LL.M. Final Thesis
in Natural Resources Law and International Environment Law

Environmentally Displaced Persons in Asia
Overcoming Vulnerability Through Regional Frameworks

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Abstract

Environmentally displaced persons continue to exist in the periphery of international law, caught in a cycle of vulnerability with few protections in international law. The foundations of human rights are based on the protection of persons at risk, and it has always risen to the occasion of prevailing circumstances. With the effects of climate change becoming increasingly apparent, it is imperative that a framework be created to govern the movement and protection of persons who are displaced by the environment.

The problem first arises at the stage of definition, where the multicausality of environmental displacement makes it near impossible in many circumstances to isolate a single source of persecution. The lack of such clarity not only keeps EDPs from receiving a protected status as a group in international law, it also distances them from existing international frameworks meant to protect vulnerable groups.

This is further exasperated in Asia, where the effects of natural disasters are magnified as a result of vulnerabilities on various fronts. The creation of a regional instrument in this region is complicated by layers of historical, cultural and geopolitical tensions. Keeping in mind the distinct interests that would be involved in the creation of any regional mechanism in Asia, this thesis attempts to identify the legal foundations for a regional cooperation mechanism and to explore potential tools that might assist in the creation of a relatively viable solution.
Acknowledgements

This thesis is dedicated to my parents, who have always been the wind beneath my wings.

I would also like to thank my supervisor, Maria Elvira Pinedo Mendéz for the constant support, advice and assistance she extended throughout the drafting of this thesis. I would be remiss if I didn’t extend my deepest gratitude to Ian Buerger for proofreading this paper and providing insight and moral support. I would also like to thank the people who have seen me through the course of this writing process with their warmth and constant encouragement.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
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<tr>
<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of all Forms of Discrimination Against Women</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>GCC</td>
<td>Gulf Cooperation Council</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic Social and Cultural Rights</td>
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<tr>
<td>IDMC</td>
<td>Internal Displacement Monitoring Centre</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>IOM</td>
<td>International Organization for Migration</td>
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<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
</tr>
<tr>
<td>NRC (India)</td>
<td>National Registry of Citizens</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<tr>
<td>SAARC</td>
<td>South Asian Association for Regional Cooperation</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNDRR</td>
<td>United Nations Office for Disaster Risk Reduction</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
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<tr>
<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<tr>
<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
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<td>OBOR</td>
<td>One Belt One Road</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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1. Introduction

The foundation of human life on Earth has the environment at its core.\(^1\) It follows that damage to the environment will result in loss of habitat and livelihood and threaten the existence of humans in such affected regions. While climate change has been on the radar of international human rights institutions for decades, it has always remained at the periphery or been regarded as an exaggerated crisis. In recent years, however, the situation has become more immediate and calls for global action have been issued by various interest groups around the world. The UNEP’s Global Environment Outlook 2019 states that 9 million lives are lost annually from exposure to air and water pollution alone.\(^2\)

A testament to the impact of anthropogenic activities on the planet can be seen in the melting icecaps, rising sea levels, frequent wildfires, floods, hurricanes, record temperatures, and droughts,\(^3\) which consequently lead to loss of life, property and livelihood among humans. The global disparity in wealth also manifests itself in the effects of such climate change on populations, having an indirect effect on human rights and threatening democracy.\(^4\) The consensus now is that a fundamental change in social structure must occur at the global level in order to address climate change without disastrous outcomes.\(^5\) This includes addressing the fate of individuals affected by such changes to the Earth’s climate, and the need to share responsibility in pursuance of the core UN Sustainable Development Goal to “leave no one behind”, despite the absence of express mention of displacement induced by climate change in

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\(^3\) Jason Samenow, ‘It Was 84 Degrees Near The Arctic Ocean This Weekend As Carbon Dioxide Hit Its Highest Level In Human History’ \textit{Washington Post} (2019) <https://www.washingtonpost.com/weather/2019/05/14/it-was-degrees-near-arctic-ocean-this-weekend-carbon-dioxide-hit-its-highest-level-human-history/> accessed 14 July 2019


its provisions. In many instances, the choice is now increasingly between migration and starvation, to the extent that a study on internal displacement indicates that the number of persons displaced within their countries as a result of environmental changes is larger than those displaced by violence or conflict. The Intergovernmental Panel on Climate Change’s (IPCC) report of 2018 makes a definable differentiation between a 1.5 degrees and 2 degrees Celsius change in temperature, indicating that despite political will, climate change displacement risks as a result of global warming remain at tipping point levels. Food insecurity, stress on water sources, and damaged ecosystems have been projected as the major probable factors responsible for such movement.

