ON NOAH'S ARK: BUILDING ARGUMENTS FOR CLIMATE MIGRANTS

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Abstract

The principle of state sovereignty occupies a ubiquitous position in public international law, and climate change is a problem that is adversely affecting the entire planet. Thus, the connection between state sovereignty and climate change is not difficult to perceive. But this apparent congenial relationship breaks down in the context of climate migration, and we encounter an essential question – how far can state sovereignty be considered an appropriate frame in the context of negotiating the status of climate migrants? Scholars are already reasoning that the severity of climate change necessitates re-looking at the antediluvian state principle under international law. Alternatively, it can also be argued that climate change provides a marvelous opportunity for states to redefine their bargaining assumptions on global negotiating platforms. One of the major problems is finding a comprehensive definition for people displaced by climate change-related events. Thus far, for 'refugees,' the only workable definition comes from the 1951 Refugee Convention that fails to recognize climate change as a factor. Subsequent developments have also not guided offering overlapping and alternative suggestions. The limitation stems from definitional challenges and the ever-present cause-and-effect dichotomy. But what stops states from adopting a more comprehensive approach transcends far beyond these operational challenges. In this article, we posit that the obstacle is primarily related to the conflict of state interests, and it is, thereby, possible to review the status of climate migrants under the emerging consensus supporting the dilution of the principle of state sovereignty.

Keywords: Climate Change, Migration, Refugee, Sovereignty, International Law.

Introduction

In 2018 at Sundance Film Festival, a documentary called *Anote's Ark*, made by Canadian filmmaker Matthieu Rytz was screened. The documentary was on climate change and was not the first documentary on this century's most controversial topics. Yet, it stood apart in one sense because it captured the essence of a sensitive but often ignored impact of climate change,

metaphorically what could be called 'death by the sea.' Sure enough, this expression is not purely symbolic as it is almost certain that sea level rise, one of the direct impacts of climate change, will wipe out a vast part of this planet in the future, and a number of Small Island nations have to accept that destiny helplessly. The documentary was the portrayal of the fate of Kiribati, an island nation in the South Pacific. The camera captured the relentless assault of the waves destroying the life of Kiribati in every aspect. Its President Anote Tong helplessly approached the leaders of other nations to ensure asylum with dignity for his fellow citizens without much success. Eventually, the fate of his diplomatic effort got entwined with an intense human rights struggle that came to the limelight in 2015 when his fellow countryman Ioane Teitiota approached the New Zealand Government, claiming recognition as a climate refugee. His application was rejected, and he filed a complaint before the UN Human Rights Committee (HRC), which oversees the International Covenant on Civil and Political Rights implementation.

The central issue in *Ioane Teitiota v. New Zealand*[1] was applying the principle of non-refoulement under human rights treaties.[2] HRC recognized several impending threats posed by climate change but took sides with New Zealand's decision. It solemnly held that "without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized."[3] Hence, *Teitiota*, as HRC concluded, failed to fulfill the criteria under Article 6 to get recognition as a climate refugee.

What this decision entails has much broader significance than merely reading the status of people affected by climate change under the human rights jurisprudence. Generic and well-debated issues since the passing of the judgment by HRC include the validity of the decision taken by New Zealand under international law, the principle of non-refoulment under human rights treaties, causal effects of climate change to buttress the claim under human rights laws

[1] Chhaya Bhardwaj, *Ioane Teitiota v New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020*, 23 ENVIRONMENTAL LAW REVIEW 263 (2021).
[2] Principle of non-refoulment. For a detailed discussion, *see id.* at para 9.11.
[3] *Id.* at Para 9.11.

and the acceptability of climate refugee definition. Almost unanimously, particular upshots were approved - that in *Teitiota,* New Zealand did not violate any international law; the principle of non-refoulment has indeed received a new incentive to motivate state actions in the future in similar circumstances; with the severity of climate change problems, it is increasingly becoming easy to establish the causal connection; and the definition of climate refugee is at flux (This is just a remarkable fact that HRC does not have any jurisdiction to pass any order over the status of climate refugee). Our aim in this paper is not to revisit *Teitiota* or the issues it has already triggered. Instead, we will focus on a much more complex and conflict-ridden issue in international law - state sovereignty - that silently shapes international decision-making. Intuitively, we suggest that the antiquated state sovereignty principle in international law plays a central role in shaping the international climate change negotiation process in an almost uncontested fashion. Following this axiom, we will examine whether the legal status of climate refugees can be addressed better if we can conceive state sovereignty differently.

There is, however, a theoretical complexity. It is extremely difficult to locate an inclusive and satisfactory definition of climate refugees within the framework of human rights laws. What should we call them - climate refugees or climate migrants, or simply ill-fated people displaced by the forces of nature? The only available suggestion comes from the 1951 Convention on the Status of Refugees (the 1951 Refugee Convention). But the definition of climate refugee under the Convention with its additional protocol does not cover people displaced by climate change-related events. Because the debate is about a law (or lack thereof) that may apply to people affected by climate change, a stronger argument can be made in favor of addressing the problem under the existing climate change laws, both international and domestic. But efforts to include provisions about the legal protection of climate refugees within the UNFCCC framework have been futile mainly because of normative challenges. After all, under the international climate change regime, states generally vehemently argue for their interests, and anything they agree to accept under the legal rule is always qualified by sufficient long-term incentives that may or may not be available to them.

