by the development of human rights-based *non-refoulement*, particularly under the Convention Against Torture and international human rights jurisprudence. It also allows the analysis to include severe deprivation of economic, social, and cultural rights where such deprivation reaches the threshold of irreparable harm, as discussed by Vallandro do Valle (2024).

The third layer is the jus cogens core. At this level, removal is absolutely prohibited where the anticipated harm engages peremptory norms, such as torture, genocide, slavery, crimes against humanity, or comparable fundamental violations. This layer carries the strongest legal consequence because no derogation is permitted. Domestic law, bilateral agreements, national security justifications, readmission arrangements, and externalisation policies cannot override this core. This approach is consistent with the International Law Commission's understanding of *jus cogens* as a category of norms from which no derogation is permitted (International Law Commission, 2022). It also refines earlier debates by recognizing that the *jus cogens* character of *non-refoulement* is strongest where the underlying harm itself is peremptory.

The three-layer test is academically significant because it provides an operational framework rather than a general doctrinal claim. Previous literature has already argued that *non-refoulement* applies beyond the Refugee Convention or that it may have *jus cogens* character. The contribution of this article is to explain how those arguments can be organized into a practical legal test. The test allows judges, policymakers, and scholars to ask three sequential questions. First, is there a customary obligation prohibiting return to serious harm? Second, would the removal expose the person to irreparable harm protected under human rights law? Third, does the anticipated harm implicate a peremptory norm? The answer to these questions determines the source, scope, and intensity of the State's obligation.

This layered model also improves doctrinal precision. It avoids the common problem of treating *non-refoulement* as either entirely *jus cogens* or entirely non-peremptory. Instead, it recognizes that *non-refoulement* operates through overlapping legal regimes. Some applications may be grounded primarily in refugee law. Others may be grounded in human rights law. The most serious cases, especially return to torture, genocide, slavery, or crimes against humanity, engage the *jus cogens* core. This model therefore produces a more nuanced and defensible understanding of *non-refoulement* outside the Refugee Convention framework.

Limits of Sovereignty Outside the Refugee Convention Framework

The final result of the analysis is that State sovereignty remains valid in migration governance, but it is legally limited by *non-refoulement*. States retain authority to regulate borders, determine admission, remove persons without lawful status, and protect national security. However, these sovereign powers must be exercised consistently with international law. A State may refuse entry, but it may not reject a person at the frontier without assessing whether rejection would expose the person to serious harm. A State may remove a non-citizen, but it may not deport that person to torture or arbitrary execution. A State may cooperate with third countries, but it may not use such cooperation to facilitate chain *refoulement*. A State may externalize migration control, but it may not externalize responsibility.

This conclusion is particularly important for States outside the Refugee Convention framework. Such States may not be bound by Article 33 as a treaty provision, but they may still be bound by customary international law, human rights treaties, and peremptory norms. The absence of Convention ratification affects the formal source of obligation, but not necessarily the existence of protection duties. For non-party States, the minimum obligation is to avoid returning persons to serious and foreseeable harm. Where the harm reaches the level of torture, arbitrary deprivation of life, enforced disappearance, genocide, slavery, or crimes against humanity, the obligation becomes stronger and may operate as part of the *jus cogens* core.

Procedurally, the limit on sovereignty requires effective risk assessment. States must provide access to procedures capable of identifying protection needs. Collective expulsion, automatic pushbacks, blanket safe-country assumptions, and removal without individualized assessment are inconsistent with the preventive function of *non-refoulement*. A meaningful procedure must allow the person to raise a protection claim, present relevant evidence, receive interpretation where needed, and challenge removal before it occurs. Without procedural safeguards, the substantive prohibition of *refoulement* becomes ineffective.

Substantively, the limit on sovereignty requires States to assess the real conditions in the receiving State. Formal assurances are not enough if evidence shows systematic torture, arbitrary detention, persecution, or onward removal. Safe-third-country transfers must be based on actual safety, not merely diplomatic designation. Offshore processing must provide fair procedures, humane reception conditions, and protection against onward return. Interception at sea must lead to disembarkation in a place of safety, not to return to danger. In all of these contexts, the decisive question is whether State conduct exposes a person to a real risk of serious and irreversible harm.

Overall, the findings of this article show that *non-refoulement* functions as a structural limit on sovereignty. Its legal force is not confined to the Refugee Convention. Rather, it emerges through the convergence of customary international law, human rights law, and *jus cogens*. The three-layer normative convergence test explains how these legal sources operate together, while the concept of sovereignty-distance strategy explains how contemporary States attempt to avoid responsibility through externalized migration governance. These two concepts constitute the main novelty of this research and provide a stronger doctrinal basis for assessing State obligations outside the Refugee Convention framework.

