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## **Legal Protection for the Cross-Border Climate-Induced Population Movement in South Asia: Exploring a Durable Solution**

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#### ABSTRACT

*It is undeniable that South Asian cross-border climate-induced population movement is a reality, and State actors cannot deny, avoid, or sidestep this dire crisis. If the habitual home becomes uninhabitable and the right to life comes under existential threat with no alternative quality options, people are obliged to move to save their lives. Therefore, this Article suggests adopting a nonbinding legal framework in South Asia with consideration of all barriers and challenges, along with the note that at an international level less hope is left to adopt a protection mechanism for cross-border climate-induced population movement. Although the adoption of a nonbinding legal framework with temporary protection status might not be as strong as a strict legally binding permanent protection measure, it can be a pragmatic opening step toward eliminating the normative gap for cross-border climate-induced population movement in South Asia. However, larger participation and consensus of South Asian States to act under the legal framework to protect cross-border climate-induced population movement entirely depends on how well the framework will be articulated realistically. This could be achieved with a fine balance between adequacy and degree of human rights-based protection measures; integration of security-based approaches within the rights-based approach; incorporation of flexible and large incentives for host states; distribution of balanced and feasible obligations among the host states, states of origin, and developed countries to find a durable solution; integration of support and cooperation from an external source and international community; determination of boundaries of acceptable conduct; and limiting discretion and flexibility. The South Asian Association of Regional Cooperation (SAARC) can take the lead to implement the framework, along with the support of other international and intergovernmental institutions. While establishing the protection framework, it is fundamental to bear in mind that cross-border climate-induced population movement is not a mechanism for adjustment but the last resort of survival that needs to be governed intensely with the tools of human rights, equity, justice, and fairness.*

*The urgency to protect cross-border climate-induced population movement is fierce, and we must now agree to act with collective efforts, spirit, and integrity.*

## INTRODUCTION

As per the report of the Intergovernmental Panel on Climate Change (IPCC), by 2099 the average global temperature will rise between 1.8°C and 4°C.<sup>1</sup> With high confidence, IPCC's recent report reveals a more dreadful scenario.<sup>2</sup> The report projected that between 2030 and 2052,<sup>3</sup> global temperature is very likely to rise by 1.5°C.<sup>4</sup> Sea level rise will be 0.1 meters less at a temperature increase of 1.5°C compared to 2°C<sup>5</sup> (8–13 cm by 2030 and 17–29 cm by 2050).<sup>6</sup> Sea level rise will cause loss of life, biodiversity, ecosystem, land, and massive displacement of the human population.<sup>7</sup> It is also anticipated that by 2050 an estimated one billion humans will be displaced or migrated due to the adversarial impact of climate change.<sup>8</sup> This figure is quite daunting. Moreover, according to the IPCC's fifth assessment report,<sup>9</sup> the massive climate displacement and migration will take place in tropical areas.<sup>10</sup> Tropical areas are already experiencing the phenomena, and in South Asia the scenario is acute.<sup>11</sup> In 2018, due to

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<sup>1</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON EMISSION SCENARIOS v (2000), [https://www.ipcc.ch/site/assets/uploads/2018/03/emissions\\_scenarios-1.pdf](https://www.ipcc.ch/site/assets/uploads/2018/03/emissions_scenarios-1.pdf) [<https://perma.cc/D8QY-75NT>] (last visited Nov. 15, 2020).

<sup>2</sup> *Special Report: Global Warming of 1.5°C*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2018), <https://www.ipcc.ch/sr15/> [<https://perma.cc/P8GU-8Z7R>] (last visited Nov. 15, 2020) [hereinafter AN IPCC SPECIAL REPORT].

<sup>3</sup> *Id.* at vi.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 207.

<sup>6</sup> Debbie Hemming et al., *Impacts of Mean Sea Level Rise Based on Current State-of-the-Art Modelling*, HADLEY CENTRE FOR CLIMATE PREDICTION & RSCH., EXETER 144 (2007).

<sup>7</sup> AN IPCC SPECIAL REPORT, *supra* note 2, at 8.

<sup>8</sup> Luke Baker, *More than 1 Billion People Face Displacement by 2050 – Report*, REUTERS (Sept. 15, 2020), <https://www.reuters.com/article/ecology-global-risks/more-than-1-billion-people-face-displacement-by-2050-report-idUSKBN2600K4> [<https://perma.cc/A3VY-FND2>].

<sup>9</sup> CLIMATE & DEVELOPMENT KNOWLEDGE NETWORK, THE IPCC'S FIFTH ASSESSMENT REPORT: WHAT'S IN IT FOR SOUTH ASIA? 2 (2014), <https://cdkn.org/wp-content/uploads/2014/04/CDKN-IPCC-Whats-in-it-for-South-Asia-AR5.pdf> [<https://perma.cc/B8EZ-TA5D>].

<sup>10</sup> *Id.* at 18.

<sup>11</sup> Rafael Reuveny, *Climate Change-Induced Migration and Violent Conflict*, 26 POLITICAL GEOGRAPHY 656, 658 (2007).

the adverse impact of climate change across South Asia, 3.3 million people were displaced internally and across borders.<sup>12</sup> From this region, it is estimated that, by 2100, about 13 to 40 million people will be displaced due to climate change.<sup>13</sup>

In South Asia, along with other socioeconomic problems, cross-border displacement and migration resulting from climate shifts cause multifaceted challenges linked with environmental, human rights, humanitarian, and security issues.<sup>14</sup> It also gives rise to the risk of violent conflict within the region<sup>15</sup> and ultimately places the cross-border displaced population in a marginalized and vulnerable condition.<sup>16</sup> Considering these contexts, this Article aims to explore existing legal protection mechanisms for cross-border climate-induced displacement and migration in South Asia.

Under this topic, the key question that this Article intends to explore is how existing South Asian legal frameworks of climate change, human rights, and humanitarian law address issues related to cross-border climate-induced population movement. Analyzing this question might help us to understand how state actors in South Asia can better address human rights and regional peace and security issues related to climate-induced migration. This analysis can eventually suggest which potential regional legal framework would be effective to protect cross-border climate-induced migration.

To explore and examine the existing legal mechanism for the protection of cross-border CID/M (climate-induced displacement and migration), this Article relies primarily on a desk review of existing laws, policies, and strategic documents, complemented by experts and stakeholder interviews. Subsequently, the findings are qualitatively analyzed throughout this Article. The discussion in this Article is divided into four parts. Part I briefly dwells on the dilemma of labeling climate-induced movement. Part II analyzes human rights, regional peace, and the national and regional security context of South Asia related to cross-border climate-induced movement. Part III assesses the

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<sup>12</sup> INTERNAL DISPLACEMENT MONITORING CENTRE GLOBAL REPORT ON INTERNAL DISPLACEMENT 2019 34 (2019), <https://reliefweb.int/report/world/global-report-internal-displacement-2019-grid-2019-0> [<https://perma.cc/92BT-6P4M>].

<sup>13</sup> Vositha Wijenayake & Vidya Nathaniel, *Addressing Loss and Damage and Climate Displacement in South Asia*, CLIMATE ACTION NETWORK SOUTH ASIA: BLOG (Dec. 1, 2014), [http://www.cansouthasia.net/addressing-loss-and-damage-and-climate-displacement-in-south-asia/#\\_ftn5](http://www.cansouthasia.net/addressing-loss-and-damage-and-climate-displacement-in-south-asia/#_ftn5) [<https://perma.cc/AJV2-EDMS>].

<sup>14</sup> Reuveny, *supra* note 11, at 659.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 668.

present legal framework at the global, regional, and national levels for the protection of cross-border climate-induced population movement. It showcases the prevailing legal vacuum and the barriers to developing a protection mechanism for the climate-induced population movement. Part IV highlights the key issues to consider for framing a potential regional protection framework for cross-border climate-induced population movement in South Asia.

## I THE DILEMMA IN LABELING AND DEFINING CLIMATE-INDUCED POPULACE MOVEMENT

Those who are affected by climate-induced populace movement are often termed *climate refugees*, *climate migrants*, *a climate-displaced population*, *environmental migrants*, *environmental refugees*, or *an environmentally displaced population*. Choosing suitable terminology seems profoundly challenging here, as scholars have little to no agreement on choosing specific terminology for climate-induced populace movement. Such disagreement eventually requires defining the scope of climate-induced populace movement and results in a vague, complex, and open-ended definition. For example, in 2007, the International Organization for Migration stated that climate-induced populace movement coexists with environmental migration and termed such movement as *environmental migration* and suggested a definition for it.<sup>17</sup> However, like the United Nations High Commissioner for Refugees, many other organizations and scholars criticized the definition for being too broad to be useful, especially in the legal context.<sup>18</sup> Essam El-Hinnawi termed someone affected by climate-induced populace movement as an *environmental refugee*.<sup>19</sup> El-Hinnawi's definition was also not well accepted for being too broad and inconsistent with the *refugee* definition given by the *Convention Relating to the Status of Refugees 1951*.<sup>20</sup> Similar efforts were also

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<sup>17</sup> *Migration, Environment and Climate Change (MECC) Division*, INT'L ORG. FOR MIGRATION, <https://www.iom.int/migration-and-climate-change-0> [<https://perma.cc/F2KG-F5T7>] (last visited May 27, 2019).

<sup>18</sup> See Christine Gibb & James Ford, *Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?* 7 ENV'T RSCH. LETTERS 1, 7 (2012).

<sup>19</sup> U.N. Env't Program, *Environmental Refugees* at 4, U.N. Doc. UNEP/1985 (1985), <https://digitallibrary.un.org/record/121267> [<https://perma.cc/6ZCY-VTHL>].

<sup>20</sup> U.N. Treaty Series, *Convention Relating to the Status of Refugees*, U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons Vol. 189 at 152,

made by many other scholars<sup>21</sup> and institutions.<sup>22</sup> However, specific and agreed-upon terminology for the climate-induced populace movement has yet to develop.

However, the Cancun Agreement and the Paris Agreement<sup>23</sup> termed climate-induced populace movement as *climate-induced displacement* and *migration*.<sup>24</sup> As per the direction of the Paris Agreement and paragraph forty-nine of the *Decision 1/CP.21*,<sup>25</sup> in 2018, under the *Warsaw International Mechanism for Loss and Damage*, the Task Force on Displacement (TFD) was established. The task of TFD is to formulate a recommendation to “avert, minimize and address displacement related to the adverse impacts of climate change.”<sup>26</sup> TFD addressed climate-induced populace movement as climate-induced “displacement” and “migration.”<sup>27</sup> Therefore, it can be contended that the climate change governing regime prefers to term climate-induced populace movement as *climate-induced displacement and migration* (CID/M) instead of using widely used terms like *climate refugee* or *environmental migrant*.

However, none of the aforementioned international instruments define the terminology of CID/M or explicitly spell out who or what type of movement should be included or excluded in this category. Definitional shortcomings, categorical complexity, and conceptual

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U.N. Doc. A/CONF.2/Rev.1 (1951), <https://treaties.un.org/doc/Publication/UNTS/Volume%20189/volume-189-I-2545-English.pdf> [<https://perma.cc/5ASY-FHST>].

<sup>21</sup> See e.g., JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 28 (2012); Jean-François Durieux, *Climate Change, Forced Migration, and International Law*, 25 INT'L J. REFUGEE L. 187, 188 (2013); Fanny Thornton, *Stormy Weather: The Challenge of Climate Change and Displacement*, 21 INT'L J. REFUGEE L. 851, 851 (2009).

<sup>22</sup> See “Climate Refugees” Legal and Policy Responses to Environmentally Induced Migration, EUR. PARL. DOC. PE 462.422 at 10 (2011). For example, European Parliament’s Committee termed climate induced population movement as “environmentally induced displacement” with a wide-ended definition. *Id.* at 10.

<sup>23</sup> Paris Agreement, Conf. of the Parties on Its Twenty-First Session, at Preamble, U.N. Doc. FCCC/CP/2015/10/Add.1 (2016) [hereinafter *Decision 1/CP.21*]. By nature, the Paris Agreement is a legally binding international treaty.

<sup>24</sup> See Framework Convention on Climate Change, Conf. of the Parties on Its Sixteenth Session, U.N. Doc. FCCC/CP/2017/Add. 1 (2010), <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> [<https://perma.cc/RTQ7-HAEB>] [hereinafter *Decision 1/CP.16*]. The report is a nonbinding political decision. *Decision 1/CP.21*. By nature, the Paris Agreement is a legally binding international treaty. See *Decision 1/CP.16*.

<sup>25</sup> *Decision 1/CP.21*, *supra* note 23, ¶ 49.

<sup>26</sup> Task Force on Displacement: At a Glance (2019), <https://unfccc.int/wim-excom/sub-groups/TFD>.

<sup>27</sup> Report of the Task Force on Displacement 4 (2018), [https://unfccc.int/sites/default/files/resource/2018\\_TFD\\_report\\_17\\_Sep.pdf](https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf) [<https://perma.cc/FP2X-KAVP>].

disagreements<sup>28</sup> are still present. But it is also undeniable that negotiation attempts for a specific legally binding definition would be a complex and lengthy process.<sup>29</sup> Since there is a lack of attribution (direct and clear linkage) among climate change, adverse weather events, and population movement,<sup>30</sup> it is difficult, yet not impossible, to categorize population displacement or migration particularly for climate change. Moreover, climate change stressors are often pooled with factors like social, economic, or political pressure, as well as internal conflicts and other environmental impacts.

However, articulating a clear and specific definition appears to be a much-required and needed starting point to secure effective legal protection for the climate-induced populace movement. A clear legal definition is required, not only to map who falls within the category of CID/M but also to articulate their rights and to formulate appropriate policy responses to tackle the issue.<sup>31</sup> In defining and categorizing CID/M, the key elements required to be taken into consideration are as follows:

1. CID/M should be considered as a separate and distinct category of movement where displacement and migration are primarily triggered by the adversarial impact of climate change such as salinity intrusion, sea level rise, flooding, intensified cyclone, and prolonged drought. The reason behind such separate categorization is that—if population movement takes place as a result of the adversarial impact of climate change—the international community is required to take responsibility for it because climate change and its adverse impacts are a result of high-level greenhouse gas (GHG) emissions from developed countries.<sup>32</sup> Conversely, population movement due to environmental factors might occur by breaching substantive international state obligation or by evading state responsibility.<sup>33</sup> Therefore, considering different consequences and responsibilities of developed countries, CID/M should not be kept within the category of environmental displacement or migration and must be identified separately.