For India, the inflow of people from neighbouring countries is already a severe problem. The estimation suggests that India will face a substantial increase in migration in the days ahead.[4] In most cases, total displacement with loss of home and livelihood has gone unnoticed.

[4] INTERNAL DISPLACEMENT MONITORING CENTRE, GLOBAL REPORT ON INTERNAL DISPLACEMENT 2020 (2020)., https://www.internal-displacement.org/global-report/grid2020/ (last visited November 26, 2022).

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Domestically, the little legislative framework can deal with the displacement problem. For example, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement Act, 2013 is one legislation that provides compensation in cases of land acquisition by the Government for developmental activities to take place in the state. Another legislation that deals with rehabilitation in climate events is the Disaster Management Act of 2005, which prepares disaster plans, prevents or mitigates the effects of disasters, and coordinates and manages responses. However, these laws do not address the rehabilitation of climate refugees from other nations. This indicates a crisis that already needs a domestic solution. But can that solution be exclusionary in nature? Here, we may sheepishly forward a line of reasoning leading to some more tricky questions – does it make sense for India to accept climate refugees from Bangladesh? What is the difference when India can refuse to accept migrants from Kiribati but should accept them when they come from Bangladesh? Here also, theoretically, the search for plausible answers should begin with the inquiry into India's sovereign rights *vis a vis* its position in international law. In the following progression, we posit that India is already positioned to extend protection to vulnerable populations who enter the country after being severely affected by climate change events. In this way, India forwards a unique template of state sovereignty that may open up a tremendous opportunity for other nations to learn from regional cooperation, which can have a meaningful impact on future climate change negotiations.

The article is divided into five parts. The first part introduces the subject. Part II deals with the definitional challenges that are connected to the identification of people displaced by the events of climate change. Disconcertingly, we note that international law challenges have proved difficult to overcome. Part III discusses the relevant theories of state sovereignty. This Part is divided into two segments – the first section touches briefly upon the conventional understanding of state sovereignty, The following area opens up to a more contemporary application of the concept. The discussion prepares us to delve into an inquiry undertaken in Part IV related to the status, importance, and application of state sovereignty in international environmental law. The following section of this Part examines the application of the idea of state sovereignty in the context of climate migration. Part V is about India's standing. By adopting a nuanced and tolerable class towards climate displacement, we argue that India advances a regional model of cooperation under which the concept of state sovereignty makes way for profound humanitarian reasons. Part VI concludes the paper.

Definitional Challenges

Because the plight of climate refugees has been a matter of open debate since the 1980s, the existing definitional discontent is somewhat undesirable.[5] Typical classification with somewhat interchangeable expressions such as environment/climate migrant, climate refugees, and environmentally/climate displaced persons has led us to overlap and contested jurisprudence. In this article, for the sake of simplicity, we prefer to use them interchangeably, though.

Upfront, we face difficulty determining the reasons responsible for displacing people from their original places. Suppose rising levels inundate a low-lying area of a country, and affected people start migrating. In such a case, it is possible to assume that increasing sea level is the direct negative impact of climate change causing displacement. The same issue in another country, where low-lying areas are better protected because of proper and timely initiatives taken by the government, will not be severe enough. However, then the focus of the debate shifts from a lack of options available to the affected group to a lack of action on the part of the government.[6] This takes us to a standoff. How should we identify groups forced to move only because of climate change? How should we segregate climate change as a reason from other possible causes? How far different terminologies used thus far accept these nuances?

It, therefore, certainly makes sense to understand the specific terminologies. In 1970, Lester Brown of the World Watch Institute coined the term 'environmental refugee' or 'climatic refugee,' which began to gain popularity in the 1990s.[7] The general understanding that followed presented a plain meaning of climate refugee - a person or a group of persons who become stateless due to anthropogenic or natural climate change. One can argue that such an understanding of climate refugees is a subset of the climate-induced migration 'or displacement.' As it suggests, climate-induced migration or displacement can be categorized further based on the extent of the removal caused. In addition, there can be further classification

[5]This perhaps came in the limelight when Essam El-Hinnawi of UNEP called environmental refugees 'as: *... those people who have been forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life'*

[6] Alex Randall, *Climate refugee statistics,* CLIMATE AND MIGRATION COALITION (Nov 25, 2022, 11.07 A.M) https://climatemigration.org.uk/climate-refugee-statistics/ (last visited November 26, 2022).

[7] James Morrissey, *Rethinking the Debate on Environmental Refugees: 'From Maximalists and Minimalists' to Proponents and Critics*, 19 JPE 36, 49 (2012); *See also* CAMILLO BOANO ET.AL., ENVIRONMENTALLY DISPLACED PEOPLE: UNDERSTANDING THE LINKAGES BETWEEN ENVIRONMENTAL CHANGE, LIVELIHOODS AND FORCED MIGRATION (2008).

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- internal and cross-border migration. Internal migration means the migration which causes the person to migrate within the nation, for example, a shift from rural to urban regions. What we need to acknowledge is that migration is a phenomenon that has numerous push factors, such as better job opportunities, health care facilities, education systems, political stability, religious freedom, etc.[8]

Nevertheless, an expression like climate or environmental refugee has been criticized as misleading. These criticisms mainly point towards the 1951 Refugee Convention and international refugee law, where the expression 'climate refugees' finds a place. The definition available under the 1951 Convention is narrow and misses an additional category of persons like climate migrants. It was meant to be that way because international law did not include the debate over climate change within its fold when the 1951 Convention took shape. This is amply reflected as some scholars reasoned that the term 'climate refugee' is a phantom manifestation of something without lawful subsistence. According to them, persons forced to escape their country due to ecological or climatic processes or events will not necessarily meet the refugee definition defined by Article 1A (2) of the Refugee Convention[9] and Protocol.[10] It does not accept climate change as one of the criteria for creating refugees.