Environmental Displacement and the Expansion of Non-Refoulement Protection

A further finding of this study is that environmental displacement strengthens the argument that non-refoulement should not be confined to the formal Refugee Convention framework. Environmental displacement refers to movement caused or intensified by environmental degradation, climate-related disaster, sea-level rise, drought, floods, loss of livelihood, water scarcity, or ecological conditions that make human life increasingly unsafe or unsustainable. Although the Refugee Convention does not expressly include environmental harm as an independent ground for refugee status, this does not mean that environmentally displaced persons are entirely outside international legal protection. McAdam (2016) argues that climate change and disasters expose the limits of existing refugee law because many affected persons do not meet the classical refugee definition despite facing serious protection needs.

The key legal question is whether return would expose the person to a real risk of serious and irreparable harm. In some cases, environmental harm may create conditions that threaten the right to life, health, food, water, shelter, and human dignity. Where such conditions reach an extreme level, removal may raise issues under human rights-based non-refoulement. McAdam (2020) explains that climate-related non-refoulement claims are difficult but legally possible where the risk to life becomes sufficiently serious and imminent. Ammer and Mayrhofer (2023) similarly show that cross-border disaster displacement may engage Article 3 of the European Convention on Human Rights where return would expose a person to inhuman or degrading treatment.

Environmental displacement also shows the importance of linking non-refoulement with sustainable development and environmental justice. Persons displaced by ecological harm often occupy a vulnerable legal position because they may not qualify as refugees under Article 1A(2) of the Refugee Convention, yet they may face serious harm if returned. In this situation, a narrow interpretation of sovereignty would allow States to remove individuals without adequately assessing environmental risk. A broader human rights and environmental law approach requires States to conduct individualized and contextual risk assessments before removal, especially where return may expose individuals to conditions incompatible with human dignity (Pijnenburg, 2023; Vallandro do Valle, 2024).

This finding is significant for States outside the Refugee Convention framework. Even if a State is not formally bound by Article 33 of the Refugee Convention, it may still have obligations under customary international law, human rights treaties, and general principles of international law. Where environmental harm creates a foreseeable risk of death, inhuman treatment, or severe deprivation of basic needs, non-refoulement may operate as a limit on removal. Therefore, environmental displacement should not be treated merely as a humanitarian issue, but as a legal issue involving State responsibility, environmental protection, and the limits of migration sovereignty.

The environmental dimension also strengthens the article's argument that non-refoulement must be analyzed through a layered framework. At the customary baseline, States must avoid returning individuals to serious and foreseeable harm. At the human rights non-derogability layer, removal is prohibited when environmental conditions create a real risk of irreparable harm, such as death, inhuman treatment, or severe deprivation of basic needs. At the jus cogens core, removal becomes absolutely prohibited where the anticipated harm is connected to peremptory violations, such as torture, slavery, genocide, crimes against humanity, or comparable fundamental violations. This layered approach avoids the overly broad claim that all environmental displacement automatically triggers non-refoulement, while also rejecting the narrow view that environmental harm is legally irrelevant to protection against removal.

The relevance of environmental displacement also shows that sovereignty cannot be understood merely as a right to exclude. Sovereignty must be exercised consistently with international legal obligations, including human rights protection and environmental responsibility. States may regulate migration, but they must not return persons to conditions where environmental degradation, climate-related disaster, or ecological collapse creates a real risk of serious and irreparable harm. This does not mean that every climate-affected person is automatically entitled to international protection. Rather, it means that removal decisions must include a serious assessment of environmental risk, individual vulnerability, available protection in the receiving State, and the possibility of onward harm. Such an approach is more consistent with contemporary developments in non-refoulement doctrine, environmental law, and sustainable development.

Limits of Sovereignty Outside the Refugee Convention Framework

The final result of the analysis is that State sovereignty remains valid in migration governance, but it is legally limited by non-refoulement. States retain authority to regulate borders, determine admission, remove persons without lawful status, and protect national security. However, these sovereign powers must be exercised consistently with international law. A State may refuse entry, but it may not reject a person at the frontier without assessing whether rejection would expose the person to serious harm. A State may remove a non-citizen, but it may not deport that person to torture, arbitrary execution, inhuman treatment, or severe deprivation of basic rights. A State may cooperate with third countries, but it may not use such cooperation to facilitate chain refoulement. A State may externalize migration control, but it may not externalize responsibility (Hirst, 2024; Nicolosi, 2024).

In the context of environmental displacement, the limits of sovereignty become even more complex. States may argue that climate-related or environmentally induced movement does not fall within the Refugee Convention and therefore remains subject to ordinary immigration control. However, this argument is insufficient where return would expose individuals to environmental conditions that seriously threaten life, health, dignity, or survival. Sovereignty cannot be used as a legal shield to ignore foreseeable ecological harm. A State may control admission and removal, but it must first assess whether environmental degradation, disaster vulnerability, lack of access to essential resources, or ecological collapse creates a real risk of serious and irreparable harm (McAdam, 2020; Ammer & Mayrhofer, 2023).