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<sup>28</sup> Gibb & Ford, *supra* note 18, at 7.

<sup>29</sup> MCADAM, *supra* note 21, at 135–37.

<sup>30</sup> See Gibb & Ford, *supra* note 18, at 7.

<sup>31</sup> MCADAM, *supra* note 21, at 56.

<sup>32</sup> Benoît Mayer, *Governing International Climate Change-Induced Migration in Southeast Asia*, CLIMATE CHANGE, MIGRATION AND HUMAN SECURITY IN SOUTHEAST ASIA 28, 43 (Lorraine Elliott ed., 2011) [hereinafter Mayer, *Governing*].

<sup>33</sup> Andrea Laura Mackielo, *Core Rules of International Environmental Law*, 16 J. INT'L & COMPAR. L. 257, 260 (2009).

2. CID/M can be caused by slow-onset events. For example, sea level rise, salinization, increased temperature, forest or land degradation, and biodiversity loss result in gradual population displacement or habitation migration.<sup>34</sup> Also sudden-onset events, like cyclone Aila that hit the coastal part of Bangladesh in 2007, can result in a large number of population displacement.<sup>35</sup> In sudden-onset events, populations may suddenly realize that their place of living is no longer habitable due to that sudden-onset climatic event. Here, though both are climate movements, the types of movements are separate from each other. Therefore, while categorizing CID/M, both types of events must be taken into consideration as they are all adverse impacts of climate change.<sup>36</sup>
3. CID/M can be forced (mostly due to sudden-onset climatic events), planned, or voluntary (mostly due to slow-onset climatic events), and the line between forced and voluntary movement is very thin.<sup>37</sup> Movement can also be internal or cross-border. Therefore, at the time of categorizing CID/M, the primary focus should not only be whether it was forced, planned, or voluntary or whether the movement was internal or cross border. Rather, the emphasis should be given on the severity of the adverse impact of climate change that deteriorates the environment at a level that either makes the place uninhabitable or where people's right to life is an existential threat.<sup>38</sup> Consequently, to be considered as CID/M, forced displacement or voluntary migration has to take place due to the climate change stressors that make an individual's place of living uninhabitable or where the right to life is threatened, or both.
4. Often scholars define displacement as internal forced movement and *migration* as internal or cross-border movement, which is in nature, more planned and voluntary.<sup>39</sup> The definition given by the *Guiding Principles on Internal Displacement, 1998* on *internally displaced persons* also includes displacement where nature of movement was involuntary, forced, and coercive.<sup>40</sup> However, if

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<sup>34</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON CLIMATE CHANGE AND LAND 28 (2019), [https://www.ipcc.ch/site/assets/uploads/2019/08/4.-SPM\\_Approved\\_Microsite\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2019/08/4.-SPM_Approved_Microsite_FINAL.pdf) (last visited Nov. 20, 2020).

<sup>35</sup> M. Rezaul Islam and Mehedi Hasan, *Climate-Induced Human Displacement: A Case Study of Cyclone Aila in The South-West Coastal Region of Bangladesh*, 81 NAT. HAZARDS 1051, 1051 (2016), <https://link.springer.com/article/10.1007/s11069-015-2119-6#citeas>.

<sup>36</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON CLIMATE CHANGE AND LAND 265–68 (2019), <https://www.ipcc.ch/srcl/> (last visited Nov. 20, 2020).

<sup>37</sup> DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 314 (2017).

<sup>38</sup> MCADAM, *supra* note 21, at 56.

<sup>39</sup> STELLINA JOLLY & NAFEES AHMAD, CLIMATE REFUGEES IN SOUTH ASIA: PROTECTION UNDER INTERNATIONAL LEGAL STANDARDS AND STATE PRACTICES IN SOUTH ASIA 41–42 (Leïla Choukroune ed., 2019).

<sup>40</sup> U.N. Commission on Human Rights, Report on Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/2998/53/Add.2, at Introduction (1998) [hereinafter U.N. *Guiding Principles*].

we refer to the term *displacement* to indicate *internal* displacement only, it might not be consistent with the term *internally displaced persons*.<sup>41</sup> To indicate internally or movement within the territory, the guideline uses the term *internally displaced persons*.<sup>42</sup> If the word *displaced* standing alone includes movement within the territory, the 1998 guideline would not use the additional adjective *internally* to indicate *internally displaced persons*. To indicate internally or within the territory movement the guideline uses the term *internally displaced persons*. If the word *displaced* standing alone includes within the territory movement, the 1998 guideline would not use the additional adjective *internally* to indicate *internally displaced persons*. Therefore, it can be contended that when the term *displacement* is used as a stand-alone term, it refers to the internal or cross-border where movement is involuntary in nature.

5. For human movement to be considered as CID/M, the individual must prove—especially in cross-border movement—that there are no other accessible, quality options<sup>43</sup> and the individual must be obliged to move to save his/her individual life. It is worth noting that CID/M can be temporary or permanent. For permanent displacement or migration, people must also prove there is little possibility that the deteriorating environmental condition of their habitual home can be restored to its previous condition—for example, sea level rise, acute salinization, or drought have made basic needs such as water unavailable.<sup>44</sup>
6. Therefore, considering the above factors, this Article will indicate only those individuals whose root cause of displacement or migration is primarily triggered by the adverse impact of climate change that makes his/her habitual home uninhabitable or where the right to life is an existential threat and such a situation left the individual in a situation where the person does not have alternative quality or viable options to save his/her life except to move.

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<sup>41</sup> See Jean-Philippe Lavoyer, *Guiding Principles on Internal Displacement: A Few Comments on the Contribution of International Humanitarian Law* 38 INT'L REV. RED CROSS 324, 467–70 (2010).

<sup>42</sup> See *id.*

<sup>43</sup> Matthew CM. Hill, *Closing the Gap: Towards Rights-Based Protection for Climate Displacement in Low-Lying Small Island States*, 20 N.Z.J. ENV'T L. 43, 47 (2016).

<sup>44</sup> CAMILLO BOANO ET AL., REFUGEE STUDIES CENTRE, ENVIRONMENTALLY DISPLACED PEOPLE: UNDERSTANDING THE LINKAGES BETWEEN ENVIRONMENTAL CHANGE, LIVELIHOODS AND FORCED MIGRATION 7 (2008), [https://www.unicef.org/socialpolicy/files/Environmentally\\_displaces\\_people.pdf](https://www.unicef.org/socialpolicy/files/Environmentally_displaces_people.pdf) [<https://perma.cc/2XSU-UY85>].

## II

## CLIMATE-INDUCED MIGRATION AND DISPLACEMENT IN SOUTH ASIA: A CONTEXTUAL ANALYSIS

Globally, South Asia is measured as one of the most vulnerable, disaster-prone climate hot spot regions<sup>45</sup> due to its geographical setting, hydrogeological factors, low altitude, extreme climatic inconsistency, overpopulation, and socioeconomic factors.<sup>46</sup> IPCC's *Fifth Assessment Report* showcases many observed changes in the climatic system of South Asia.<sup>47</sup> The subcontinent is experiencing a change in sea level rise because of the glaciers melting in the Himalayan range.<sup>48</sup> Many low-lying coastal areas of South Asian states, specifically Bangladesh, Maldives, India, and Sri Lanka, are losing lands from permanent inundation.<sup>49</sup> South Asian countries are also increasingly exposed to other slow- and rapid-onset disasters, which are leading to massive population displacement. For example, in 2009 tropical Cyclone Aila hit Bangladesh and India. About 2.3 million people from India<sup>50</sup> and 850,000 people from Bangladesh<sup>51</sup> were displaced by this tropical cyclone. In 2015, an estimated 7.9 million people were displaced from South Asia,<sup>52</sup> and in 2016 the estimated displacement was 3.6 million people.<sup>53</sup> However, cross-border CID/M in South Asia is less<sup>54</sup> than the internal CID/M, though the amount of cross-border CID/M is not insignificant. An estimated 3,230,025 CID/M migrants from Bangladesh and 810,172 CID/M migrants from Nepal are currently

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<sup>45</sup> JOLLY & AHMAD, *supra* note 39, at 186.

<sup>46</sup> *Id.* at 186.

<sup>47</sup> CLIMATE & DEVELOPMENT KNOWLEDGE NETWORK, *supra* note 9.

<sup>48</sup> J.M. Maurer, J.M. Schaefer, S. Rupper, & A. Corley, *Acceleration of Ice Loss Across the Himalayas over the Past 40 Years*, SCIENCE ADVANCES 6 (2019), <https://advances.sciencemag.org/content/advances/5/6/eaav7266.full.pdf>.

<sup>49</sup> See Susmita Dasgupta, *Risk of Sea-Level Rise: High Stakes for East Asia & Pacific Region Countries*, WORLD BANK BLOGS (Mar. 9, 2018), <https://blogs.worldbank.org/eastasiapacific/risk-of-sea-level-rise-high-stakes-for-east-asia-pacific-region-countries>.

<sup>50</sup> JOLLY & AHMAD, *supra* note 39, at 34.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 35.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 36.

staying in India.<sup>55</sup> Pakistan is currently hosting 2,326,275 CID/M migrants from Afghanistan.<sup>56</sup>

It is undeniable that cross-border movement makes an individual more vulnerable than internal movement because internal CID/M is monitored and regulated by a state according to its national laws and policies. Whereas in cross-border CID/M, once someone crosses the border, they get excluded from their state's jurisdiction and<sup>57</sup> seek protection from other countries. Fleeing or leaving the country of origin makes an individual extremely vulnerable to persistent basic human rights violations, exploitation, violence, and discrimination. Cross-border CID/M is also a potential threat for regional security and peace,<sup>58</sup> which will be discussed in detail in the latter part of the Article. Considering the view above, this Article aims to examine cross-border CID/M in South Asia from the context of human rights violations and regional peace and security to explore why an effective protection mechanism for cross-border CID/M is needed.

#### ***A. Context from Human Rights Violation***

In South Asia, the fundamental migration corridors are between Nepal and India; India and Pakistan; Afghanistan and Pakistan; and Bangladesh and India.<sup>59</sup> Multiple case studies on CID/M from different parts of South Asia reveal massive human rights violations.<sup>60</sup> In cross-border CID/M, human rights violations mostly happen before crossing the border of the state of origin, during journey/transit, and after

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<sup>55</sup> Simrit Kaur & Harpreet Kaur, *A Storm of Climate Change Migration Is Brewing in South Asia*, EAST ASIA FORUM (June 17, 2018), <https://www.eastasiaforum.org/2018/06/17/a-storm-of-climate-change-migration-is-brewing-in-south-asia> [https://perma.cc/N7Z2-AJCC].

<sup>56</sup> *Id.*

<sup>57</sup> Benoît Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT'L ENV'T L. & POL'Y 357, 369 (2011) [hereinafter Mayer, *International Challenges*].

<sup>58</sup> Architesh Panda, *Climate Induced Migration from Bangladesh to India: Issues and Challenges* (Sept. 6, 2010) (manuscript at 16), <https://ssrn.com/abstract=2186397>; see also Arpita Bhattacharyya & Michael Werz, *Climate Change, Migration, and Conflict in South Asia*, CTR. AM. PROGRESS 55 (Dec. 3, 2012, 4:14 AM), <https://www.americanprogress.org/issues/security/reports/2012/12/03/46382/climate-change-migration-and-conflict-in-south-asia/> [https://perma.cc/NZY3-4THR].

<sup>59</sup> INTERNATIONAL LABOUR ORGANIZATION, PROMOTING EFFECTIVE GOVERNANCE OF LABOUR MIGRATION FROM SOUTH ASIA 7 (Apr. 8, 2016), [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms\\_326235.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kathmandu/documents/publication/wcms_326235.pdf) [https://perma.cc/VFG7-66JS].

<sup>60</sup> *Id.* at 14–15.

reaching the destination.<sup>61</sup> Often, factors that result in displacement/migration are the same as those that result in human rights violations. For example, due to the adverse impact of climate change, an individual can lose their habitual residence and eventually become trapped in an inhumane situation where their right to life; access to basic needs such as food, health care, and cultural identity; territorial integrity; or livelihood are violated or threatened.

While in transit, displaced or migrating individuals often live in perilous conditions<sup>62</sup> that risk a range of human rights violations.<sup>63</sup> For example, climate vulnerability is very high in the coastal region of Bangladesh,<sup>64</sup> where displacement or migration is a very common phenomenon.<sup>65</sup> Seeking better living conditions, vulnerable populations are often forced to or voluntarily choose cross-border movement and become victims of human traffickers. Such attempts for illegal cross-border movement often result in debt; inhuman, degrading treatment and captivity by traffickers; arrest and detention by the coastal or destination states; and high death rates due to risky migration routes.<sup>66</sup> In May 2019, thirty-seven Bangladeshi illegal migrants drowned off the Tunisian coast.<sup>67</sup> In transit, migrant women and children remain at high risk of health hazards, sexual abuse, violence, exploitation, and trafficking,<sup>68</sup> resulting in gross human rights violations.

Human rights violations also remain high when migrant or displaced persons reach their destination country due to forceful pushbacks, deterrent migration laws, restrictions and banning at the border,

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<sup>61</sup> OFF. UNITED NATIONS HIGH COMM'R HUM. RTS., *Discussion Paper: The Rights of Those Disproportionately Impacted by Climate Change* (2016), <https://www.ohchr.org/Documents/Issues/ClimateChange/EM2016/DisproportionateImpacts.pdf> [<https://perma.cc/C9KV-T3LR>] [hereinafter *Discussion Paper*].

<sup>62</sup> Off. United Nations High Comm'r Hum. Rts., *Situation of Migrants in Transit*, ¶ 3, U.N. Doc. A/HRC/31/35, (2016) [hereinafter *Situation of Migrants in Transit*].

<sup>63</sup> *Id.* ¶ 7.

<sup>64</sup> Nasir Uddin et al., *Mapping of Climate Vulnerability of the Coastal Region of Bangladesh Using Principal Component Analysis*, 102 APPLIED GEOGRAPHY 47, 47 (2019).

