

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.¹⁶⁶

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.¹⁶⁷ Under this customary rule,¹⁶⁸ 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.¹⁶⁹ Breach of no-harm obligation entails liability for the responsible state.¹⁷⁰ 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,¹⁷¹ due diligence strain, multiple wrongdoers, determining proportional contribution,¹⁷² complexities with joint or several liabilities,¹⁷³ and retrospective liability. However, the uncertainty in establishing state liability to protect CID/M migrants under the no harm

¹⁶⁶ BODANSKY ET AL., *supra* note 37, at 321.

¹⁶⁷ 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).

¹⁶⁸ 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*].

¹⁶⁹ *Id.* at 2.

¹⁷⁰ *Id.* at 15.

¹⁷¹ 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).

¹⁷² *Id.*

¹⁷³ *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 articles¹⁷⁴ 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.¹⁷⁵

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 1990.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ Similarly, the *Migration for Employment Convention* of 1949¹⁷⁹ and the *Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live* of 1985¹⁸⁰ also do not recognize migrants' rights to cross the

¹⁷⁴ Mayer, *No-Harm supra* note 168, at 54.

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

¹⁷⁶ 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).

¹⁷⁷ *Id.* at Article 2(1).

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

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

¹⁸⁰ 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.¹⁸¹ 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.¹⁸² 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.¹⁸³ 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.¹⁸⁴ 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).¹⁸⁵ 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

¹⁸¹ Mayer, *No-Harm supra* note 168, at 54.

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

¹⁸³ JOLLY & AHMAD, *supra* note 39, at 149.

¹⁸⁴ *Id.* at 125.

¹⁸⁵ *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 2006,¹⁸⁶ the Dhaka Declaration 2008 and SAARC Action Plan on Climate Change 2009-11;¹⁸⁷ and the Thimphu Statement on Climate Change 2010.¹⁸⁸ 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.¹⁸⁹ However, the 2014 Kathmandu Declaration addressed the “safety, security, and wellbeing of their migrant workers,”¹⁹⁰ but issues related to CID/M remain absent due to lack of strong political will and financial resources.¹⁹¹

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.”¹⁹² So far, refugees and climate-induced displacement remain contentious issues within SAARC countries. Therefore,

¹⁸⁶ 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>].

¹⁸⁷ 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).

¹⁸⁸ 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.

¹⁸⁹ *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>].

¹⁹⁰ 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 [<https://perma.cc/CB6T-29UU>].

¹⁹¹ 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).

¹⁹² 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.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵

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.

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

¹⁹⁴ JOLLY & AHMAD, *supra* note 39, at 35–36.

¹⁹⁵ 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*

Afghanistan	<ul style="list-style-type: none"> • No legislation that specifically addresses/refers to CID/M. • The National Adaptation Programs of Action of 2009; the National Policy on Internally Displaced Persons, 2013 refers to internal displacement. • Under Article 7 of the Afghanistan Constitution, migrants get human rights protection. • Migrants, in general, are regulated under the Citizenship Act, 1992, Presidential Decree 104 and 297.
Bangladesh	<ul style="list-style-type: none"> • The Disaster Management Act 2012 addresses displacement from a wider context. • 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. • Articles 31 and 32 of the Bangladesh Constitution grant human rights protection to each and all persons irrespective of citizenship. • 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.
Bhutan	<ul style="list-style-type: none"> • No legislation that specifically addresses/refers to CID/M. • No policies that specifically address/refer to CID/M. (For example, the Bhutan National Adaptation Plan of Action did not refer to CID/M.) • Article 7 of the Constitution of the Kingdom of Bhutan grants human rights protection to all persons. • Migrants, in general, are regulated under the Citizenship Act of 1985; Immigration Act, 2007; Immigration Rules and Regulation, 2012.

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

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.¹⁹⁶

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,¹⁹⁷ family category,¹⁹⁸ or humanitarian¹⁹⁹ category.²⁰⁰ 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.

¹⁹⁶ JOLLY & AHMAD, *supra* note 39, at 125.

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

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

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

²⁰⁰ *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.²⁰¹ 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.²⁰² 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.²⁰³ 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.²⁰⁴ 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

²⁰¹ *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://perma.cc/9LC4-VGB6>].

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

²⁰³ *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://perma.cc/AA98-9WEZ>].

²⁰⁴ *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.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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.

²⁰⁵ Nishimura, *supra* note 96, at 118.