This approach does not mean that every person affected by climate change or environmental degradation automatically receives protection against removal. Rather, it requires a careful legal assessment of the severity, foreseeability, and individual impact of environmental harm. The obligation of non-refoulement is triggered not by environmental hardship in general, but by environmental conditions that reach the threshold of irreparable harm. This distinction preserves the legitimate role of State sovereignty while ensuring that sovereignty is exercised consistently with human rights, environmental justice, and the preventive purpose of non-refoulement (Vallandro do Valle, 2024).

This conclusion is particularly important for States outside the Refugee Convention framework. Such States may not be bound by Article 33 as a treaty provision, but they may still be bound by customary international law, human rights treaties, and peremptory norms. The absence of Convention ratification affects the formal source of obligation, but not necessarily the existence of protection duties. For non-party States, the minimum obligation is to avoid returning persons to serious and foreseeable harm. Where the harm reaches the level of torture, arbitrary deprivation of life, enforced disappearance, genocide, slavery, crimes against humanity, or comparable fundamental harm, the obligation becomes stronger and may operate as part of the jus cogens core (Allain, 2001; Costello & Foster, 2016; International Law Commission, 2022).

Procedurally, the limit on sovereignty requires effective risk assessment. States must provide access to procedures capable of identifying protection needs. Collective expulsion, automatic pushbacks, blanket safe-country assumptions, and removal without individualized assessment are inconsistent with the preventive function of non-refoulement. In environmental displacement cases, risk assessment should include the actual environmental conditions in the receiving State, availability of water, food, shelter, health services, livelihood, disaster protection, and the capacity of the State to protect vulnerable persons. Without procedural safeguards, the substantive prohibition of refoulement becomes ineffective.

Substantively, the limit on sovereignty requires States to assess the real conditions in the receiving State. Formal assurances are not enough if evidence shows systematic torture, arbitrary detention, persecution, environmental collapse, severe disaster vulnerability, or onward removal. Safe-third-country transfers must be based on actual safety, not merely diplomatic designation. Offshore processing must provide fair procedures, humane reception conditions, and protection against onward return. Interception at sea must lead to disembarkation in a place of safety, not to return to danger. In all of these contexts, the decisive question is whether State conduct exposes a person to a real risk of serious and irreversible harm.

Overall, the findings of this article show that non-refoulement functions as a structural limit on sovereignty. Its legal force is not confined to the Refugee Convention. Rather, it emerges through the convergence of customary international law, human rights law, environmental displacement discourse, and jus cogens. The three-layer normative convergence test explains how these legal sources operate together, while the concept of sovereignty-distance strategy explains how contemporary States attempt to avoid responsibility through externalized migration governance. These two concepts constitute the main novelty of this research and provide a stronger doctrinal basis for assessing State obligations outside the Refugee Convention framework.

Conclusion

This article concludes that non-refoulement has developed beyond its classical formulation under Article 33 of the 1951 Refugee Convention. Its legal force now emerges through the convergence of customary international law, international human rights law, and, in its core content, jus cogens. The study further shows that environmental displacement strengthens the need to understand non-refoulement beyond the narrow refugee-law framework. Persons displaced by environmental degradation, climate-related disaster, ecological vulnerability, or severe deprivation of basic needs may not always qualify as refugees under the Refugee Convention, but they may still require protection where return would expose them to serious and irreparable harm. This conclusion is consistent with scholarship showing that climate change, disasters, and severe deprivation create protection gaps that cannot be fully resolved by conventional refugee law alone (McAdam, 2016, 2020; Vallandro do Valle, 2024).

The main contribution of this article lies in the formulation of the three-layer normative convergence test and the concept of sovereignty-distance strategy. The three-layer test provides a doctrinal framework for identifying the source, scope, and intensity of State obligations outside the Refugee Convention framework. The first layer is the customary baseline binding all States. The second layer is the human rights non-derogability layer protecting all persons from irreparable harm. The third layer is the jus cogens core prohibiting removal to peremptory violations such as torture, genocide, slavery, and crimes against humanity. When applied to environmental displacement, this framework helps determine whether ecological harm reaches the legal threshold necessary to limit removal. This approach refines previous debates on non-refoulement as custom and jus cogens by distinguishing ordinary protection claims, human rights-based irreparable harm, and the peremptory core of the obligation (Allain, 2001; Costello & Foster, 2016; International Law Commission, 2022).