<sup>65</sup> *Id.*

<sup>66</sup> MIXED MIGRATION CENTRE, WHAT MAKES REFUGEES AND MIGRANTS VULNERABLE TO DETENTION IN LIBYA? A MICRO LEVEL STUDY OF THE DETERMINANTS OF DETENTION 1, 5–6 (2019), [https://reliefweb.int/sites/reliefweb.int/files/resources/082\\_determinants\\_of\\_detention.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/082_determinants_of_detention.pdf).

<sup>67</sup> Dhaka Tribune, *37 Bangladeshis Among 60 Migrants Reportedly Drown off Tunisia Coast* (May 11, 2019, 9:43 PM), <https://www.dhakatribune.com/world/2019/05/11/51-bangladeshi-migrants-drown-off-tunisia-coast>.

<sup>68</sup> *Situation of Migrants in Transit*, *supra* note 62, ¶ 49.

dangerous interceptions, and administrative sentences. State practices like these do not conform to the standards and principles set by human rights law. Moreover, these practices make it difficult to cross the borders safely and result in torture, death, and human rights abuses. For example, to stop illegal migration in India, the Indian Border Security Force often uses firearms on the India-Bangladesh border even if the illegal migrant is unarmed.<sup>69</sup> In the last ten years, the Indian Border Security Force killed 294 Bangladeshi people on the India-Bangladesh border,<sup>70</sup> which is alarming. Even after crossing the border, the displaced person often remains in a precarious situation (especially women, children, persons with disabilities, people in minority status).<sup>71</sup> It happens due to the deprivation, discrimination, and limited or no access to some basic human rights in general,<sup>72</sup> such as lack of access to basic health care, education, the labor market, legal protection, judicial and redress mechanisms, and cultural rights.<sup>73</sup> The barrier to enjoying all these rights ultimately keeps the CID/M migrants at a greater risk of extortion, exploitation, trafficking, abuse (especially gender-based and sexual abuse), discrimination, violence, forced deportation, and unlawful detention. For example, in 2009 when Bhola island was submerged due to the cyclone Aila, many displaced populations crossed the border and moved to India.<sup>74</sup> These displaced populations have no legal protection in India and survive under the constant fear of deportation to their homeland, which is uninhabitable.<sup>75</sup>

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<sup>69</sup> Brad Adams, *India's Shoot-to-Kill Policy on the Bangladesh Border*, HUMAN RIGHTS WATCH (Jan. 23, 2011, 10:48 AM), <https://www.hrw.org/news/2011/01/23/indias-shoot-kill-policy-bangladesh-border> [<https://perma.cc/66P2-5JBP>].

<sup>70</sup> *294 Bangladeshis Killed by BSF in Last 10yrs: Home Minister*, THE DAILY STAR (July 11, 2019, 06:15 PM), <https://www.thedailystar.net/country/294-bangladeshi-killed-by-bsf-in-last-10-years-1769911> [<https://perma.cc/VZY9-AS43>].

<sup>71</sup> *Situation of Migrants in Transit*, *supra* note 62, ¶ 29–30.

<sup>72</sup> *Id.* ¶ 10.

<sup>73</sup> *Discussion Paper*, *supra* note 61, at 2.

<sup>74</sup> Jane McAdam & Ben Saul, *Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh*, 53 GER. Y.B. INT'L L. 243, 244 (2010), [https://unfccc.int/files/adaptation/groups\\_committees/loss\\_and\\_damage\\_executive\\_committee/application/pdf/mcadam\\_and\\_saul\\_gyil\\_2010.pdf](https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/mcadam_and_saul_gyil_2010.pdf) [<https://perma.cc/WMP5-V88L>]; *18 Killed as Cyclone Aila Lashes Coast*, THE DAILY STAR (May 26, 2009, 12:00 AM), <https://www.thedailystar.net/news-detail-89865> [<https://perma.cc/2QBT-7CXB>].

<sup>75</sup> Bhattacharyya & Werz, *supra* note 58, at 34.

### ***B. Context from Regional Peace and Security***

Territorial borders are considered delicate issues as they are often linked to the independence and sovereignty of a state. Because of this, states remain very rigid when it comes to giving access to migrant, displaced populations or refugees.<sup>76</sup> Moreover, cross-border population movement poses a significant threat and tension in national and regional peace and security. Within the South Asia region, due to a high level of climate-induced populace movement, there is rising tension between countries like India and Bangladesh; Nepal and India; Afghanistan and Pakistan; Maldives and Sri Lanka; India and Sri Lanka.<sup>77</sup> The amount of CID/M migrants from Bangladesh and Nepal to India is one of the persistent geopolitical tensions in this region. India, in August 2019, excluded nearly 2 million people from its Assam citizenship list on the grounds of illegal immigration.<sup>78</sup> Many of these declared illegal immigrants from Bangladesh are climate-induced displaced populations who lost their lands due to salinity intrusion, flood, or river erosion and were forced to cross the border.<sup>79</sup> Stripping citizenship from such a large number of people casts clouds on geopolitical relationships and creates the fear of statelessness.

States that host migrants or displaced populations are also facing security problems within the territory with the growing conflict between migrants and citizens. In Assam and West Bengal of India, the biggest issue of conflict is the residence of a large number of Bangladeshi illegal migrants.<sup>80</sup> The situation can be better explained by discussing the Bodo tribe and the Muslim Bengali settlers' conflict that took place in Assam in 2012. Due to climate stressors in the last few decades, a significant number of populations from coastal areas of Bangladesh migrated to Assam, West Bengal, and Tripura.<sup>81</sup> This high

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<sup>76</sup> Elisa Massimino & Alexandra Schmitt, *A Right-Centered Paradigm for Protecting the Forcibly Displaced*, CTR. AM. PROGRESS (Dec. 7, 2020, 9:02 AM), <https://www.americanprogress.org/issues/security/reports/2020/12/07/493435/rights-centered-paradigm-protecting-forcibly-displaced/> [<https://perma.cc/8YDR-9DX5>].

<sup>77</sup> See JOLLY & AHMAD, *supra* note 39, at 39.

<sup>78</sup> Abusaleh Shariff, 'National Register of Indian Citizens' (NRIC) – Does the Assam Experience Help Mainland States? 3 (Nov. 2019) (unpublished manuscript), [https://www.researchgate.net/publication/337366837\\_'National\\_Register\\_of\\_Indian\\_Citizens'\\_NRIC\\_-\\_Does\\_the\\_Assam\\_Experience\\_help\\_Mainland\\_States\\_1](https://www.researchgate.net/publication/337366837_'National_Register_of_Indian_Citizens'_NRIC_-_Does_the_Assam_Experience_help_Mainland_States_1).

<sup>79</sup> Chandrani Sinha, *Climate Refugees Stripped of Citizenship in Assam*, THE THIRD POLE (Nov. 8, 2019), <https://www.thethirdpole.net/en/2019/11/08/climate-refugees-stripped-of-citizenship-in-assam> [<https://perma.cc/5Q83-8XJZ>].

<sup>80</sup> Bhattacharyya & Werz, *supra* note 58, at 4–5.

<sup>81</sup> *Id.* at 29.

flow of population movement has increased intolerance toward Bangladeshi migrants.<sup>82</sup> Moreover, in Assam, Bangladeshi migrants have slowly taken control in forest, farming, and cultivation land traditionally controlled by the Bodo community.<sup>83</sup> Gradually, Bangladeshi migrants have become powerful in local politics and started to get involved with some illegal trades like drug smuggling.<sup>84</sup> Bangladeshi migrants' growing power and control over the land spread fear and bitterness amongst the Bodo and other tribal communities.<sup>85</sup> Moreover, Bodo tribe leaders asserted that Bangladeshi settlers were using their power to impose the Muslim religion and Bangladeshi culture in the area.<sup>86</sup> All these issues stoked tension in the area and have resulted in several attacks by the locals on Bangladeshi settlers.<sup>87</sup> However, a massive outburst took place in 2012 on the issue of building a mosque.<sup>88</sup> The riot started by the killing of a Bangladeshi migrant named Abdul Quader and lasted one week.<sup>89</sup> Eighty people died (mostly Bengali migrants and some Bodos as well), and many Bangladeshi migrants are still missing.<sup>90</sup> At the time of the riot, Assam people also made a strong demand to deport all Bangladeshi migrants. After the conflict, many Bangladeshi migrants were forced to leave the villages and had to stay in a makeshift relief camp for a long time.<sup>91</sup> According to Rehana Bibi (aged 63, whose son was killed in the riot), "We prefer to stay in these government-aided camps though we don't

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<sup>82</sup> *Id.* at 43.

<sup>83</sup> Arpita Bhattacharyya, *Understanding the Historical Conflicts Behind Today's Violence in Assam*, CTR. AM. PROGRESS (Aug. 29, 2012, 8:00 AM), <https://www.americanprogress.org/issues/security/reports/2012/08/29/35050/understanding-the-historical-conflicts-behind-todays-violence-in-assam> [<https://perma.cc/WK8N-6BWH>] [hereinafter Bhattacharyya, *Understanding*].

<sup>84</sup> Krishna N. Das, *Stateless Rohingya Refugees Sucked into Booming Bangladesh Drug Trade*, REUTERS (Feb. 27, 2017), <https://www.reuters.com/article/us-myanmar-rohingya-bangladesh-drugs/stateless-rohingya-refugees-sucked-into-booming-bangladesh-drug-trade-idUSKBN1662LK>.

<sup>85</sup> Bhattacharyya, *Understanding*, *supra* note 83.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Bangladesh Opposition Leader's Execution Sparks Deadly Riots*, CBS NEWS (Dec. 12, 2013, 8:04 AM), <https://www.cbsnews.com/news/deadly-riots-after-bangladesh-kills-opposition-leader/> [<https://perma.cc/ZH57-652K>].

<sup>90</sup> S.B., *Killing for a Homeland*, THE ECONOMIST (Aug. 24, 2012), <https://www.economist.com/banyan/2012/08/24/killing-for-a-homeland>.

<sup>91</sup> *Id.*

get enough to eat or space to sleep. But that is better than constantly living with the threat of death.”<sup>92</sup>

Many local people termed the riot as “killing for homeland.”<sup>93</sup> The Bodo tribe and the Muslim Bangladeshi settlers’ conflict is a good case to prove the interlinkage between climate change, human mobility, and growing tensions and threats to national and regional peace and security. The conflict also showcases noteworthy gaps in the protection mechanism of cross-border CID/M.

### III

#### PROTECTION MECHANISM FOR CID/M: ANALYZING THE EXISTING LEGAL FRAMEWORK

The contextual analysis above makes it evident that an international, regional, and national mechanism is immediately needed to secure the rights of displaced or migrant people. However, besides a lack of a clear definition,<sup>94</sup> there is also no single legal and normative framework that specifically and adequately addresses the protection issue of cross-border CID/M at the international level. For cross-border CID/M, a huge protection gap paves the way to deny or condemn the rights of CID/M migrants by the international communities and national governments. Therefore, this section aims to evaluate existing legal gaps at the international,<sup>95</sup> regional, and national legal frameworks to showcase why and how protection mechanisms for cross-border CID/M remains missing from any protection regimes. Solving this problem may lead us to adopt a new approach or to develop a new mechanism for protecting the rights of CID/M migrants.

#### *A. Legal Gaps in the International Legal Framework*

At the global level, the governing regimes that are most relevant for CID/M are climate change, refugee, statelessness, migration, and human rights law.<sup>96</sup> The discussion below evaluates why and how the

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<sup>92</sup> Subir Bhaumik, *Assam Violence Reverberates Across India*, AL JAZEERA (Aug. 16, 2012), <https://www.aljazeera.com/indepth/features/2012/08/201281572950685537.html> [https://perma.cc/2TJN-JA64].

<sup>93</sup> S.B., *Killing for a Homeland*, THE ECONOMIST (Aug. 24, 2012) <https://www.economist.com/banyan/2012/08/24/killing-for-a-homeland>.

<sup>94</sup> BODANSKY ET AL., *supra* note 37, at 318.

<sup>95</sup> *Id.*

<sup>96</sup> JOLLY & AHMAD, *supra* note 39, at 79; Lauren Nishimura, ‘Climate Change Migrants’: *Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies*, 27 INT’L J. REFUGEE L. 107, 114 (2015).

protection mechanism for cross-border CID/M remains entirely missing in each regime.

*1. International Climate Regulatory Regime: An Inadequate Avenue to Protect CID/M Migrants*

In 1990, the report of the IPCC underscored CID/M as an adverse impact of climate change,<sup>97</sup> though the United Nations Framework Convention on Climate Change 1992 (UNFCCC) does not address CID/M.<sup>98</sup> In its text, there is no explicit reference to CID/M. However, Articles 3.2 and 4.8 recognize vulnerable developing country Parties' specific needs and special circumstances resulting from the adverse impact of climate change.<sup>99</sup> These articles also request that parties give full consideration to taking appropriate action to meet the needs and concerns of developing countries to address the adverse impact of climate change.<sup>100</sup> Through recognizing the vulnerability of developing countries, the UNFCCC recognizes CID/M under a broader context instead of referring specifically to CID/M. The reason behind remaining silent on the issue of CID/M may be that the UNFCCC is more focused on GHG emission reduction and CID/M is primarily viewed as part of adaptation.<sup>101</sup> Looking into climate-induced migration from the perspective of adaptation strategy can be partially rational. But looking at the entire picture of CID/M from an adaptation perspective is an oversimplification which may bypass many fundamental human rights of CID/M, such as the right to cultural practice and the right to maintain a traditional livelihood.

However, the legal protections for CID/M have drawn huge focus at the UNFCCC negotiation table, specifically from the Small Island Developing States (SIDS) and Least Developed Countries (LDCs) Groups.<sup>102</sup> It also draws interest from academics, scientists, NGOs, and their strong advocates, which was later reflected in the Cancun Agreement that was adopted in 2010. The Cancun Agreement contains the first explicit reference of CID/M in the climate-governing regime,

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<sup>97</sup> IPCC, FIRST ASSESSMENT REPORT - OVERVIEW AND POLICYMAKER SUMMARIES 1, 55 (1992).

<sup>98</sup> See U.N. Framework Convention on Climate Change, *U.N. Framework Convention on Climate Change*, U.N. Doc. FCCC/Informal/84 (May 9, 1992).