²⁰⁶ *Id.*

²⁰⁷ 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.”²⁰⁸ Some argue that strict liability is derived from the principles of “responsibility and corrective justice.”²⁰⁹ 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).²¹⁰ 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.²¹¹ 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.²¹²

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.²¹³ Polluter countries express such reluctance by taking the benefit of not having any strict

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

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

²¹⁰ WEISBACH, *supra* note 208, at 33.

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

²¹² 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.

²¹³ 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 incentives²¹⁴ with prolonged liabilities and expenditures.²¹⁵ 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.²¹⁶ Moreover, eighty-five percent of the world's displaced populations are currently hosted by developing countries.²¹⁷

The legacy of the governing regime of refugee law also has a spillover effect in this political unwillingness.²¹⁸ Unless states sign the Refugee Convention of 1951, under customary international law it is hard to strictly enforce the customary principle of non-refoulement.²¹⁹ 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.²²⁰ 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

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ 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>.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ 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.²²¹ The goal of this initiative is to establish a consensus among states on “the protection agenda”²²² 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.²²³ 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.²²⁴ 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.²²⁵

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.²²⁶ 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.²²⁷ Because climate change will affect each region differently, the result is different patterns of population movement and displacement.²²⁸ Therefore, it would be nearly impossible for a single global treaty to accommodate all the

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

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

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

²²⁶ JOLLY & AHMAD, *supra* note 39, at 187.

²²⁷ MCADAM, *supra* note 21, at 156.

²²⁸ *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 intricate²²⁹ as there is a lack of political will.²³⁰ 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.²³¹ 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,²³² or it can be a supportive and guiding tool to help state actors in dealing with cross-border CID/M.²³³ It can also be a viable option to address specific, particular attuned needs of South Asia, its countries, and CID/M.²³⁴ 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 foresight²³⁵ 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

²²⁹ *Id.* at 176.

²³⁰ *Id.* at 178.

²³¹ Mayer, *Governing*, *supra* note 32, at 379–80.

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

²³³ MCADAM, *supra* note 21, at 191.

²³⁴ *Id.*

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

implemented.²³⁶ 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

²³⁶ *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.²³⁷ 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).”²³⁸

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.²³⁹ Moral or ethical grounds alone fail to persuade receiving states to renounce partial sovereign rights to open the border²⁴⁰ 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.²⁴¹ Massive illegal migration may result in internal instability; exacerbate human, drug, or arms trafficking; increase piracy

²³⁷ Mayer, *Governing*, *supra* note 32, at 35.

²³⁸ 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://perma.cc/4Z92-4NEF>].

²³⁹ MCADAM, *supra* note 21, at 267.

²⁴⁰ Mayer, *Governing*, *supra* note 32, at 37–38.

²⁴¹ *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 act²⁴² 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.²⁴³ Such actions mostly encompass assistance efforts²⁴⁴ 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.²⁴⁵ However, according to the Secretary-General of the United Nations, the duty to protect the refugee/displaced population primarily rests upon the host country.²⁴⁶ International protection is complementary to the protection afforded by a host country.²⁴⁷

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

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

²⁴³ 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>].

²⁴⁴ *Id.*

²⁴⁵ Feijen, *supra* note 232, at 62.

²⁴⁶ 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>].

²⁴⁷ *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.”²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ A similar approach was also adopted in the *European Union Directive 2011/95/EU*²⁵¹ 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

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

²⁴⁹ 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>].

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

²⁵¹ 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.²⁵² 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,²⁵³ 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.²⁵⁴ 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.²⁵⁵ 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.²⁵⁶ Therefore, considering the converse

²⁵² Olsson, *supra* note 250, at 23–24.

²⁵³ MCADAM, *supra* note 21, at 265.

²⁵⁴ 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].

²⁵⁵ UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992), at preamble.

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

connection between contributions and impacts,²⁵⁷ the major GHG-emitting countries should bear a share of the burden²⁵⁸ to protect the rights of the CID/M migrants, considering the principles of equity, justice,²⁵⁹ fairness, cooperation, and common but differentiated responsibility, and to comply with the obligation under the climate- and human-rights regulatory regime.²⁶⁰ 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.²⁶¹ 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.²⁶²

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

²⁵⁷ 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>].

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ 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).

²⁶² MCADAM, *supra* note 21, at 236.

CID/M, the distribution of well-defined institutional responsibilities²⁶³ 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 conduct²⁶⁴ 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

²⁶³ *Id.*

²⁶⁴ *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.