The concept of sovereignty-distance strategy explains how States may maintain factual control over migration while attempting to create legal distance from responsibility through pushbacks, offshore processing, maritime interception, safe-third-country transfers, readmission agreements, and cooperation with third-country authorities. In environmental displacement cases, similar strategies may appear when States treat environmentally displaced persons as ordinary irregular migrants without assessing the real risk of ecological harm upon return. This article therefore argues that sovereignty over migration control remains valid, but it is not absolute. It must be exercised consistently with non-refoulement, human rights protection, environmental justice, and sustainable development.

The limitation of this research is that it uses normative legal analysis and does not conduct empirical fieldwork on the implementation of non-refoulement in national asylum or immigration systems. Further research may develop the proposed framework through comparative studies of non-party States to the Refugee Convention, transit States, and States affected by climate-induced displacement. Future studies may also examine how domestic courts, regional human rights bodies, and administrative authorities assess environmental harm as a basis for protection against removal.

Acknowledgement

The authors express their appreciation to the Faculty of Law, Universitas 17 Agustus 1945 Jakarta, the Faculty of Law, Universitas Internasional Batam, and the Faculty of Law, Universitas Pasundan, Bandung, for their academic support during the preparation of this article. The authors also acknowledge colleagues and academic reviewers who provided constructive comments, language suggestions, and scholarly input for improving the clarity and coherence of the manuscript. This research did not receive any specific grant from public, commercial, or not-for-profit funding agencies.

Author Contributions Statement

W conceived the main research idea, developed the conceptual framework, and drafted the initial manuscript. ES contributed to the analysis of international legal sources, refinement of the argument on *non-refoulement* and State sovereignty, and critical revision of the manuscript. IM contributed to literature review, analysis of *jus cogens*, manuscript organization, and final editing. W, ES, IM approved the final version of the manuscript and agreed to be accountable for all aspects of the work.

AI Usage Statement

The authors declare that the use of Artificial Intelligence (AI) tools in this work was strictly limited to supportive functions, including language editing, grammar checking, and improving clarity and readability. AI was not used to generate the core ideas, conduct substantive legal analysis, interpret legal materials, or draw scholarly conclusions. The authors retain full responsibility for the originality, accuracy, and academic integrity of the content. AI tools are not credited as authors or contributors, in accordance with ethical standards in academic publishing.

Conflict of Interest

This section is a statement from the author that this article has a conflict of interest or not.

References

Allain, Jean. "The Jus Cogens Nature of Non-Refoulement." *International Journal of Refugee Law* 13, no. 4 (2001): 533–558.

Ammer, Margit, and Monika Mayrhofer. "Cross-Border Disaster Displacement and Non-Refoulement under Article 3 of the ECHR: An Analysis of the European Union and Austria." *International Journal of Refugee Law* 35, no. 3 (2023): 322–345.

Costello, Cathryn, and Michelle Foster. "Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test." In *Research Handbook on International Law and Migration*, edited by Vincent Chetail and Céline Bauloz, 273–327. Cheltenham: Edward Elgar, 2016.

Ghezelbash, Daniel, and Emilie McDonnell. "Challenging Externalisation Through the Lens of the Human Right to Leave." *Netherlands International Law Review* 71, no. 1 (2024): 119–154.

Goodwin-Gill, Guy S., and Jane McAdam. *The Refugee in International Law*. 4th ed. Oxford: Oxford University Press, 2021.

Hathaway, James C. *The Rights of Refugees under International Law*. 2nd ed. Cambridge: Cambridge University Press, 2021.

Hirst, Ned. "The Extra-Territorial Scope of Non-Refoulement." *Cornell International Law Journal* 55 (2024): 351–370.

International Law Commission. *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), with Commentaries*. Geneva: United Nations, 2022.

McAdam, Jane. *Climate Change, Disasters, and Displacement in International Law*. Oxford: Oxford University Press, 2016.

McAdam, Jane. "Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement." *American Journal of International Law* 114, no. 4 (2020): 708–725.

Nicolosi, Salvatore Fabio. "Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law." *Netherlands International Law Review* 71, no. 1 (2024): 1–20.

Pijnenburg, Annick. "Migration Deals Seen through the Lens of the International Covenant on Economic, Social and Cultural Rights." *International Journal of Refugee Law* 35, no. 2 (2023): 151–170.

UNHCR. *The Principle of Non-Refoulement under International Human Rights Law*. Geneva: UNHCR, 2018.

UNHCR. *Legal Considerations on Asylum and Non-Refoulement in the Context of "Instrumentalization"*. Geneva: UNHCR, 2024.

Vallandro do Valle, Mariana Ferolla. "Fleeing Deprivation: Deducing Non-Refoulement Obligations from Economic, Social and Cultural Rights." *International Journal of Refugee Law* 36, no. 4 (2024): 353–376.