<sup>99</sup> *Id.* at 4, 8–9.

<sup>100</sup> *Id.* at 8.

<sup>101</sup> JOLLY & AHMAD, *supra* note 39, at 85.

<sup>102</sup> BODANSKY ET AL., *supra* note 37, at 312, 321.

though unlike the Kyoto Protocol, the Cancun Agreement has no legally binding effect.<sup>103</sup> The Cancun Agreement acknowledges that at the national, regional, and global levels there is a need to “enhance understanding, coordination, and cooperation concerning” CID/M and require states to undertake “enhance[d] adaptation action.”<sup>104</sup> However, the provision is not specific enough. The requirement to take enhanced adaptation action is a voluntary obligation that represents a mere political acknowledgment<sup>105</sup> and failed to produce concrete actions.<sup>106</sup> Moreover, the provision did not refer to enhanced responsibility for developed countries under the “common but differentiate responsibility” principle, which was advocated by developing countries and strongly denied by the developed countries.<sup>107</sup> However, the Cancun Agreement formally created space for CID/M at the UNFCCC negotiation table and was discussed in the context of adaptation, loss, and damage.<sup>108</sup>

During the negotiation on the text of the Paris Agreement, developing countries, academics, and human rights organizations strongly advocated to include reference of CID/M in the Paris Agreement. The reference to CID/M survived until the last final draft text of the Paris Agreement under the loss and damage (Article 8).<sup>109</sup> However, the reference to CID/M was deleted from the final text due to strong opposition from Australia.<sup>110</sup> Australia refused to agree on a mutually agreed legal status for CID/M that might create a burden for Australia to receive a high-volume population of migrated or displaced persons from a low-lying country like Tuvalu, Kiribati, or the Solomon Islands.<sup>111</sup> Currently, the reference to CID/M exists only in the Paris Agreement’s preamble where parties are recommended to “respect, promote, and consider” migrants’ rights while taking action for climate

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<sup>103</sup> *Id.* at 326.

<sup>104</sup> Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session*, U.N. Doc. FCCC/CP/2010/7/Add.1, at 3, 5 (Mar. 15, 2011).

<sup>105</sup> Nishimura, *supra* note 96, at 116.

<sup>106</sup> *Id.*

<sup>107</sup> BODANSKY ET AL., *supra* note 37, at 325–26.

<sup>108</sup> *Id.* at 326.

<sup>109</sup> Omer Karasapan, *Refugees: Displaced from the Paris Climate Change Agreement?*, BROOKINGS (Dec. 7, 2015), <https://www.brookings.edu/blog/future-development/2015/12/07/refugees-displaced-from-the-paris-climate-change-agreement/> [<https://perma.cc/6LRU-VD42>].

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

change.<sup>112</sup> However, Article 8.4 of the Paris Agreement lists factors (like slow-onset events, permanent and irreversible damage) for which people might get displaced or be forced to migrate.<sup>113</sup> Therefore, it could be argued that Article 8 covers the issue of CID/M. Article 8 requests and recommends that parties cooperate and facilitate enhanced understanding, action, and support to address the listed factors.<sup>114</sup> Again, in nature, these provisions are all voluntary and have no legal effect. However, it is worth noting that several countries in their nationally determined contributions (NDCs) referred to CID/M in an internal context, not cross-border (Chad, Egypt, Nigeria, Kiribati referred to CID/M in their respective NDCs)<sup>115</sup>

A TFD is established under the Warsaw International Mechanism for Loss and Damage to lay down recommendations for an integrated approach to address CID/M.<sup>116</sup> In September 2018, TFD finalized and forwarded the recommendations to the *Warsaw International Mechanism for Loss and Damage*.<sup>117</sup> Later at COP24, under Decision 10/CP.24, recommendations were adopted.<sup>118</sup> The key recommendations included in the Annex of Decision 10/CP.24 are listed below:

1. Invites parties to enhance understanding on CID/M at both the internal and cross border levels.<sup>119</sup>
2. Invites parties to develop relevant laws and policies to address displacement caused by the adverse impacts of climate change, taking into consideration respective human rights of the displaced populations.<sup>120</sup>

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<sup>112</sup> Decision 1/CP.21, *supra* note 23, at 2.

<sup>113</sup> *Id.* at 12.

<sup>114</sup> *Id.*

<sup>115</sup> NDC Registry (Interim), UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx> [<https://perma.cc/RDV4-8KCP>] (last visited Feb. 8, 2021).

<sup>116</sup> WARSAW INTERNATIONAL MECHANISM (WIM) TASK FORCE ON DISPLACEMENT (TFD), MOVING FORWARD TOGETHER: AVERTING, MINIMIZING AND ADDRESSING DISPLACEMENT: THE SECOND PHASE OF THE TASK FORCE ON DISPLACEMENT 2 (Dec. 3, 2019), <https://unfccc.int/sites/default/files/resource/28112019%20Concept%20Note%20and%20Programme%20TFD%20Side%20Event%20%28FINAL%20DRAFT%29%20updated.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> Decision 10/CP.24, ¶ 4–5.

<sup>119</sup> Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-Fourth Session*, U.N. Doc. FCCC/CP/2018/10/Add.1, at 43 (Mar. 19, 2019).

<sup>120</sup> *Id.*

3. Encourages parties to integrate into national planning process challenges and opportunities related to climate-induced human mobility.<sup>121</sup>
4. Invites parties to recognize the need for displaced or migrant persons while they are in the country of origin, or transit or in the destination. It also invites parties to facilitate and secure safe, regular, orderly, and responsible human mobility and migrations.<sup>122</sup>
5. Invites parties to enhance support on regional, sub-regional, and trans-boundary cooperation to address displacement.<sup>123</sup>

How effective will recommendations made by TFD will be, and to what extent it will protect the rights of CID/M, is yet to be seen. However, from the above discussion, it is clear that in the climate regulatory regime there is neither a defined legal status of CID/M migrants nor is there any protection mechanism to secure their rights. There is no clarification regarding the rights of CID/M migrants, and no commitments and obligations are given to states to protect CID/M migrants. Such gaps primarily result from the failure to make a strong case for CID/M migrants at the climate negotiations table and the lack of agreement from the developed countries' party side. It is noteworthy that, as of 2020, progress on the implementation of these recommendations is not yet visible.

## 2. *Refugee Law: Definitional Barrier*

International refugee law under the 1951 Geneva Convention extends its safeguards solely to refugees, stateless persons, asylum seekers, and returnees. However, it was a long debate to consider cross-border, climate-induced displacement under the category of refugee to get legal protection under the 1951 Convention. To be considered a refugee, an individual needs to fall under the category set by the 1951 Convention.<sup>124</sup> Under the 1951 Convention, refugee status is narrowly confined to those individuals who face "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."<sup>125</sup> Under this specific definition of the Convention, climate-induced displaced people do not qualify to be considered refugees.

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<sup>121</sup> *Id.* at 44.

<sup>122</sup> *Id.*

<sup>123</sup> Framework Convention on Climate Change, *supra* note 104.

<sup>124</sup> Geneva Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 189 U.N.T.S. 150.

<sup>125</sup> *Id.*

Under the 1951 Convention, the persecutor must either be a person from the government or a non-state actor over whom the government has no control or is unwilling to control.<sup>126</sup> In climate-induced displacement, the root cause of population movement may be the adverse impact of climate change, and it is difficult to fit the adverse impact of climate change into the mold of the persecutor.<sup>127</sup> Thus, the adverse impacts of climate change (such as rising sea level, loss of land, and cyclones) might be life-threatening but cannot be considered persecution. On the other hand, it is also very unlikely that the government will persecute people who are under the threat of climate change.<sup>128</sup> Again, to prove an act of persecution, it would be hard to prove the causal link between government actions with mens rea and climate-induced displacement for such action. Yet again, to be considered a refugee the reason for persecution must fall under any five grounds mentioned in the definition. However, displacement due to the adverse impact of climate change or the environment is not included as a reason for persecution. Some scholars argue that climate-induced displacement might fall under the category of “membership of a particular social group.”<sup>129</sup> However, according to the Handbook for the 1951 Convention, “particular social group” includes persons of similar background, habits, or social status (such as nationality, race, and religion), and having membership of such a particular social group must be at the root of the fear of persecution.<sup>130</sup> Climate-displaced people can be considered as having a similar background, but fear of persecution for being a climate-induced people is illogical to accept.

Considering all these grounds, in a recent asylum case *Ioane Teitiota v. Chief Executive of the Ministry of Business Innovation and Employment*, a New Zealand court declared that Teitiota’s plea to be considered a climate refugee was novel but not convincing.<sup>131</sup> The court held that

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<sup>126</sup> *AF (Kiribati) v Refugee Status Branch (RSB) of the Dep’t of Labour* [2013] NZIPT 800413 at ¶ 54.

<sup>127</sup> Marta Picchi, *Climate Change and the Protection of Human Rights: The Issue of “Climate Refugees,”* 13 US-CHINA L. REV. 576, 577 (2016).

<sup>128</sup> *Id.*

<sup>129</sup> Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENV’T L.J. 480, 480 (1998).

<sup>130</sup> *Id.*

<sup>131</sup> *Ioane Teitiota v. Chief Exec. of the Ministry of Bus., Innovation & Emp.* [2015] NZSC 107.

The Refugee Convention did not apply to Teitiota and is not well suited to protect environmental migrants generally. Relief under the Refugee Convention is limited to states with governments that have caused, either directly or indirectly, the suffering of a group of people on account of race, religion, nationality, political opinion, or membership in a particular social group. Kiribati and other states facing climate change should certainly not aspire to such a draconian option for relief.<sup>132</sup>

Hence, the judgment made it clear that the definition of refugee given in the 1951 Convention does not cover climate-induced displacement, and with its narrow application, the Convention cannot extend its protection to climate-induced displacement. However, the United Nations Human Rights Committee made an observation on this judgment upon a complaint filed by Ioane Teitiota in January 2020. According to the observation, the judgment did not violate the right to life of Ioane Teitiota. However, the United Nations Human Rights Committee recognized that sudden or slow-onset events could be a threat to the right to life for which a person can seek cross-border protection, and it can link up with the principle of non-refoulement.<sup>133</sup> This recognition from the United Nations Human Rights Committee is significant for future cases. Nevertheless, if an individual crosses the border due to fear from persecution, and if he also suffers from the adverse impact of climate change, the person can be considered a refugee and receive the protections that this recognition entails.<sup>134</sup>

The narrow and limited refugee definition given in the 1951 Convention is the key barrier here for excluding climate-induced displacement from legal safeguards under the refugee law. However, some have suggested widening the scope of the definition by amending it to include climate-induced displacement. Even if there is an amendment to the definition, it will not solve the issue, as there is the least possibility that climate change displacement will result due to the persecution of government or non-state actors. And if an attempt is made to change the definition entirely with a wider concept, it would give rise to the risk of degrading existing protection measures for refugees by opening a wide-ended floodgate.

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<sup>132</sup> *Id.*

<sup>133</sup> Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, U.N. Human Rights Committee CCPR/C/127/D/2728/2016 (Jan. 7, 2020), at 9, 15, [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200107\\_CCPRC127D27282016-\\_opinion.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200107_CCPRC127D27282016-_opinion.pdf).

<sup>134</sup> Gibb & Ford, *supra* note 18, at 6.

### 3. *Laws of Statelessness: Incompetent for CID/M*

Sea level rise may cause the disappearance of habitable lands or states in which the entire population may get displaced. Scholars have the opinion that international law related to statelessness might extend its protection to this type of CID/M even though there are uncertainties and complexities about the application of the concept.<sup>135</sup> The 1954 Convention on Stateless Persons considers an individual as a stateless person when the person is “not considered as a national by any State under the operation of its law.”<sup>136</sup> The 1954 Convention protects a stateless person from forceful expulsion, provided that they are lawfully staying inside the receiving country’s territory.<sup>137</sup> The Convention is not rights-oriented and in narrow scope recognized the exercise of human rights during a stateless person’s stay in the receiving country. The Convention encourages states (though in very weak language) to reduce the number of stateless persons.<sup>138</sup> However, the Convention does not recognize the stateless person’s right to cross or enter into the territory of other states. It mentions only that the receiving state allow reasonable time to a stateless person within which the person can seek “legal admission into another country.”<sup>139</sup>

In CID/M, the population usually intends to cross a border when there is a risk of inundation due to sea level rise. Such movement in no way strips their nationality. Therefore, as there are no denials of nationality, it is not possible to consider them stateless per the definition of the 1954 Convention. Even if a state completely disappears due to sea level rise (presuming for small island countries), the question may arise as to whether the law related to stateless persons will be applicable for these permanently displaced people or not. The answer to that question is also debatable, as there is legal uncertainty about whether to consider a disappeared state as an extinct state. To be considered a state under international law, a country must have a government, permanent territory, population, and the capacity to enter into a relationship with other states.<sup>140</sup> Disappearance of a state gives

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<sup>135</sup> Mayer, *International Challenges*, *supra* note 57, at 383.

<sup>136</sup> Convention relating to the Status of Stateless Persons, art. 1(1), Sept. 28, 1954, 360 U.N.T.S. 117.

<sup>137</sup> *Id.* at art. 31(1).

<sup>138</sup> *Id.* at *Introductory Note*.

<sup>139</sup> *Id.* at Article 31(3).

<sup>140</sup> Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

rise to questions of the existence of these elements. However, international law considers a state extinct only when a state splits, merges, or is voluntarily absorbed by other states.<sup>141</sup> Moreover, continuity or extinction of a state also depends on political decisions and assessment of other states.<sup>142</sup>

The discussion above made it evident that a population displaced due to the disappearance of a state cannot be de jure considered stateless persons, though de facto they will be stateless for having a formal nationality which is not, in practice, effective. Even if de jure they are considered as stateless, protection under the 1954 Convention will not be very helpful for them because the Convention neither gives the right to enter into a foreign territory nor does it address the issue of permanent settlement. But, under the Convention, CID/M may allow a stateless person to make a claim for naturalization under the notion of reduction of statelessness. The narrow scope of the 1954 Convention leaves limited scope for the wider interpretation to protect CID/M migrants who lost their state due to sea level rise. The protection under the Convention may arise only if a state disappears and is formally declared extinct, making its nationals legally stateless. However, there is no imminent possibility of a state submerging. It is also noteworthy that climate change displacement occurs soon after the land becomes uninhabitable and it will occur before the state disappears. Therefore, effective protection is needed to address the current situation by adopting effective laws.