Over the years, critics have urged us to break free from the thin understanding of climate refugees. They have contended that instead of climate refugee, environmental migrant, or something more contemporary, an expression such as 'displaced person' appears to be more appropriate vocabulary.[11] Alternatively, from the theoretical point of view, as J. McAdam argues, the term climate migrant seems to be more appropriate in comparison to climate refugees:

The movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their

[8] STEPHEN CASTLES & COLIN RAJAH, ENVIRONMENTAL DEGRADATION, CLIMATE CHANGE, MIGRATION AND DEVELOPMENT: MEXICO (2010).
[9] Convention relating to the Status of Refugees, 1951 (adopted 28 July 1951, entered into force 22 April 1954).
[10] Protocol relating to the Status of Refugees, OHCHR 1967, https://www.ohchr.org/Documents/ProfessionalInterest/protocolrefugees.pdf. (last visited November 26, 2022).
[11] STELLINA JOLLY & NAFEES AHMAD, CLIMATE REFUGEES IN SOUTH ASIA: PROTECTION UNDER INTERNATIONAL LEGAL STANDARDS AND STATE PRACTICES IN SOUTH ASIA (2019).

habitual place of residence or choose to do so, either temporarily or permanently, within a State or across an international border.[12]

Making a move towards recognition of this idea in 2018, United Nations finalized the text of the Global Compact on Safe, Orderly, and Regular Migration. This first internationally negotiated agreement exclusively covers several drivers of international migration, including climate change. In Preamble it referred to the United Nations Framework Convention on Climate Change and other notable conventions. In several paragraphs, the 2018 Global Compact on Refugees touches upon issues related to climate change, which is neatly condensed in Objective 2, which is about 'minimizing the adverse drivers and structural factors that compel people to leave their origin.'[13] Subsequently, member states agreed to set up an International Migration Review Forum (IMRF) to assess the progress made on the 2018 Global Compact. The first IMRF took place on May 2022 in New York, resulting, unsurprisingly, in a report on Progress Declaration.[14] The short and mostly rhetorical Declaration offers little in terms of transforming state enthusiasm into something binding. It mainly emphasizes upon cooperative model at the international level through hortatory language. Besides, the 2018 Global Compact and IMRF text fails to recognize any actionable commitment to mitigate various artificial factors triggering global mass migration.

It appears that the test adopted to examine the legal status of people affected by climate change follows an archetype – think, feel and bargain for the formless pledge. The pattern was repeated in the report submitted to the Human Rights Council in 2022 by Ian Fry, the Special Rapporteur on promoting and protecting human rights in the context of climate change.[15] Nonetheless, the six-point plan to address the challenges faced by people uprooted by climate change is explicitly considered from a human rights perspective. It does little to address the gap that exists in the definition.

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[12] J. McAdam, *From Economic Refugees to Climate Refugees? Review of International Refugee Law and Socio-Economic Rights: Refuge from Deprivation,* 31 Melbourne Journal of International Law 579 (2009).

[13] United Nations Framework Convention On Climate Change, United Nation (1992) Objective 2, https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (last visited November 26, 2022).

[14] International Migration Review Forum & UN Migration (IOM), Pledges of the International Organization For Migration (IOM) in the Context of The International Migration Review Forum, https://www.iom.int/sites/g/files/tmzbdl486/files/documents/iom-pledges-v3.pdf (last visited November 26, 2022).

[15] Ian Fry, *Connection between human rights and climate change 'must not be denied'*, UN NEWS GLOBAL PERSPECTIVE HUMAN STORIES, CLIMATE AND ENVIRONMENT (Oct 21, 2022).

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Hence, it is more feasible that apart from convening a separate treaty to address the definitional and status conundrum, at least two options can be tried - relooking at the status of climate refugees under the 1951 Convention and upgrading the United Nations Framework Convention on Climate Change by adding a protocol. In the case of the former, Article 1(A)(2) of the 1951 Refugee Convention defines 'refugee' as a person:

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

It is challenging to read climate change as a driver within this definition because the causes are diverse, and it is difficult to identify one factor that contributes to climate alteration. If the matter can reasonably be solved by strengthening domestic institutional mechanisms, then there is no need to refurbish the definition provided by the 1951 Refugee Convention. Yet, an option is provided in the Convention itself to revise the above description. Article 45 of the Refugee Convention provides that any member "state may request a revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations."[16] Thus far, no such proposal has been forwarded. The upshot is simple. With the growing scientific understanding, climate change as a cause of displacement is difficult to establish conclusively with the ever increasing scientific knowledge. This, however, gets further complicated if we treat climate change as a subset of environmental problems. This distinction is essential as not all environmental problems arise because of climate change, but all climate change-related issues can be read within the broader ambit of environment-related problems Therefore, the term 'environmental refugee' receives more purchases.

Evolution of the concept of Sovereignty

The concept of state sovereignty is always considered a challenging puzzle to solve in international law. Over the years, intense arguments ensued between positivists, realists,

[16] The Refugee Convention, 1951, art. 45.

liberals and critical thinkers about its contents, importance, and application. This section briefly covers that discourse.