This thesis, while also briefly discussing internal displacement and refugee crises in countries in Asia, will more specifically attempt to identify and evaluate legislation and international documents in the Asian region that may be utilized for the protection of persons displaced from their homes and forced to move across borders as a result of environmental factors. While internally displaced persons (IDPs) are safeguarded by domestic law, environmentally displaced persons (EDPs), defined as persons travelling across borders as a result of climate induced displacement, do not fall within these protections. In fact, they do not fall exactly within the definitions of any group of persons protected under international or domestic laws. Some Pacific countries that face a high risk of climate change induced inhabitability of their territories have now begun introducing policies dealing with displacement induced by disasters, development projects or climate change at large. It now becomes essential to acknowledge the real need to create a framework that governs the movement of EDPs and ensures their protection.

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10 Id

11 Id
The introduction will first cover the history of climate-induced migration as well as the current circumstances and the need to consider climate change as a serious factor in migration legislation. Thereafter, a brief overview of the scope, relevance and methodology of this paper and its subject matter will be discussed along with its limitations.

1.1 The Environment and Migration

Forced migration has the effect of increasing pressure on existing infrastructure, undermining economic growth, giving rise to conflict, and poor health, education, and social indicators. Add to this the effect of the short time period over which such large-scale dispersions occur, and existing infrastructures are more than likely to collapse. Professor Norman Myers of Oxford University predicted that there could be as many as 200 million climate migrants by the year 2050. While this number is not definitive, the absence of a framework to govern the crisis if and when it takes hold, is problematic.

1.1.1 The History of Climate Induced Movement

Historically, human dispersal across the continents as well as evolution have been a result of shifts in climate during the late Pleistocene, when climate affected the living conditions and available resources. During this period, decreased precession leading to higher boreal summer insolation intensified the rainfall that was received in north Africa, the Levant and the Arabian Peninsula. This led to corridors of regions that provided habitable Savannah type conditions, resulting in a possible exchange pathway between the populations of Eurasia and

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14 Axel Timmermann and Tobias Friedrich, 'Late Pleistocene Climate Drivers Of Early Human Migration' (2016) 538 Nature

15 Donald O Henry, From Foraging To Agriculture (University of Pennsylvania Press 1989)

16 Timmermann & Friedrich (n 14)
Africa.\textsuperscript{17} This is turn affected the dispersal pattern of \textit{Homo sapiens} across the globe in Europe, Asia, the Americas and Australia.\textsuperscript{18}

Similarly, the parallels between climate change and the movement of Neanderthals is evidenced by their rapid spread through Europe south of 50° North and the Mediterranean after the commencement of the long Stable Warm Phase.\textsuperscript{19} In addition, perhaps as a result of the final climate deterioration in the years after 37 ka BP,\textsuperscript{20} there was a visible withdrawal to the West and the Southeast to the Atlantic Ocean and the Black Sea respectively.\textsuperscript{21} There is also evidence of Neanderthals and modern humans withdrawing toward the south during the Late Glacial Maximum, when coverage by ice sheets were at a maximum.

It is thus abundantly clear that toward the end of the last Ice Age, the human species travelled extensively to find more favorable living conditions, going so far as to find their way to far off continents.