#### *4. Human Rights Law: Limited Scope for CID/M*

The adverse impacts of climate change threaten the enjoyment of fundamental human rights like the right to life, shelter, water, food, and so on. Difficulties in exercising these rights often result in permanent, internal or cross-border, displacement or migration. However, human rights laws remain tremendously silent in the sole context of climate change and cross-border CID/M.<sup>143</sup> In the international human rights regime, there is neither any binding agreement that discourses cross-border CID/M nor has any attempt been made for the expansion of the regime to include cross-border CID/M.<sup>144</sup> The United Nations' *Guiding Principles on Internal Displacement* was adopted in 1998 and

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<sup>141</sup> James Crawford, *THE CREATION OF STATES IN INTERNATIONAL LAW* 705–14 (2nd ed. 2006).

<sup>142</sup> Mayer, *International Challenges*, *supra* note 57, at 384.

<sup>143</sup> BODANSKY ET AL., *supra* note 37, at 320.

<sup>144</sup> Nishimura, *supra* note 96, at 117.

recognizes human rights violations that resulted from natural disasters and extends protections for the people displaced due to a natural disaster.<sup>145</sup> However, the guidelines do not apply to the displaced or migrant people who crossed the territorial border of a state.<sup>146</sup> To address the protection issue of cross-border CID/M, scholars often refer to the principles of non-refoulement and responsibility to protect, two new emerging principles.<sup>147</sup> Therefore, this section of the Article will explore the efficiency and scope of these principles to extend protection to cross-border CID/M.

The principle of non-refoulement is a well-known customary international law<sup>148</sup> adopted in a good number of international agreements.<sup>149</sup> Though the principle originated from refugee laws, human rights laws extend its scope further. The principle of non-refoulement prohibits states from rejecting, deporting, or returning an alien to the country of origin, or the frontiers of the territory, if there is a substantial risk of deprivation of life, physical integrity, or liberty, or a possibility of being subject to cruel, inhuman treatments or degrading punishments or tortures.<sup>150</sup> Under the principle, prohibited conduct from the state includes “expel[ing],” “return[ing],” “extradit[ing],” and “reject[ing].”<sup>151</sup> The principle applies to any person and is “not limited to those formally recognized as refugees.”<sup>152</sup> Rules related to admission

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<sup>145</sup> U.N. *Guiding Principles*, *supra* note 40.

<sup>146</sup> *Id.* at Introduction.

<sup>147</sup> See, e.g., BODANSKY ET AL., *supra* note 37, at 321; Mostafa Mahmud Naser, *Climate-Induced Displacement in Bangladesh: Recognition and Protection Under International Law*, 82 NORDIC J. INT’L L. 487 (2013); Nishimura, *supra* note 96, at 118.

<sup>148</sup> Nils Coleman, *Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law*, 5 EUR. J. MIGRATION & L. 23, 23 (2003).

<sup>149</sup> International instruments that adopted the principle of “non-refoulement” are the 1951 Convention Relating to the Status of Refugees, Declaration on Territorial Asylum (1967), 1969 OAU Convention on Refugees, Cartagena Declaration on Refugees (1984), American Convention on Human Rights (1969), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), International Covenant on Civil and Political Rights (1966), European Convention on Human Rights (1950), and the European Convention on Extradition (1957). Guy S. Goodwin-Gill, *The 1967 Declaration on Territorial Asylum*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2012), [https://legal.un.org/avl/pdf/ha/da/da\\_e.pdf](https://legal.un.org/avl/pdf/ha/da/da_e.pdf) [<https://perma.cc/K8ZV-D4N5>].

<sup>150</sup> Elihu Lauterpacht & Daniel Bethlehem, *The Scope & Content of the Principle of Non-refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION ¶¶ 166, 175, 179 (Erika Feller et al. eds., 2003).

<sup>151</sup> *Id.* at 90–92.

<sup>152</sup> *Id.* at 88.

and non-refoulement also apply to large-scale “mass influx” situations<sup>153</sup> and grant temporary protection.<sup>154</sup>

To apply this principle to CID/M, individuals need to establish that on return there is a risk of deprivation of the right to life or liberty, or the possibility of torture or cruel, inhuman, degrading punishment or treatment. As the Article discussed above, the adverse impact of climate change imposes a potential threat to absolute rights (i.e., the right to life by affecting other fundamental rights like the right to food, shelter, health).<sup>155</sup> The adverse impact of climate change may also severely degrade living conditions by violating the right to food, water, health, and housing, which can be linked with degradation/inhuman treatment from the wider context.<sup>156</sup> Moreover, the adverse impact of climate change may cause mass displacement, and the application of the non-refoulement principle will be significant here to deal with mass-influx situations<sup>157</sup> Because even in mass influx, receiving states are required to provide admission and temporary protection to the displaced people until conditions permit for safe return.<sup>158</sup>

However, the difficulties in exercising the right to life and liberty or in becoming the subject of cruel punishment or torture must arise from an act of the state or anyone acting on behalf of the state. And as mentioned in previously, these elements are completely missing in the matter of CID/M.<sup>159</sup> So, the principle of non-refoulement and its application to CID/M is still a gray area, and any claims from CID/M under this principle need to be carefully tailored, developed, and argued with the ambit of states’ obligations of non-refoulement.<sup>160</sup> The international community also needs to consider widening the applicability of the principle so that cross-border CID/M and gross violations of human rights for this cannot remain unaddressed. Though it is worth noting that the principle of non-refoulement grants safety from expulsion with temporary protection, this cannot solve the problem of many CID/M migrants who lost their land permanently and need permanent settlement in a country.

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<sup>153</sup> *Id.* at 103–05.

<sup>154</sup> *Id.* at 144(f).

<sup>155</sup> *See supra* Part I.

<sup>156</sup> *See infra* Part III.

<sup>157</sup> Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards, Legal and Protection Policy Research Series*, UNHCR (2011), at 39, 46.

<sup>158</sup> BODANSKY ET AL., *supra* note 37, at 320.

<sup>159</sup> *See infra* Part IV.

<sup>160</sup> *Id.* at 321.

For the protection of CID/M migrants and to overcome the legal limitations, another avenue that scholars are currently exploring is the principle of responsibility to protect.<sup>161</sup> According to this new emerging principle,

State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, that responsibility to protect must be borne by the broader community of states.<sup>162</sup>

Under this new principle, responsibility to protect specifically includes three responsibilities: “responsibility to prevent, react and rebuild.”<sup>163</sup>

The text made it clear that the principle does not cover the context of climate change nor is it intended to extend protection to CID/M migrants. The scope of the principle primarily covers situations like a crime against humanity, genocide, ethnic cleansing, and war crimes including military intervention. Human rights violations or threats to human security from climate change are not within the ambit of the principle.<sup>164</sup> However, displacement and harm caused by the adverse impact of climate change might be considered “state failure” of prevention, where the state is unable to “halt or avert” the situation.<sup>165</sup> Though, in the climate change context, “failure of state” to prevent the adverse impact of climate change does not occur from the action or inaction from the concerned state but due to the failure of developed countries to reduce the emission of GHG into the atmosphere. Still, an attempt can be made to link up CID/M with the principle of responsibility to protect from a wider perspective. For such an expansion of the application of the principle, more legal analysis and interpretation is needed.

However, through the responsibility to protect principle, establishing the international community’s duty to protect CID/M will

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<sup>161</sup> Susan Martin, *Forced Migration, the Refugee Regime and the Responsibility to Protect*, 2 *GLOB. RESP. PROTECT* 38, 38 (2010).

<sup>162</sup> INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT*, at viii (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/4SMC-5YV3>].

<sup>163</sup> *Id.* ¶ 8.28.

<sup>164</sup> About the Responsibility to Protect, Parliamentary Hearing at the United Nations New York, 1 (Nov. 20–21, 2008), <http://archive.ipu.org/splz-e/unga08/s1.pdf> [<https://perma.cc/97SD-HY5K>].

<sup>165</sup> INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 162, at (1)B.

give rise to other legal questions and challenges: What will a protection obligation entail? Will it entail an obligation to admit cross-border CID/M migrants into the territory permanently, or will it be some temporary assistance? CID/M requires more permanent and long-term solutions, and temporary assistance will not serve much help to the cross-border CID/M migrants. Again, if the obligation entails the responsibility to admit CID/M, it will be contrary to the sovereign rights of a state. The exercise of obligation might be more complicated when cross-border CID/M happens between two developing countries, like Bangladesh and India, where both countries are suffering from similar adverse impacts of climate change and are under the severe threat of loss of lands. Moreover, there is also concern about the proper application of the principle, as the principle has no legally binding effect and application of it might be driven by a state's political will or discretionary power.<sup>166</sup>

Under the no harm principle of general international law, the responsibility to protect CID/M migrants can be established to get a durable and permanent solution to the cross-border CID/M.<sup>167</sup> Under this customary rule,<sup>168</sup> the basis of states' liability to protect CID/M migrants arise from failing to reduce GHG emission in the atmosphere, which causes transboundary environmental harm and results in climate change with its related adverse effects.<sup>169</sup> Breach of no-harm obligation entails liability for the responsible state.<sup>170</sup> However, under the no-harm rule, establishing state liability for the climate change context is an intricate and contentious issue because of causal uncertainty and attribution,<sup>171</sup> due diligence strain, multiple wrongdoers, determining proportional contribution,<sup>172</sup> complexities with joint or several liabilities,<sup>173</sup> and retrospective liability. However, the uncertainty in establishing state liability to protect CID/M migrants under the no harm

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<sup>166</sup> BODANSKY ET AL., *supra* note 37, at 321.

<sup>167</sup> Rina Kuusipalo, Exiled By Emissions—Climate Change Related Displacement and Migration in International Law: Gaps in Global Governance and the Role of the UN Climate Convention, *VT. J. OF ENV'T L.* 614, 626 (2017).

<sup>168</sup> Benoît Mayer, *The Relevance of the No-Harm Principle to Climate Change Law and Politics*, 19 *Asia Pac. J. Env't L.* 1, 15 (2016) [hereinafter Mayer, *No-Harm*].

<sup>169</sup> *Id.* at 2.

<sup>170</sup> *Id.* at 15.

<sup>171</sup> Sharaban T. Zaman & M. Hafijul Islam Khan, *A Legal Appraisal on Liability and Compensation Logic to Address the Impact of Climate Change*, in *CONSERVATION, SUSTAINABILITY, AND ENVIRONMENTAL JUSTICE IN INDIA*, 197–98 (Alok Gupta ed., 2020).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

rule is slowly being wiped out with the advancement of science and technology to establish a causal link between carbon emission, global warming, and the adverse impact of climate change. Moreover, scholarly articles<sup>174</sup> and groundbreaking judicial decisions like the judgment of the *Urgenda Foundation v. Government of the Netherlands* set forth new, innovative, wide, and flexible interpretations of the no harm rule to support the climate change liability claim.<sup>175</sup>

##### 5. Migration Law: Absence of Protection

Crossing international borders and gaining admission into a territory are imperative issues that closely connect with state sovereignty. Therefore, immigration-related rules and regulations mostly depend on domestic migration laws, which decide the eligibility criteria for migrants hoping to gain admission and permission to reside in that territory. These laws also determine the migrant's legal status, duration of stay, employment rights, and other issues. Nevertheless, at the international level, to protect cross-border migrants' rights, some legal instruments are adopted. For instance, the Migrant Workers Convention was adopted by the United Nation in 1990.<sup>176</sup> The Convention recognizes an individual as a migrant if the person is involved in some remunerated activities in a foreign state irrespective of their legal status.<sup>177</sup> This wider definition includes a climate-induced migrant who is involved in remunerated activities in a foreign state. However, the Convention did not provide any rights or protections to the migrant to cross the border.<sup>178</sup> Similarly, the *Migration for Employment Convention* of 1949<sup>179</sup> and the *Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live* of 1985<sup>180</sup> also do not recognize migrants' rights to cross the

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<sup>174</sup> Mayer, *No-Harm supra* note 168, at 54.

<sup>175</sup> The Hague District Court 24 Juni 2015, 7196 m.nt Rechtbank Den Haag, (*Urgenda Foundation/ Government of the Netherlands*) (Neth.).

<sup>176</sup> G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Dec. 18, 1990).

<sup>177</sup> *Id.* at Article 2(1).

<sup>178</sup> *Id.* See also Mayer, *Governing supra* note 32, at 385–86.

<sup>179</sup> Adopted by International Labour Organization Convention on July 1, 1949 (entered into force January 22, 1952).

<sup>180</sup> Adopted by United Nations General Assembly on December 13, 1985. G.A. Res. 40/144, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live.

border or stay in other territories.<sup>181</sup> All these legal instruments in reality address some fundamental human rights for migrants who are in a specific circumstance, and these circumstances do not include migrations due to climate factors. Also, all these legal instruments are ratified by very few states, which indicates a lack of political will to protect and recognize economic migrants' human rights.<sup>182</sup> International migration law does not provide adequate protection to the migrants from where climate migrants can invoke some support.

### ***B. Legal Gaps in Regional Legal Protection Mechanisms of South Asia***

Due to sociopolitical instability, internal conflicts, war, and environmental factors, South Asia as a region has historically witnessed considerable intraregional displacement and human movement.<sup>183</sup> Historically, it is evident that countries in this region not only generate refugees, migrants, or displaced populations (like Afghanistan, Sri Lanka, Bhutan, Bangladesh) but also host them (like India, Pakistan, Bangladesh, Nepal). The region witnessed the largest intraregional human displacement and population movement in 1947, during the time of the India-Pakistan Partition; in 1970, when the Soviet Union and Afghanistan War broke out; in 1971, when Bangladesh fought for its independence; and recently due to climate change.<sup>184</sup> Though the region experienced huge human displacement and population movement over time, courtiers in South Asia have yet to develop any regional legal protection mechanisms for human displacement and population movement. In South Asia, the sole regional organization is the South Asian Association of Regional Cooperation (SAARC).<sup>185</sup> Unfortunately, neither through SAARC nor bilaterally has an attempt been made by SAARC countries to extend legal protection to the displaced or migrant population.