A. Theories that Matter Most

The concept of state sovereignty enjoys an enigmatic position in international law, neither accepted entirely as a powerful influencer in international relations nor relegated to a place of rhetoric when it comes to evaluating the associations between states. Therefore, the long history of state sovereignty is marked by literature reflecting both thflavorsrs, formalism, and realism. Stephen D. Krasner, in his classic book *Sovereignty: Organized Hypocrisy*, recognizes at least four different representations that are associated with sovereignty - domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty.[17] In general, among all the classes, Westphalian and international legal sovereignty gained prominence in public international law most. According to Krasner, they are examples of organized hypocrisy.[18] In a different take on state sovereignty,, Anne Bodley distinguished between external and internal sovereignty by emphasizing the 'power of independent action in external and internal relations' that represents the a comprehensive idea of sovereignty.[19]

Conceivably, a combination of states experiencing both internal and external sovereignty sets up an international order under which they interact. It is not difficult to understand what internal and external sovereignty means. Whereas internal sovereignty denotes complete authority and control exercised by a state in matters located within the state boundary, external sovereignty deals with issues outside the territory of a state. A typical description of external sovereignty is found in the *Island of Palmas Case,* where 'sovereignty' was signified as 'independence regarding a portion of the globe' and was further stated as 'the right to exercise therein, to the exclusion of any other State.[20]

[17] STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999). Domestic sovereignty means how a state manages its activities within its territory and about control. which refers to the organization of political authority within a state and the level of control enjoyed by a state. By interdependence sovereignty, a state deals with cross-border issues. International legal sovereignty is about states' ability to take part in international political system and Westphalian sovereignty denotes a well-recognized principle in international law that each state has exclusive sovereign authority over its territory. However, state can have only type of sovereignty at a time.
[18] *Id* at. 25
[19] Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. I INT'L L. & POL. 419 (1999).
[20] Island of Palmas Case 2 RIAA 829 (1928) 838 https://legal.un.org/riaa/cases/vol_II/829-871.pdf (last visited November 26, 2022).

In his influential book, Professor F.H. Hinsley, while discussing the theory of sovereignty,, emphasized the ever-changing social, political, philosophical, legal, and economic backgrounds of nations that keep altering the frame of their relationships. For him, sovereignty is simply an idea that does not add many qualifications to the statehood itself.[21] This is not easy to grasp in the first place, given the fact that sovereignty as a concept has significantly saturated international legal outcomes over the years. But similarly, it can also be pointed out that such impact is to be adjudged only as a matter of degree. In other words, we focus more on the outcome of state exchanges or negotiations where sovereignty has played a part,. Eventually, we understand little about the content and theoretical justification of the concept. Indeed, one can trace the opposing idea as well. For example, Alan James, a contemporary scholar of Hinsley, focused more on existing state practices. According to him, sovereignty is an integral aspect of state practice, the ambit, and application of which only a state can justify in the context of its membership in international society.[22]

To add this, we may refer to the classic postulation forwarded by John Austin in his *The Province of Jurisprudence Determined,* where he stated that "[s]upreme power limited by positive law is a flat contradiction in terms."[23] This sharp observation was made with the idea that the sovereign states enjoy unparalleled authority within their given territories. Surely then, according to this theory, conditions can make and enforce any law they want. The power a sovereign state enjoys is limitless, and there cannot be any superior force to which it must bow down. In this way, sovereignty to Austin (also to Jeremy Bentham) is the fact that makes law possible.[24] An important question, therefore, can be asked - Can sovereign voluntarily give consent to limit its own authority? In the world of Hobbes this is also impermissible, as he said:[25]

The Sovereign of a Common-wealth . . . is not subject to the Civil Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by

[21] *See,* F.H. HINSLEY, SOVEREIGNTY 126–213 (2d ed., Cambridge Univ. Press 1986). Even before the state emerged as a distinctive form in the sixteenth century, medieval theorists viewed the problem of regulating secular rulers in both their domestic and external affairs through the common lens of Christian theology and natural law. *See id.* at 45–125, 164–78.
[22] ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY (1986).
[23] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 141 (Wilfrid E. Rumble Ed., Cambridge Univ. Press 1995) (1832).
[24] Pavlos Eleftheriadis, *Law and Sovereignty*, OXFORD LEGAL STUDIES RESEARCH PAPER NO. 42/2009, http://dx.doi.org/10.2139/ssrn.1486084 , *see,* also H. L. A. Hart, *Bentham on Sovereignty*, 2 IRISH JURIST 327-335 (1966).
[25] *See generally* THOMAS HOBBES, LEVIATHAN 190 (A.R. Waller ed., Cambridge Univ. Press 1935) (1651).

repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himself; because he that can bind, can release; and therefore he that is bound to himself only, is not bound.

For Hobbes, this uninhibited power comes from the social contract. It can also be said that common consent justifies infinite sovereignty. It is clear that sovereignty a, as perceived by Austin, Bentham and Hobbes, as normativity in it and their blunt portrayal of a legal system exists because certain governance structures are present. Unsurprisingly, this strange realm of sovereignty faced strong criticism from H.L.A. Hart and Joseph Raz[26] and clearly, is at odds with the popular vision of international law where state consent, whether diligently conformed or not, is considered fundamental. However, it is important at the same time to enquire into whether state consent can independently produce legally binding obligations. Immediately we recall the influence of *pacta sunt servanda*,[27] the centrality behind the formation of international law-making through treaties. But this alone cannot explain why state consent should be legally binding because consent can simply be a means for creating international law.[28]

This feels somewhat intuitively logical as the process of creating a law cannot possibly validate why that law should bind the lawmakers. This theoretical challenge is so difficult to overcome that it frustrated international law scholars who later stressed upon legal fictions like *jus cogens* or peremptory norm deviation which is not possible in international law. After the Second World War, the dilution of consent as a basis for creating international law continued, and treaties started covering non-consenting parties as well. For example, Article 2(6) of the UN Charter provides that the countries which are not members of the UN are also to abide by the principle of Sovereign equality and any other principle required to maintain international peace and security.[29] Similarly, the Statute of the International Criminal Court gives power to the court to proceed against non-parties who commit crimes in the territories of party states.[30] Some

[26] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 27-43 (1970); H. L. A. HART, THE CONCEPT OF LAW (1994), chaps. 1- 4; *see also id.* at 93 ("Disputes as to whether an admitted rule has or has not been violated will always occur . . . if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation."). Hart calls this second problem "inefficiency," but its relationship to "uncertainty" in the intuitive sense is obvious.
[27] I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 513-518 (1989).
[28] Jack Goldsmith & Daryl Levinson, *Law For States: International Law, Constitutional Law, Public Law*, 122 HARVARD LAW REVIEW 1847 (2009).
[29] U.N. Charter art 2.
[30] Supra note 28.

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scholars even proposed to do away with state sovereignty completely, an idea which we intend to trade with care. At this stage, it appears, at least in the context of international environmental law and especially in the context of climate migration, that the complete negation of state sovereignty may not be promising. Accordingly, the Permanent Court of International Justice's observation in the *Case of S.S. Lotus* appears to be relevant - "International 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. Restrictions upon the independence of States cannot, therefore, be presumed."[31] This opinion of PCIJ was not above controversy because of the ingrained positivist flavour. But the underneath idea survived in later international law, though with necessary modification as felt imperative after the Second World War.

B. Sovereignty as We Understand Now

After the Second World War, gradually, it became clear to the international community that cooperation was the key for survival and any rigid understanding of sovereignty should be revised for that reason. Scholars were more concerned about the legal position of sovereign states in international law. A strong argument came from Hans Kelsen, whose the monistic view and negative response to state sovereignty became part of the universal legal system. The reason for his rejection of the rigid idea of sovereignty was quite direct, though. He expected that by challenging the imperialistic 'dogma' of sovereignty, international law would promote a unitary legal view of the world order.[32] Sure enough, Kelsen's line of argument and the need to normatively bind a state in a situation where it did not give consent introduced new thinking in international law. It also appeared that state consent could not be treated as a firm tenet of state sovereignty as once conceived.

One significant blow to the consent theory comes from increasing interactions between states in the present era. The relationship has become so complex and interwoven that it is impossible to separate and identify any state interest in isolation. In his seminal work, Frédéric Mégret has introduced an additional layer to this debate. For him outsourcing various sovereign functions

[31] S.S. 'Lotus', France v Turkey, Judgment, Judgment No 9 (Decision No) PCIJ Series A No 10 (Official Citation) ICGJ 248 (PCIJ 1927) (OUP reference) (1935) 2 Hudson, World Ct Rep 20 (Other Reference) p.18.
[32] HANS KELSEN, PURE THEORY OF LAW 200 – 201 (translated by Max Knight, 1970).

by the state promotes the privatization of state sovereignty. One of the reasons that have forced Mégret to raise this concern is the 'light-touch' regulation of corporate interests and creating of much space for commercial entities principally swayed by profit maximization motives.[33]

Therefore, moving away from the classical system of international law in search for co-existence and cooperation gradually became the norm, though the theory giving prominence to the will of the state was not completely discarded. The general consensus is now to put some restraints upon states against forwarding the immutable sovereignty argument. Strong supportive observation can be found in the advisory opinion of President Bedjaoui in the *Legality of the Threat or Use of Nuclear Weapons* when he asserted:[34]

It scarcely needs to be said that the face of contemporary international society is markedly altered. Despite the still modest breakthrough of "supra-nationalism," the progress made in terms of the institutionalization, not to say integration and "globalization," of international society is undeniable. Witness the proliferation of international organizations, the gradua1 substitution of the international law of Cooperation for the traditional international law of Co-existence, the emergence of the concept of "international community" and its sometimes-successful attempts at subjectivization. A token of al1 these developments is the place in which international law now accords to concepts such as obligations erga omnes, rules of jus cogens, or the common heritage of mankind.

These inferences further open up a possibility to enquire into state sovereignty and its scope in the context of recognizing the rights of climate migrants. We have already noted that there remains a profound and pervasive tension between the concept of boundless sovereignty, and suggestions in support of imposing certain limitations on such sovereignty are also well accepted. This indeed affects the domestic decision-making process of any state. It may, therefore, undoubtedly be argued that whether it is justified for a state to deny the rights of climate migrants. The argument forwarded by Goldsmith and Levinson can provide us with the reason for this inquiry that stands upon the strength of "moral theory and international law alike" and "there is no easy escape from the challenge of reconciling normative constraints and demands on the state with the traditional claims of state sovereignty and self-determination."[35]

[33] Frederic Megret, *Are There "Inherently Sovereign Functions" in International Law?*, 115 AMERICAN JOURNAL OF INTERNATIONAL LAW 452-492 (2021).
[34] *Declaration of President Bedjaoui,* INTERNATIONAL COURT OF JUSTICE, Available at: https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-01-EN.pdf (last visited 22 October, 2022)
[35] Supra note 28.