However, SAARC, as a regional intergovernmental organization, adopted some declarations and action plans to address the climate change issues. Some examples are the Comprehensive Framework on

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<sup>181</sup> Mayer, *No-Harm supra* note 168, at 54.

<sup>182</sup> DIMITRA MANOU ET AL., *CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS* 150 (Andrew Baldwin, Dug Cubie & Anja Mih eds., 1st ed. 2017).

<sup>183</sup> JOLLY & AHMAD, *supra* note 39, at 149.

<sup>184</sup> *Id.* at 125.

<sup>185</sup> *About SAARC*, SAARC (July 12, 2020), <https://www.saarc-sec.org/index.php/about-saarc/about-saarc> [<https://perma.cc/TG8E-3LC4>]. Established in 1985 as a regional intergovernmental organization. *Id.*

Disaster Management 2006,<sup>186</sup> the Dhaka Declaration 2008 and SAARC Action Plan on Climate Change 2009-11;<sup>187</sup> and the Thimphu Statement on Climate Change 2010.<sup>188</sup> In 2016, SAARC also established the SAARC Disaster Management Centre (SDMC) to provide policy advice and support related to capacity building. SDMC also adopted strategic roadmaps on disaster management issues. Though these documents invite countries to strengthen regional collaboration to address climate change problems, displacement and population movement are neither featured nor addressed in any of these documents. In the last SAARC summit (held in 2014, at Kathmandu), civil societies urged SAARC countries to adopt a SAARC Charter to provide CID/M with rights to free movement within the SAARC region.<sup>189</sup> However, the 2014 Kathmandu Declaration addressed the “safety, security, and wellbeing of their migrant workers,”<sup>190</sup> but issues related to CID/M remain absent due to lack of strong political will and financial resources.<sup>191</sup>

It is worth noting that SAARC, as a regional organization, is politically and structurally weak. It has limited capacity to deal with the contentious issue. Under Article X of the SAARC Charter, it is set forth that “[d]ecisions at all levels shall be taken based on unanimity. Bilateral and contentious issues shall be excluded from the deliberations.”<sup>192</sup> So far, refugees and climate-induced displacement remain contentious issues within SAARC countries. Therefore,

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<sup>186</sup> UNDRR, *SAARC Comprehensive Framework on Disaster Management*, PREVENTION WEB (2007), <https://www.preventionweb.net/english/policies/v.php?id=60968&rid=4> [<https://perma.cc/E77A-GHWX>].

<sup>187</sup> The SAARC Declarations on Climate Change, South Asian Ass’n Reg’l Coop., <http://www.equitybd.net/wp-content/uploads/2015/10/The-SAARC-Declarations-on-Climate-Change.pdf> [<https://perma.cc/8TAU-VQYU>] (last visited July 17, 2019).

<sup>188</sup> Press Release, Thimphu Statement on Climate Change, Sixteenth SAARC Summit Thimphu (Apr. 29, 2010), [http://mea.gov.in/Uploads/PublicationDocs/3808\\_30th-april-2012-bil.pdf](http://mea.gov.in/Uploads/PublicationDocs/3808_30th-april-2012-bil.pdf).

<sup>189</sup> *SAARC States Urged to Allow Free Movement of Climate Refugees*, THE DAILY OBSERVER (Nov. 11, 2014, 12:00 AM), <https://www.observerbd.com/2014/11/16/55032.php> [<https://perma.cc/4FWT-9UZ8>].

<sup>190</sup> Kathmandu Declaration, South Asian Ass’n Reg’l Coop., Nov. 26–27, 2014, 21, [http://mea.gov.in/Uploads/PublicationDocs/24375\\_EIGHTEENTH\\_SUMMIT\\_DECLARATION.pdf](http://mea.gov.in/Uploads/PublicationDocs/24375_EIGHTEENTH_SUMMIT_DECLARATION.pdf) [<https://perma.cc/CB6T-29UU>].

<sup>191</sup> Zahid Shahab Ahmed, *The Role of SAARC and EU in Managing Refugees in South Asia and Beyond: Potential for North-South Cooperation*, 9 GLOB. POL’Y 76, 80 (2018).

<sup>192</sup> Charter of the South Asian Association for Regional Cooperation, South Asian Ass’n Reg’l Coop., <https://www.saarc-sec.org/index.php/about-saarc/saarc-charter> [<https://perma.cc/4D9K-TQ9G>].

references of these are entirely missing from all documents adopted from 1985 to date.<sup>193</sup> Among SAARC countries, it is only Bangladesh and Maldives who are expressing firm footing to recognize and protect CID/M. The rest of the States so far remain silent.

However, cross-border CID/M is an unavoidable reality in the South Asia region. Therefore, to strengthen and deepen mutual negotiations and dialogue between countries on the issue of cross-border mass CID/M, it is urgently required to formulate regional treaties, policies, or mechanisms. Such a step is extremely vital to address the rights of the cross-border displaced or migrant population and to develop cooperative mechanisms for regional peace and security issues.

### ***C. Legal Gaps in National Protection Mechanisms and Practices in the South Asian States***

Though all South Asian countries are very active in the United Nations climate negotiation process and are duly executing their international legal obligations under different climate governance-related legal instruments, none of the states afford effective national-level legal protection to CID/M migrants. Many states in South Asia clearly acknowledge cross-border CID/M and its related threat to human rights, national and regional peace, and security issues in national-level policy documents.<sup>194</sup> However, the national-level legal and policy responses toward cross-border CID/M are entirely missing. Equally, safeguards toward internal CID/M are significantly inadequate and at the embryonic stage.

Table 1 on the following pages briefly highlights the existing legal mechanisms and practices in South Asian states in the matter of cross-border CID/M.<sup>195</sup>

Table 1 shows that in South Asian countries there are no specific laws that refer to or address cross-border CID/M. Contrary to the significance of CID/M, the Maldives, which is under the persistent threat of disappearance due to sea levels rising, also made no reference to CID/M in any of its legislation. However, the Disaster Management Act, 2012 of Bangladesh in section 2(11)(f) refers to loss and damage. Under the loss and damage section, displacement and migration can be considered. However, the Act 2012 made no direct reference to CID/M.

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<sup>193</sup> Zahid Shahab Ahmed, *Managing the Refugee Crises in South Asia: The Role of SAARC*, 28 ASIAN & PAC. MIGRATION J. 210, 215 (2019).

<sup>194</sup> JOLLY & AHMAD, *supra* note 39, at 35–36.

<sup>195</sup> This table was exclusively developed by the author based on field research, expert consultation, and survey.

Table 1. *Existing Legal Mechanisms in South Asian States in the Matter of Cross-Border CID/M*

<b>Afghanistan</b>	<ul style="list-style-type: none"> <li>• No legislation that specifically addresses/refers to CID/M.</li> <li>• The National Adaptation Programs of Action of 2009; the National Policy on Internally Displaced Persons, 2013 refers to internal displacement.</li> <li>• Under Article 7 of the Afghanistan Constitution, migrants get human rights protection.</li> <li>• Migrants, in general, are regulated under the Citizenship Act, 1992, Presidential Decree 104 and 297.</li> </ul>
<b>Bangladesh</b>	<ul style="list-style-type: none"> <li>• The Disaster Management Act 2012 addresses displacement from a wider context.</li> <li>• The National Adaptation Programs of Action of 2005 with an update in 2009; Bangladesh Climate Change Strategy and Action Plan of 2009; Seventh Five Year Plan (2016-2020); Perspective Plan (2010-21) address internal displacement and migration from the perspective of adaptation.</li> <li>• Articles 31 and 32 of the Bangladesh Constitution grant human rights protection to each and all persons irrespective of citizenship.</li> <li>• Migrants and refugees, in general, are regulated under The Passport Act, 1920; Registration of Foreigners Act, 1939; Foreigners Act of 1946; the Citizenship Order, 1972; The Extradition Act, 1974.</li> </ul>
<b>Bhutan</b>	<ul style="list-style-type: none"> <li>• No legislation that specifically addresses/refers to CID/M.</li> <li>• No policies that specifically address/refer to CID/M. (For example, the Bhutan National Adaptation Plan of Action did not refer to CID/M.)</li> <li>• Article 7 of the Constitution of the Kingdom of Bhutan grants human rights protection to all persons.</li> <li>• Migrants, in general, are regulated under the Citizenship Act of 1985; Immigration Act, 2007; Immigration Rules and Regulation, 2012.</li> </ul>

<b>India</b>	<ul style="list-style-type: none"> <li>• No legislation that specifically addresses/refers to CID/M.</li> <li>• Kerala and Assam State Action Plans on Climate Change (SAPCCs); The National Disaster Management Plan (NDMP) refers to internal displacement and migration.</li> <li>• Part III of the Indian Constitution grants human rights protection to all persons irrespective of citizenship.</li> <li>• Migrants, in general, are regulated under Passport Act, 1920; Foreigner Registration Act, 1939; Foreigners Act of 1946; Extradition Act, 1962; Passport Act, 1967.</li> </ul>
<b>Maldives</b>	<ul style="list-style-type: none"> <li>• No legislation that specifically addresses/refers to CID/M.</li> <li>• National Adaptation Plan of Action; Climate Change Policy Framework (MCCPF) refers to climate refugees.</li> <li>• Migrants, in general, are regulated under the Immigration Act, 2007; Crossing Border By Air Act 2019; Crossing Border By Sea Act 2019; Passport Regulation Act, 2017.</li> </ul>
<b>Nepal</b>	<ul style="list-style-type: none"> <li>• No legislation that specifically addresses/refers to CID/M.</li> <li>• National Adaptation Programmes of Action; Climate Change Policy (2011) refers to internal climate-induced displacement.</li> <li>• Migrants, in general, are regulated under the Immigration Act, 1992 and The Immigration Rules, 1994; Non-Resident Nepali Act, 2064 (2008).</li> </ul>
<b>Pakistan</b>	<ul style="list-style-type: none"> <li>• Pakistan Climate Change Act, 2017, did not refer to CID/M.</li> <li>• No policies that specifically address/refer to CID/M.</li> <li>• Article 9 of the Pakistan Constitution grants protection to all persons.</li> <li>• Migrants, in general, are regulated under the Pakistan Citizenship Act, 1951 and the Pakistan Citizenship Rules, 1952; The Naturalization Act 1926.</li> </ul>
<b>Sri Lanka</b>	<ul style="list-style-type: none"> <li>• No legislation that specifically addresses/refers to CID/M.</li> <li>• National Adaptation Plan (2016-2025); Post Disaster Recovery Plan (May 2017) referred to internal displacement.</li> <li>• Migrants, in general, are regulated under the Immigrants and Emigrants Act and Regulation 1956; Citizenship Act No. 18 of 1948.</li> </ul>

In South Asia, Pakistan is the only country that has a specific law on climate change, named the *Climate Change Act, 2017*. Though the country is receiving cross-border CID/M, especially from Afghanistan, the Act did not refer to CID/M.<sup>196</sup>

Some countries refer to internal displacement in their policies (like Bangladesh, Afghanistan, Nepal, Maldives, and Sri Lanka), but reference to cross-border movement is entirely missing in these relevant policy frameworks. Countries that mention CID/M mostly refer to it from the perspective of adaptation strategies (like Afghanistan, Bangladesh) and condition rehabilitation and relocation of CID/M on the availability of financial and technical resources. Sri Lanka refers to internal displacement as a socioeconomic outcome due to the adverse impact of climate change. Human rights and protection measures for CID/M are also entirely missing in these countries' legislative frameworks. The issue of cross-border CID/M has yet to be included in the mainstream legal and policy frameworks of South Asia.

However, South Asian countries address cross-border CID/M through general immigration and citizenship laws instead of through laws specifically targeting CID/M. Considering the sovereignty and national security issues, states usually prefer to hold absolute and unrestricted power in the matter of granting citizenship, residence, or entry permits and in controlling the borders. Consequently, permission to cross the border requires strict compliance with immigration laws, and the state holds the absolute authority to prevent, refuse, or cancel the entry. In the matter of long-term or permanent stay, foreigners usually get permission under the economic category,<sup>197</sup> family category,<sup>198</sup> or humanitarian<sup>199</sup> category.<sup>200</sup> The immigration laws required for the economic, family, and humanitarian categories are usually very strict, and due to the lack of specific definition and legal status, in practice, CID/M has yet to be considered under a humanitarian ground.

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<sup>196</sup> JOLLY & AHMAD, *supra* note 39, at 125.

<sup>197</sup> Where skill and qualification requirements need to be fulfilled. Rafael Leal-Arcas, *Climate Migrants: Legal Options*, 37 *PROCEDIA – SOC. & BEHAV. SCIS.* 86, 92 (2012).

<sup>198</sup> Where one of the family members already received citizenship in the destination country. *Id.*

<sup>199</sup> Where person needs to prove humanitarian grounds like war, armed conflict, threat for persecution. *Id.*

<sup>200</sup> *Id.*

In some countries (Bangladesh, Bhutan, Afghanistan, Pakistan, and India), cross-border migrants or displaced populations may seek human rights protections under the fundamental rights guaranteed by the Constitution. India, through its judicial decisions, reinforces these protection measures toward foreigners and aliens. For example, in *Louis De Raedt v. Union of India*, the Indian Supreme Court was directed to secure life and personal liberty of each and all persons including foreigners and aliens under Article 21 of the Indian Constitution.<sup>201</sup> In *Menaka Gandhi v. Union of India*, it was held that Article 21 of the Indian Constitution is broad and includes a number of rights like the right to live with dignity, right to livelihood, right to shelter, right to protection, and the right to social security.<sup>202</sup> In *National Human Rights Commission v. State of Arunachal Pradesh*, the court held that the state is bound to provide protection to secure Article 21 and such protection shall be for every human, including foreigners.<sup>203</sup> Under this judicial decision, CID/M in India might seek legal protection in the matter of right to life and personal liberty. However, in the *National Human Rights Commission v. State of Arunachal Pradesh* case the Indian Supreme Court also held that foreign nationals do not have any guaranteed fundamental right to receive Indian citizenship.<sup>204</sup> Through this judicial decision, the Indian Government got absolute power to refuse citizenship or cancel residence of foreigners and to expel them at any time.