For the same reason, the line of reasoning forwarded by David Luban in response to demands that democracies engage in humanitarian intervention resonates:[36]

In a democracy, the political support of citizens is a morally necessary condition for humanitarian intervention, not just a regrettable fact of life. If the folks back home reject the idea of altruistic wars and think that wars should be fought only to promote a nation's self-interest, rather narrowly conceived, then an otherwise-moral intervention may be politically illegitimate. If the folks back home will not tolerate even a single casualty in an altruistic war, avoiding all losses becomes a moral necessity.

State Sovereignty, Environmental Obligations, and International Law

This part analyses the status of state sovereignty in the context of international environmental laws. We have tried to confirm the dissents to the unqualified status of sovereignty in environment-related matters,. Further, argue that in the case of climate migrants, the idea of sovereignty must give away to a more inclusive and accommodative approach.

A. Tracing the Uncomfortable Intimacy

Unsurprisingly, the intimacy between state sovereignty and environmental obligations under public international law cannot be easily explained. We have already acknowledged that the popular idea in public international law, with all theoretical conflicts, supports a basic notion, *i.e.,* within national territory, a state is sovereign and enjoys the authority to deal with its subjects and resources. This includes natural resources too. Yet, in environment related matters, this absolutism is somewhat conditioned by the state's responsibility to not inflict harm on the territory of other nations.[37] For decades this model remained a prodigious inspiration in international environmental laws. It is difficult to see the importance of this model inversely because no matter what challenges new global environmental problems pose, the orthodox configuration in public international law is systematized through the long historical discourse. In the previous part, we have already pointed out the diverse opinions of some prominent thinkers. At the same time, we acknowledged that the theoretical challenge is almost impossible to overcome, and therefore, international legal scholars in later years focused on developing a

[36] David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 79, 85–86 (Pablo de Greiff & Ciaran Cronin eds., 2002).

[37] Stockholm Declaration, 1972, https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf (last visited 22 October, 2022).

model through which the relations among states get legitimized and validated. Part of this discourse includes increasing scrutiny of state sovereignty in recent times as it is believed that the diluting this unbending norm is desirous to solve some of the complex global environmental problems that were unknown in antiquity.

Let us look at it from another perspective. Couched in concise form in the Charter of United Nations[38] – *(t) the Organization is based on the principle of the sovereign equality of all its Members* – state sovereignty appears to be a modest expression of territorial autonomy and mutual recognition. If this can be called the modern depiction of state sovereignty from the preview of environment, then ,yet again there, appear limitations in locating any descriptive content in it. Going back to the 17th century, we know that a foundation of state sovereignty was laid down during the Peace of Westphalia in 1948, resulting in the signing of two treaties between the empire and the new great powers, Sweden and France.[39] However, if we look at the Treaty of Westphalia closely, the absence of any clear idea to consider the state as a sovereign entity within organizational principles of international law surprises us. Perhaps, one can imagine that the jurisprudential gulf between positivists and realists in later days was only the result of this ambiguous legal understanding.

How should we then perceive state sovereignty as a guiding force of international environmental law in the contemporary world? Here, we need to remember that the development of international environmental law in modern era onlythe started after the 1970s when environmental treaty-making took the center stage. Unfortunately, the resulting jurisprudence carries the legacy of the the same sovereignty conundrum that plagued international law for centuries. Most environmental treaties (or treaty-making processes) explicitly or impliedly bear the mark of it, as no state will like to be part of a treaty system if the treaty does not provide them enough flexibility to make a decisions by domestic policies. More universal the problem (such as climate change) greater the flexibility. Isn't it true that Common but Differentiated Responsibility (CBDR) that prodigiously influences climate change negotiation is a construction of the clear sense of territorial sovereignty? There should hardly be any reservation that state obligations as in later years articulated through the sinuous language of the Paris Agreement, 2015 (and its predecessors too), fancifully what we call

[38] U.N. Charter, art 2.

[39] Anuschka Tischer, Peace of Westphalia (1648), OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0073.xml (last visited 23 October, 2022).

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'obligation of conduct,' is the most violent manifestation of self-awareness and self-preservation.[40] It is stated that because greater participation enhances the chance to find a solutions to the problem like climate change, making more room for states is desirable so that they can put efforts to achieve targets in accordance with their capabilities. The choice, lies in understanding the nature of the problem. If a problem is dynamic, like climate change, the structure of a treaty should be designed with supple provisions adjustable with time. Conversely, this idea leaves room for us to think about a territorial and stationary problem for which a treaty configuration can be more circumscribed, offering less leeway for states to argue unilaterally for self-preservation.

A close enough analogy can be drawn from the international regime of hazardous and ultra-hazardous substance regulation, such as oil spills and nuclear accidents. The development of the principle of absolute liability certainly indicates a notion of state responsibility that does not offer exceptions. Here, the issue of sovereignty remains mute, at least for those states responsible for the act. Looking from another viewpoint, in such a situation, the affected states' sovereign rights take precedence over the responsible state, and a model of hierarchy, though approximately, materializes. In this way, the legitimation gap[41] between internal and external sovereignty also appears immaterial. The solution is found based on the severity and territorial effect of a problem.