At the national level, cross-border CID/M is considered an issue of prominence. However, legislative responses and protection measures toward cross-border CID/M are inadequate in all South Asian countries, causing gross human right violations and increasing tension in regional peace and security.

#### ***D. Barriers to Developing Protection Mechanisms for CID/M***

The existing legal and policy gaps at the international, regional, and national levels make it evident that though CID/M is a major concern, no nation-state has made it an obligation yet. Why have no mechanisms

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<sup>201</sup> *Louis De Raedt v. Union of India with B.E. Getter v. Union of India and S.G. Getter v. Union of India*, (1991) 3 SCC 554, ¶ 13 (India), [https://www.refworld.org/cases,IND\\_SC\\_3f4b8ce54.html](https://www.refworld.org/cases,IND_SC_3f4b8ce54.html) [<https://perma.cc/9LC4-VGB6>].

<sup>202</sup> *Menaka Gandhi v. Union of India*, (1978) 2 SCR 621, 671, 694, 725 (India).

<sup>203</sup> *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) SCC (1) 742, ¶ 11 (India), [https://www.refworld.org/cases,IND\\_SC\\_3f4b8de54.html](https://www.refworld.org/cases,IND_SC_3f4b8de54.html) [<https://perma.cc/AA98-9WEZ>].

<sup>204</sup> *Id.*

have been developed under each or any of these regimes to secure protection for CID/M migrants? What are the barriers hindering the development to frame protection mechanisms for CID/M migrants? Understanding those obstacles is necessary to initiate the framing of an effective protection mechanism.

Throughout the last decade, several options have been proposed to address the protection gaps of CID/M.<sup>205</sup> Some options include adopting a new protocol or framework, setting a new definitional standard for CID/M, or expanding the scope of an existing treaty/convention to include CID/M.<sup>206</sup> However, none of these proposals were sustained at the negotiation table and the vacuum continues today. This legal vacuum is attributed to several decisive obstacles. From this Article's aforesaid discussion, it can be contended that the international legal regime's major obstacles are as follows:

1. Lack of an agreed definition on CID/M which can segregate CID/M from other categories of displacement and migration. Such lack of definition hinders not only the development of protection mechanisms but also the development of a dedicated institution focusing only on CID/M.
2. Narrow and limited scope of relevant international laws (like international human rights law, migration law, or laws related to statelessness) and lack of consensus to extend the scope of these laws. These barriers in international law have spillover effects at the national and regional levels.<sup>207</sup>

However, at the national level, the key barriers that came out from this chapter's aforesaid discussion are

1. national security concerns and intent to hold absolute sovereign power;
2. the tendency to consider cross-border climate-induced populace movement as an issue of adaptation strategy instead of considering it a failure of adaptation, which eventually simplifies the issue and gives scope to sidestep a state's accountability toward those vulnerable communities; and
3. the lack of financial and technical resources.

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<sup>205</sup> Nishimura, *supra* note 96, at 118.

<sup>206</sup> *Id.*

<sup>207</sup> JOLLY & AHMAD, *supra* note 39, at 187.

Apart from these, the lack of strict liability under the climate regulatory regime also hinders the development of a protection mechanism for CID/M. “Under strict liability, an actor is liable for any harm he causes, even if he is not at fault.”<sup>208</sup> Some argue that strict liability is derived from the principles of “responsibility and corrective justice.”<sup>209</sup> Strict liability gives a legal basis to the victim for claiming compensation. The absence of strict liability in the climate regime paved the way for polluter countries to evade their causal responsibility toward climate migrants and displaced populations. And failure to establish such strict climate liability is due to the lack of a causal link between GHG emissions and climate-induced calamities that displaced the population (clear link of harm suffered by the plaintiff resulted from defendant’s action).<sup>210</sup> There is also debate about the calculation of time which gives rise to the argument that establishing strict climate liability will be a retrospective rule.<sup>211</sup> However, the argument is not rational because from 1990 to date, emitter countries have known that excessive GHG emissions cause climate change. With this in mind, they continue their high emission use. This has been the case for almost for three decades.<sup>212</sup>

However, the primary barrier in the development of the protection mechanism for CID/M is the lack of political consensus and resistance from states at the global, regional, and national levels to create a new governing regime. Lack of political consensus stems from several decisive factors—like recognizing cross-border CID/M and developing protection measures for them. Conducting such actions will impose new obligations on states to welcome and assist a new category of the migrant and displaced population. States are reluctant to take this burden because the burden will be prolonged and will require an outlay of significant financial and technical resources.<sup>213</sup> Polluter countries express such reluctance by taking the benefit of not having any strict

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<sup>208</sup> DAVID WEISBACH, HARVARD PROJECT ON INTERNATIONAL CLIMATE AGREEMENTS, NEGLIGENCE, STRICT LIABILITY, AND RESPONSIBILITY FOR CLIMATE CHANGE 30 (July 2010).

<sup>209</sup> *Id.* See also RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY 165 n.42 (Cato Institute, 1980).

<sup>210</sup> WEISBACH, *supra* note 208, at 33.

<sup>211</sup> Edward A. Page, *Distributing the Burdens of Climate Change*, 17 ENV'T POLS. 556, 560 (2008).

<sup>212</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FIRST ASSESSMENT REPORT: OVERVIEW AND POLICYMAKER SUMMARIES 6 (1992), [https://www.ipcc.ch/site/assets/uploads/2018/05/ipcc\\_90\\_92\\_assessments\\_far\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/05/ipcc_90_92_assessments_far_full_report.pdf).

<sup>213</sup> Nishimura, *supra* note 96, at 119.

liability. On the other hand, developing countries' (like in South Asia) bases of reluctance are uncertain reception of states' gains or insignificant economic incentives<sup>214</sup> with prolonged liabilities and expenditures.<sup>215</sup> All these problems ultimately discourage developing countries from taking an additional burden, as they have no historical responsibility for GHG emissions and are themselves perplexed with climate change and other socioeconomic problems like poverty, overpopulation, and land shortage.<sup>216</sup> Moreover, eighty-five percent of the world's displaced populations are currently hosted by developing countries.<sup>217</sup>

The legacy of the governing regime of refugee law also has a spillover effect in this political unwillingness.<sup>218</sup> Unless states sign the Refugee Convention of 1951, under customary international law it is hard to strictly enforce the customary principle of non-refoulement.<sup>219</sup> The obligation to accept refugees is mostly exercised voluntarily. In the matter of cross-border CID/M, states also want to see it as a voluntary obligation. Also, the principle of non-refoulement has yet to apply to the mass population displacement triggered by natural calamities.<sup>220</sup> Moreover, under the Refugee Convention of 1951, host states not only have a responsibility to receive refugees and secure a safe stay but they are also overburdened with the obligation to find a durable solution for the refugees in the third country or at the country of origin. This complex burden under the refugee laws discourages the development of a new legal protection framework for CID/M. Burdened countries might need to receive thousands or millions of migrants/displaced populations, and this number has alarmingly increased over the years.

Therefore, a clear, sustainable legal framework is needed as a tenable solution for cross-border CID/M. This solution can effectively overcome all aforesaid realities, and burdened countries can get support

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Gonzalo Delacámara, *Climate Refugees: Towards A Global, Federal Solution*, SMART WATER MAG. (Jan. 31, 2019), <https://smartwatermagazine.com/blogs/gonzalo-delacamara/climate-refugees-towards-a-global-federal-solution>.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> U.N. High Commissioner for Refugees, Summary of Deliberations on Climate Change and Displacement (Apr. 2011), <https://www.unhcr.org/4da2b5e19.pdf> [<https://perma.cc/JPR9-ENSD>].

from the majority of the states. CID/M is a unique global challenge that needs to be discussed efficiently.

The Nansen Initiative is a 2012, state-led consultative initiative that seeks to build consensus on cross-border CID/M.<sup>221</sup> The goal of this initiative is to establish a consensus among states on “the protection agenda”<sup>222</sup> of CID/M. The Nansen Initiative’s protection agenda stands on the three pillars of (a) building international cooperation and solidarity, (b) developing standards for the treatment of CID/M, and (c) developing an operational response.<sup>223</sup> Under the protection agenda, its phases are (1) preparedness before displacement, (2) displacement time assistance and protection, and (3) post displacement solution for the transition.<sup>224</sup> However, the initiative is in a very preliminary stage and the process has no plan to develop new legal standards or laws. Nonetheless, it believes that building consensus through this process might result in new soft or hard laws.<sup>225</sup>

#### IV

#### REMEDYING THE EXISTING REGIONAL PROTECTION GAP IN SOUTH ASIA

Scant attention of international law, state actors’ lack of willingness, persistent denial of recognition, and restrictive attitude to protect CID/M are all roadblocks to conceiving an effective legal protection mechanism for cross-border CID/M.<sup>226</sup> Considering the situation, the key question is what is the best pragmatic step toward eliminating the normative gap and securing protection for cross-border CID/M?

According to McAdam, the existing protection gap related to cross-border CID/M cannot be resolved by international law or by adopting an international treaty.<sup>227</sup> Because climate change will affect each region differently, the result is different patterns of population movement and displacement.<sup>228</sup> Therefore, it would be nearly impossible for a single global treaty to accommodate all the

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<sup>221</sup> The Nansen Initiative, *About Us*, <https://www.nanseninitiative.org/secretariat/> (last visited Feb. 3, 2021) [<https://perma.cc/HZJ6-DX9R>].

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> ANGELA WILLIAMS, RICHARD BLACK, THE NANSEN INITIATIVE, UNHCR AND THE FORESIGHT REPORT ON MIGRATION AND GLOBAL ENVIRONMENTAL CHANGE, 10 (2012).

<sup>226</sup> JOLLY & AHMAD, *supra* note 39, at 187.

<sup>227</sup> MCADAM, *supra* note 21, at 156.

<sup>228</sup> *Id.*

incompatible interests of original and host countries along with addressing diverse population movements under each region's varied contexts. Moreover, there are difficulties in segregating cross-border CID/M as discussed in Part II. Even negotiation for such a global treaty would be extremely intricate<sup>229</sup> as there is a lack of political will.<sup>230</sup> Extending the scope of other international regulatory regimes that are developed to guard another category of people will not help either to address the special and diverse needs of CID/M.<sup>231</sup> Considering all these reasons, for South Asia, a regional protection mechanism might provide a better platform than relying on international laws. However, in South Asia, as cross-border migration altogether remains a contentious issue due to the number of national-level barriers, adopting a nonbinding legal framework might be an effective opening step instead of directly pushing for a legally binding regional agreement.

The benefit of a nonbinding legal framework is that it can accommodate flexibility while determining state obligations and standards of actions. It can also lead toward the adoption of a legally binding treaty by establishing *opinio juris* through state practice,<sup>232</sup> or it can be a supportive and guiding tool to help state actors in dealing with cross-border CID/M.<sup>233</sup> It can also be a viable option to address specific, particular attuned needs of South Asia, its countries, and CID/M.<sup>234</sup> Considering all these, this section will explore a potential regional protection framework for the cross-border CID/M in South Asia.

#### ***A. Framing a Potential Protection Framework: Key Issues to Consider***

The nonbinding legal framework needs to be crafted cautiously with ample empirical understanding and foresight<sup>235</sup> to avoid the adoption of an oversimplified and vague legal framework, which cannot be translated practically or adapted to make a real difference while being

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<sup>229</sup> *Id.* at 176.

<sup>230</sup> *Id.* at 178.

<sup>231</sup> Mayer, *Governing*, *supra* note 32, at 379–80.

<sup>232</sup> Liv Feijen, Book Review, 28 *UTRECHT J. INT'L & EUR. L.* 61, 64 (2012).

<sup>233</sup> MCADAM, *supra* note 21, at 191.

<sup>234</sup> *Id.*

<sup>235</sup> See Walter Kälin, *Conceptualising Climate-Induced Displacement*, in *CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES* 103 (Jane McAdam ed., 2010).

implemented.<sup>236</sup> Caution also needs to be taken while architecting state obligation to avoid imposing inequitable, irrational, or impractical obligations on the state. The flexibility and discretion of states while complying with obligations also need to balance so that flexibility and discretion cannot make cross-border CID/M sufficiently unprotected. Therefore, while architecting rational normative frameworks it is important to understand—specifically in the category of cross-border CID/M—the patterns of movement and displacement, outline the current and future needs of people who already cross the border due to climate change, comprehend the patterns of human rights violations in different stages of migration or displacement journeys, and analyze the threat and growing tension to regional peace and security related with cross-border CID/M. While drafting the normative frameworks, it is also important to recognize that some people may not be able to move due to poverty and other social factors (these can be referred to as trapped populations). Attention must be paid to this group when designing a legal framework.

In the normative protection framework, the key actors will be the country of origin and the host country. The participation of the international community is also essential here. Therefore, while crafting a nonbinding legal framework for South Asia it is important to give much attention to a number of critical factors like the following:

- in existing global, regional, and national laws there is a clear gap in recognizing, protecting, and facilitating resettlement of cross-border CID/M;
- “responsibility to protect” cannot be applied here. Historically, South Asian states have had no contribution to the global climate change problem. Rather, they are most vulnerable due to the adverse impacts of climate change. Therefore, a responsibility-based normative framework will not be a viable option here;
- South Asian states have limited capacity to assist or protect cross-border CID/M and to grant permanent protection to them, as countries are overburdened with multiple complex socioeconomic and climate change-related problems; and
- it is also particularly important to keep in mind the coexistence of two converse facts: the cross-border CID/M phenomenon and the dearth of political will to protect them.

These aforementioned key factors also give rise to a number of indispensable questions that need to be answered critically if we truly want to capture the majority of South Asian states’ consensus to open

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<sup>236</sup> *Id.*

the border for cross-border CID/M and to implement the framework effectively. Here the key critical questions are as follows:

- What would be the possible nature of the protection framework? Will it be solely rights-based or will it accommodate other factors?
- Considering the limited capacity of the South Asian countries for cross-border CID/M, what would be the degree of protection?
- How to capture the state's consensus to adopt and implement the nonbinding legal framework? In other words, how to make a country agree to act under the framework?