The question further comes – Is climate migration itself an emotional problem or a derivative of a complex emotional problem like climate change but, in essence, territorial in nature? We believe that climate migration is a severe territorial problem that, if not addressed quickly, can create a domino effect worldwide. There may be certain dynamism in it as the more severe the climate catastrophe, the larger the possibility of population shift. However, this idea must not be used to build a satisfactory argument justifying the limited or lack of steps taken by the states to ameliorate the problem. In other words, while addressing climate change, a state may give consent conditioned by its sovereign interests. But tackling climate migration demands a stricter regime of state obligations. This is even more justified if we recall our argument in the opening part of this article, *i.e.,* it is possible to see the issue of climate migration as an institutional failure within a state where the problem originates.

[40] Resounding statement comes from Article 4.
[41] *Supra* n. 28.

B. In Search of Environmental Normativity

Undeniably, climate change poses multiple threats. Other than pure environmental challenges, several concerns over international security also emerge. It is now given that negative changes in natural environmental conditions are largely attributable to human activities. Increasingly it is becoming difficult for us to react with appropriate mitigation and adaptation strategies to address the problems associated with climate change. As a result, we have started to understand that the relationships between nations are bound to be altered, and consequently, our understanding of state sovereignty and state fragility must also be re-worked.

If we accept that the modern concept of state sovereignty is built on both a state's output and input legitimacy, climate change seriously compromises a state's capability to provide basic resources to its population and, thereby, can drastically affect its output legitimacy. This attrition can lead to state fragility and failure, which in succession can upset regional and international security.[42] In fact, it should make sense to make an inclusive argument to legitimize environmental claims by abolishing the divide between internal and external sovereignty in some issues. The struggle of climate migrants for survival in different parts of the world undoubtedly appears to be a potential reason for such dilution. Therefore, the legitimation gap that a sovereign state often uses to validate its decision in domestic matters will appear to be a weak justification to avoid universal duties towards humanity. Even so, it feels necessary not to reject the concept of sovereignty entirely as states are endowed with a commitment to protect their citizens from external authority. This duty is a a non-negotiable component of the sovereignty itself. For this reason, it is better to rework the concept to make it more accommodative and distributed across the border, especially within the states in question.

For now, it should be clear to us, as argued by Derek Croxton, that "(a)although no one yet conceived sovereignty as the recognition of the right of other states to rule the territory, the increasingly complex diplomatic milieu shows how a polar system was able to develop. In this sense, one may locate the origins of sovereignty around the peace of Westphalia, but only as a consequence of the negotiations, not of an explicit or implicit endorsement of the sovereignty

[42] Caitlin E. Werrell & Francesco Femia, *Climate Change, the Erosion of State Sovereignty, and World Order*, 22 THE BROWN JOURNAL OF WORLD AFFAIRS (2016).

in the terms of the treaties."[43] It will surely be a logical conclusion not to accept state sovereignty as an overwhelming guiding criterion for environmental treaty-making. Likewise, it will be wrong to obey the absolute supremacy of state sovereignty while interpreting provisions of treaties, at least in certain situations. At the most, we can treat state sovereignty as a contested concept similar to democracy and liberty.[44] The first meaning is given and accepted. But the proper application should be further examined in the light of the nature of the contest at the ground level. In this way, we can definitely repudiate absolute normativity that backs the supremacy of state sovereignty. Reasonably, what we can prefer is the idea of 'conditional normativity,' especially in the context of recognition of the rights of displaced people affected by climate change.

V. India and Climate Migration: An Alternative Expression

India's considerable bargaining advantage comes from its clever approach in international politics. Being a growing economy and intellectual hub India enjoys a strategic advantage in South Asia. Unsurprisingly, with China, India has been able to assert its demands during climate talks without inviting any coercive consequences. From taking part in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and thereafter avoiding binding quantified carbon emission limits laid down under Kyoto Protocol, India always firmly pointed out the differentiated responsibilities that participating countries should take for mitigating the effects of climate change. It has remained India's consistent narrative, and in the post-Kyoto period, India successfully presented before developed nations challenging conditions to rework their incentives.[45]

Later, when countries started to work on the legal character of the Paris Agreement, India's typical abhorrence towards binding emission targets started to attract criticism. This was not unexpected as before the the Paris negotiation started, at Durban Platform, India, it tried hard to put forward its preference for the inclusion of an ambiguous phrase, such as 'agreed outcome with legal force', into the parties' decision.[46] The upshot of this effort is largely reflected in the flexible language of Article 4 of the Paris Agreement in the form of obligation of conduct. At

[43] Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 THE INTERNATIONAL HISTORY REVIEW 569-591 (1999).
[44] ANDREW DOBSON, FAIRNESS AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE (1999).
[45] *See* Lavanya Rajamani, *India's Approach to International Law in the Climate Change Regime*, 57 INDIAN JOURNAL OF INTERNATIONAL LAW 6 (2017).
[46] Ibid.

COP 26 held at Glasgow, Scotland,[47] India maintained its stance and demand for more carbon space, deferring its Net Zero goal by 2070. Recently held COP 27[48] has not added much to this set-up. The significant outcomes of the COP 27 include the establishment of the Loss and Damage fund for Vulnerable countries and also the incorporation of a five-year program to promote climate technology solutions in developing countries. It also initiated a work program aiming at the implementation and mitigation of climate change. The States were also requested to strengthen and revise their climate action plan at the national level and expedited the process of phasing out of fossil fuel subsidies in order to meet the 2030 targets.[49] But how far these lofty aspirations will materialize is doubtful at this stage.