To protect the rights of cross-border CID/M, there is strong advocacy to adopt a rights-based approach, as the approach upholds humanitarian and human rights discourses.<sup>237</sup> To move and live with dignity, it is undoubtedly essential to protect cross-border CID/M rights through a human-rights-centric manner. According to the Inter-Agency Standing Committee, the aim of the protection mechanism should “[e]ncompass[] all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. HR law, IHL, refugee law).”<sup>238</sup>

However, the rights-based approach calls for actions from a wider perspective of morality and ethics, rather than asserting it from a technical and legal sense.<sup>239</sup> Moral or ethical grounds alone fail to persuade receiving states to renounce partial sovereign rights to open the border<sup>240</sup> and to take extra burdens by granting protection to the cross-border CID/M. Therefore, moral and ethical grounds under a rights-based approach need to trade off with some firm technical and legal grounds that can induce states to agree to act. This eventually triggers the third question.

The security-based approach can help in this regard. Cross-border CID/M triggers potential threats in internal, transborder, or regional peace and security.<sup>241</sup> Massive illegal migration may result in internal instability; exacerbate human, drug, or arms trafficking; increase piracy

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<sup>237</sup> Mayer, *Governing*, *supra* note 32, at 35.

<sup>238</sup> INTER-AGENCY STANDING COMMITTEE, PROTECTION OF INTERNALLY DISPLACED PERSONS, 1, 4 (1999), [https://interagencystandingcommittee.org/system/files/legacy\\_files/protection\\_of\\_internally\\_displaced\\_persons\\_inter\\_agency\\_standing\\_committee\\_policy\\_paper\\_0.pdf](https://interagencystandingcommittee.org/system/files/legacy_files/protection_of_internally_displaced_persons_inter_agency_standing_committee_policy_paper_0.pdf) [<https://perma.cc/4Z92-4NEF>].

<sup>239</sup> MCADAM, *supra* note 21, at 267.

<sup>240</sup> Mayer, *Governing*, *supra* note 32, at 37–38.

<sup>241</sup> *Id.* at 38.

or terrorism; or contribute to the security threats in other ways. According to Benoît Mayer, a state's willingness to avoid all these peace and security threats can be a driving force or reason to induce a state to act<sup>242</sup> in the matter of cross-border CID/M. Therefore, while framing the nonbinding protection framework, human rights, humanitarian concerns, and fairness need to integrate and reconcile with peace and security incentives in an utmost realistic and comprehensible way. This can convince South Asian states to adopt and implement the agreed-upon norms. Through cooperation, burden sharing, and capacity-related support, greater incentives should also be granted to host states so that they do not feel overburdened and can act efficiently to protect cross-border CID/M.

However, the integration of a rights-based approach in the protection framework triggers the second complex issue related to the degree of protection and the limited capacity of host states. According to refugee law, the term *protection* includes the adoption and implementation of all activities that are needed to secure refugees' rights.<sup>243</sup> Such actions mostly encompass assistance efforts<sup>244</sup> such as admission into the country of destination, protection against expulsion (application of non-refoulement), nondiscrimination, accessing basic human rights in host countries to lead a dignified life, and most importantly, finding a durable solution through the return into the country of origin, reintegration in the host country, or resettlement in the third country. Scholars suggest adopting an inclusive interpretation of the term *protection* to cover diverse patterns of climate-induced migration and displacement and to accommodate different needs based on varied vulnerabilities.<sup>245</sup> However, according to the Secretary-General of the United Nations, the duty to protect the refugee/displaced population primarily rests upon the host country.<sup>246</sup> International protection is complementary to the protection afforded by a host country.<sup>247</sup>

According to Sadrudin A. Khan, "International protection can only function as a supplement to the protection arising from the internal

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<sup>242</sup> *Id.*; see also INTER-AGENCY STANDING COMMITTEE, *supra* note 239, at 5.

<sup>243</sup> THE U.N. REFUGEE AGENCY, *Module One: What Is Refugee Protection?* 1, 2 (2019), <https://www.unhcr.org/4371d9482.pdf> [<https://perma.cc/R6JK-5PTX>].

<sup>244</sup> *Id.*

<sup>245</sup> Feijen, *supra* note 232, at 62.

<sup>246</sup> U.N. General Assembly, *Refugees and Stateless Persons: Report of the Secretary-General*, U.N. Doc. A/C.3/527 (Oct. 26, 1949), <https://www.refworld.org/docid/3ae68bf00.html> [<https://perma.cc/V7DM-AN8R>].

<sup>247</sup> *Id.*; see also Antonio Fortin, *The Meaning of 'Protection' in the Refugee Definition*, 12 INT'L. J. REFUGEE L. 548, 548 (2000).

institutions of the host country.”<sup>248</sup> Undoubtedly it is a huge responsibility and prolonged burden for a host state that has limited resources and capacity and is already perplexed with other socioeconomic problems. Therefore, considering the resource and capacity constraints, in framing the protection framework it is also critically necessary to decide up to what extent would South Asian states be obliged to grant protections. Will it be temporary protection until the displaced population gets a durable solution elsewhere, or more about permanent settlement?

Considering the socioeconomic context, resource constraints, and the land crisis of South Asian states, it would not be rational or justified to oblige the host state to grant permanent protection and settlement within its territory. Furthermore, South Asian states have zero contribution to the global climate change problem. Therefore, temporary protection status until the displaced population gets a durable solution elsewhere might be a more viable option here. Typically, under humanitarian and human rights grounds, such temporary protection status is given with *ad hoc* basis assistance.<sup>249</sup> Such an approach has already been adopted in many national laws (like in the *United States Immigration and Nationality Act* (1952), *Finland Aliens Act* (2004), *Sweden Aliens Act* (2005)) to grant protection toward disaster-induced, cross-border displaced persons.<sup>250</sup> A similar approach was also adopted in the *European Union Directive 2011/95/EU*<sup>251</sup> for the cross-border displaced population who needs protection.

Compared to permanent protection status, temporary protection status is undeniably weaker, as it does not provide, first and foremost, strict duty on the state to protect the displaced population. As such, many scholars consider it as an insufficient measure, and as incapable

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<sup>248</sup> H. H. Prince Sadruddin Aga Khan, *The Refugee Today and Churches*, 19 ECUMENICAL REV. 160, 163 (1967).

<sup>249</sup> Volker Türk & Rebecca Dowd, Protection Gaps, *The Oxford Handbook of Refugee and Forced Migration Studies*, (2014), at 6, <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-024?rskey=f9FX12&result=7> [<https://perma.cc/Q82K-2RJM>].

<sup>250</sup> Louise Olsson, *Environmental Migrants in International Law: An Assessment of Protection Gaps and Solutions* (2015) (B.S. Thesis, Örebro Universitet).

<sup>251</sup> European Parliament and the Council of 13 December 2011, Directive on the Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, U.N. Doc. 2011/95/EU (2011).

of providing a sustainable solution.<sup>252</sup> However, instead of living with the protection gaps and until inventing a sustainable option, adoption of such temporary protection status can be an adequate option,<sup>253</sup> and provides a good opening for cross-border CID/M migrants to get admission and humanitarian assistance in the host state and to find a durable solution. Such a flexible approach gives leeway to the host state to determine the admission and protection issues on a case-by-case basis, and such discretion may induce South Asian states to open their borders. It is worth noting that the aforementioned legislation usually grants temporary protection status for sudden onset events to deal with mass influx. However, to protect cross-border CID/M migrants, temporary protection status should be granted for slow onset events as well.

Regarding a durable solution for cross-border CID/M migrants, a return to the country of origin in many cases will not be an option if the land becomes permanently uninhabitable. Reintegration in the host country would be difficult in South Asia, as all states are overpopulated and have an acute land crisis.<sup>254</sup> Therefore, resettlement in a third country can be an option for a durable solution and lobbying with the third country should not be considered solely as the duty of a host state. The country of origin should also actively cooperate to persuade this. While framing the nonbinding protection framework for South Asia, provisions for support and funding from the international community (more specifically from developed countries) should also be adequately integrated, because climate change is a human-caused phenomenon resultant from excessive GHG emissions by developed countries.<sup>255</sup> With zero contribution to this problem, developing and least-developing countries unfairly bear climate change burdens, along with other socioeconomic problems. It is also clear that developing countries (including those in South Asia) cannot cope with a large influx of cross-border CID/M migrants.<sup>256</sup> Therefore, considering the converse

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<sup>252</sup> Olsson, *supra* note 250, at 23–24.

<sup>253</sup> MCADAM, *supra* note 21, at 265.

<sup>254</sup> See Michael Kugelman, *Climate-Induced Displacement: South Asia's Clear and Present Danger*, WILSON CENTER (Sep. 30, 2020), <https://www.wilsoncenter.org/article/climate-induced-displacement-south-asias-clear-and-present-danger> [https://perma.cc/YDK8-RT7A].

<sup>255</sup> UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992), at preamble.

<sup>256</sup> ASIAN DEVELOPMENT BANK, CLIMATE CHANGE AND MIGRATION IN ASIA AND THE PACIFIC vii (2011).

connection between contributions and impacts,<sup>257</sup> the major GHG-emitting countries should bear a share of the burden<sup>258</sup> to protect the rights of the CID/M migrants, considering the principles of equity, justice,<sup>259</sup> fairness, cooperation, and common but differentiated responsibility, and to comply with the obligation under the climate- and human-rights regulatory regime.<sup>260</sup> To share the burden with major emitter countries, the principle of common but differentiated responsibility can play a significant role, as it is one of the key guiding principles of the UNFCCC.<sup>261</sup> This key principle can assist in architecting how the burden-sharing process should be articulated. For example, how will major emitter countries assist the cross-border CID/M migrants? By receiving them, by providing technical or financial assistance, or by adopting any other means?

Being the sole regional institute, SAARC can be the possible implementing agency of this nonbinding protection framework. However, as mentioned in the previous chapter, SAARC has already adopted some of the declarations related to climate change. Adoption of a protection framework would be an important forward step to address the vulnerability of the CID/M migrants and to secure their rights. It is also vital to develop multiagency strategies in the protection framework to complement and support each other.<sup>262</sup>

Therefore, besides SAARC and state actors, organizations like UNFCCC, the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the United Nations Environmental Programme (UNEP), United Nations Women, the United Nations Children's Fund (UNICEF), and other civil societies' involvement should be integrated to build multi-stakeholder partnerships so that they can come forward to facilitate the implementation of the framework. Since the key focus of the protection framework should be to guard the needs and rights of the cross-border

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<sup>257</sup> Sumudu Atapattu, "Climate Refugees" and the Role of International Law, OXFORD RSCH. GRP., <https://www.oxfordresearchgroup.org.uk/blog/climate-refugees-and-the-role-of-international-law> [<https://perma.cc/U7XX-EJJC>].

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Yuli Chen, *Reconciling Common but Differentiated Responsibilities Principle and no More Favourable Treatment Principle in Regulating Greenhouse Gas Emissions from International Shipping*, 123 MARINE POL'Y 1, 3 (2021).

<sup>262</sup> MCADAM, *supra* note 21, at 236.

CID/M, the distribution of well-defined institutional responsibilities<sup>263</sup> is also vital and should be guided by the principle of human rights. While shaping responsibility for SAARC, state actors, and other organizations, it is also essential to determine boundaries of acceptable conduct<sup>264</sup> and set limits for exercising discretion and flexibility, so that human-rights-focused responses measure can be effectively implemented.

### CONCLUSION

The preceding discussion made it evident that—though cross-border CID/M is a dreadful phenomenon in South Asia—substantial normative gaps and denial of protection at an international, regional, and national level cause gross human right violations, increase humanitarian crises, heighten tension in regional peace and security, and persistently increase the risk of violent conflict. The normative gaps and denials of acknowledging obligations of protection for the cross border CID/M is the by-product of definitional shortcomings; categorical complexity; conceptual disagreement; the narrow scope of relevant international laws; lack of political will to recognize CID/M and to create a new governing regime; lack of strict liability in climate governing regimes; considering cross-border CID/M as an issue of adaptation strategy instead of failure of adaptation; the inclination to hold absolute sovereign power within the territory; restrictive attitudes toward protecting CID/M migrants; the spilling effect of refugee-governing regimes; the complex regimes; the lack of financial and technical resources; other socioeconomic problems of South Asian states; and so on.

But it is also undeniable that due to the hardest hit of climate change in South Asia, cross-border CID/M is a reality and state actors cannot deny, avoid, or sidestep this dire crisis. If the habitual home becomes uninhabitable and the right to life comes under existential threats with no alternative quality options, to save their lives, people are obliged to move.

Therefore, considering all barriers and challenges, along with the note that at the international level little hope is left to adopt a protection mechanism for cross-border CID/M, the Article suggests adopting a

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.*; see also Eoin O'Carroll, *Climate Change Could Redraw National Borders*, THE CHRISTIAN SCI. MONITOR, <https://www.csmonitor.com/Environment/Bright-Green/2009/0714/climate-change-could-redraw-national-borders> [<https://perma.cc/Q2VG-9AL6>] (last visited Feb. 21, 2021).

nonbinding legal framework in South Asia. Though adoption of a nonbinding legal framework with temporary protection status might not be as strong as a strict legally binding permanent protection measure, it can be a pragmatic opening step toward eliminating the normative gaps for cross-border CID/M in South Asia.

However, larger participation and consensus of South Asian states to act under the legal framework to protect cross-border CID/M migrants depends entirely on how well the framework will be articulated realistically with a fine balance among adequacy and degree of human rights-based protection measure; integration of security-based approach within the rights-based approach; incorporation of flexibility and greater incentive for host states; distribution of balanced and feasible obligation among the host state, state of origin and developed countries to find a durable solution; integration of support and cooperation from an external source and international community; determining boundaries of acceptable conduct; and setting limits of exercising discretion and flexibility. SAARC can take the lead in implementing the framework along with the support of other international and intergovernmental institutions. The normative frameworks should also set forth specific mechanisms for populations who got trapped due to poverty and other social factors.

To conduct this colossal work, South Asian state heads can also consider conducting comprehensive research work before framing the protection framework or before starting regional negotiations to assess, analyze, and understand each aforementioned issue. In this whole process, it is necessary to bear in mind that cross-border CID/M is not a mechanism for adjustment, but the last resort of survival which needs to be governed intensely with the tools of human rights, equity, justice, and fairness. The urgency to protect cross-border CID/M migrants is fierce and we must now agree to act with collective endeavor and integrity.