Nonetheless, India's overall target is to improve energy efficiency by enhancing solar power capacity, promoting electric transport, and using hydrogen reserves as an alternative to other fossil fuels. But what remains unsatisfactory is India's domestic approach towards an already established and envious environmental jurisprudence. Apparently, it is possible to see this separately from the difficulties faced by a part of the population who have lost their land and livelihood because of climate change-related events. But on closer look, a different argument can be made. As we have already pointed out that in the last decade, India has diluted some of its essential environmental laws, which can have a more significant negative impact on the overall environment of India. Two of the most important areas where such dilution has happened are coastal zone regulation and environment impact assessment.

Hence, India stands at a crossroads. On the one hand, it wants to uplift the lives of its population in all matters. On the other, it is either bound by specific international legal obligations or general (customary) norms of international law. Recently, the United Nations High Commissioner for Refugees has identified India as a safe place for asylum seekers.[50] Even if we consider this a the compliment, it is bound to raise a few uncertainties when we think about potential governance issues that may arise in accepting the inflow of displaced populations

[47] *COP26: India PM Narendra Modi pledges net zero by 2070*, BBC, November 2, 2021, https://www.bbc.com/news/world-asia-india-59125143 (last visited 30 November, 2022).
[48] *COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries,* UNITED NATIONS CLIMATE CHANGE, November 20, 2022, https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries (last visited 30 November, 2022).
[49] Fiona Harvey, *What are the key outcomes of Cop27 climate summit?*, THE GUARDIAN, November 20, 2022, https://www.theguardian.com/environment/2022/nov/20/cop27-climate-summit-egypt-key-outcomes.
[50] *UNHCR India – Help for Refugees*, UNHCR, https://help.unhcr.org/india/?lang=en (last visited 23 October, 2022).

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from other nations. India has not signed the 1951 Refugee Convention and its 1967 Protocol. Hence, legally India is not bound to bend down to any related external demands.

Yet, answering the questions raised by Shrikant Eknath Shinde and Helena Vijaykumar Gavit in Lok Sabha on February 2022, Union Minister of Environment, Forest and Climate Change Shri Bhupender Yadav accepted that "there is no established study for India providing a quantified attribution of climate change triggering migration/displacement of people. While many studies monitor extreme events in the environment, the science of attribution of these changes particularly to climate change, is far more complex and currently an evolving subject."[51] One thing becomes clear from these observations. India is yet to acknowledge completely that climate change is the main driver for human displacement. In spite of that it is accepting population from its neighbouring states, although, in the absence of any clear planning. It is expected that this may lead to '*ad hoc* measures such as forced deportation, detention, and selective protection and assistance based on religion, region, gender, and other factors.'[52]

The analysis of such situations is beyond the scope of this article. Rather we prefer to suggest that India has already shown the hint of leadership in developing a regional framework for addressing the climate induced migration. It could have easily forwarded a sovereignty argument. The reason for which India has preferred not to do so, we suppose, is mainly geographical. It shares important international borders with many countries, some of which share the common ancestry and culture as well. In such backdrop, it does not make any sense for India to shy away from humanitarian catastrophe, irrespective of in which side of the border such crisis arises. Only couple of things it needs to do specifically from here on. Firstly, India must ensure the proper application of its domestic environmental laws so that climate catastrophe can largely be mitigated up to a meaningful level. This to certain extent can help India to address the domestic life and livelihood issues arising out of environment related problems. The benefit will be seen in the long run as India can have more space for governance to address the issue, such as inflow of people affected by climate change from other nations. Secondly, India must work out a plan to make its leadership prominent in the South Asian

[51] LOKSABHA, QUESTIONS: LOK SABHA (February 2, 2022), https://loksabhaph.nic.in/Questions/QResult15.aspx?qref=33192&lsno=17 (last visited 23 October, 2022).

[52] Surbhi Arul, *India needs to recognise the rights of climate refugees*, IDR, June 3, 2022, https://idronline.org/article/climate-emergency/india-needs-to-recognise-the-rights-of-climate-refugees/ (last visited 23 October, 2022).

region when it comes to provide solution to climate migrants. Avoiding the thorny sovereignty dilemma, it can play a leadership role to make its neighbours responsive towards the long-term benefits of shared responsibilities. Overall, the condition is ripe for India to promote an alternative solution to the problem of climate induced displacements and given the climate vulnerability of India and other countries in the South Asian region, it should not be a matter of choice. In fact, more accurately it should be treated as a mandate that emanates from the necessity for the survival of humanity.

VI. Conclusion

To close the discussion, we can say that the construct of state sovereignty in the context of climate migration is in flux. The increasing complexity associated with climate migration demands that there cannot be any stubborn reference to the old notion of state power and control. Surely, the normative foundation should emerge from that growing need of urgent action that potentially and preferably is likely to alter any ontological dogma in favour of selective international dealings. India, being a key player for developing a global climate action plan and strategies, holds the enormous potential to forward an alternative narrative that can infuse the international climate change law in future. For that matter, the regional inclusive model for addressing the climate migration problem that it is already informally advancing holds the key for a better tomorrow. Perhaps, the countries from other parts of the world are watching.

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