In more recent history, the effect of the climate on human behaviour can be seen between the twelfth and fourteenth centuries CE, when a medieval warming period created conditions more ideal for agriculture in Europe.\textsuperscript{22} It was around the same time that Scandinavian Norse began moving toward North Atlantic islands and colonizing and creating permanent settlements in the Faroe Islands, Iceland, and Greenland.\textsuperscript{23} Unlike Europe, the Americas faced droughts and many settlements were abandoned, while in Asia, there is literature to suggest that highly variable conditions and constant droughts were what necessitated the expansion of Genghis Khan’s empire into Europe and China.\textsuperscript{24}

\textsuperscript{17} Id
\textsuperscript{18} Id
\textsuperscript{19} Tjeerd H. van Andel, William Davies & Bernard Weninger, The Human Presence in Europe during the Last Glacial Period I: Human Migrations and the Changing Climate, in Tjeerd H Van Andel, William Davies and Leslie Aiello, \textit{Neanderthals And Modern Humans In The European Landscape During The Last Glaciation} (McDonald Institute for Archaeological Research 2004) 31
\textsuperscript{20} This is a time scale used in archaeology which expands into kilo annum before present, where one ka BP is one thousand years.
\textsuperscript{21} Ibid
\textsuperscript{22} Robert A McLeman, \textit{Climate And Human Migration} (Cambridge University Press 2013) 5
\textsuperscript{23} Ibid
\textsuperscript{24} Ibid
Circumstances once again changed during the Little Ice Age, a cooling period dated between the sixteenth and nineteenth centuries, that saw abandonment of settlements in Greenland and Iceland, the desertion of agricultural and coastal settlements in Europe, and abandonment of cities in Asia due to lack of water.25

These patterns are harder to replicate today as a result of the modern State and the restrictions on movement the concept creates.

1.1.2 The Current Scenario

Climate change related change in environmental patterns are becoming more and more apparent in recent years. The rate of sea ice loss in the summer at present exceeds all past projections made in that regard.26 The predicted range of sea level rise for this century is somewhere between ten and thirty inches.27 The effect this will have on low lying areas will be profound even prior to forced migration as a result of rising water levels causing submersion. As seawater continues to push into coastal aquifers, well water will become increasingly briny. In addition, seawater will slowly degrade bacterial action, thereby causing sewage systems to fail.28 Salinization of agricultural land, desertification, storms, floods, etc. are all likely events that would make regions inhospitable. This said, IPCC estimates have, over the years, proved to be conservative, and actual sea level rise has always been at the upper limit of these estimations. In effect, the predicted consequences of sea level rise are likely to be greater than those currently predicted or expected.

In richer countries, greater efforts can be made to forestall the movement of the sea further and further into the land. Along an extended coastline, these efforts are more likely to be futile. The Dutch have recognized the difficulties associated with such efforts, and have made the decision to abandon some of the land that they lose to the sea.29 In poor countries, people will have no choice but to move to higher ground, further into the mainland, already occupied by large numbers of people who are unlikely to welcome the intrusion. After three feet of sea level rise, millions of environmentally displaced persons will be fleeing across borders, making today’s

25 Ibid
27 IPCC report 2018, (n 78)
28 Henry Pollack, A World Without Ice (Penguin Group 2009)
29 Ibid
immigration related problems appear miniscule. As long ago as 1990, the IPCC reported that
the single greatest impact of climate change would be migration.³⁰

1.2 Objective, Scope, Limitations and Relevance

The scope of this paper is largely limited to a focus on the case of Environmentally Displaced Persons (EDPs). The subject matter is not limited to any one area of law and will be especially wide-ranging in view of the Asian region and its varying jurisdictions.

1.2.1 Objective

The principal purpose of this paper is to identify the legal mechanism that exists in Asia in relation to climate induced migration. The absence of an international framework at the global level is evident from the literature. This paper will attempt to identify existing legislation and consider the potential for a regional mechanism within or outside these instruments, that provides protection in terms of easier movement and justiciable rights at the destination State. The research question, therefore, is: What legislation and principles can be used for EDP protection in Asia? In the absence of a uniform legal system or cultural and political uniformity in the region, this task is daunting, but necessary.

1.2.2 Scope and Limitations

The scope of this paper is limited to EDPs in Asia, with more focus on the South Asian and South East Asian regions. Russia and the Middle Eastern countries will be excluded for the most part as they are not integrated into typically Asian regional cooperation instruments. For the purpose of this thesis, any reference to Asian States will be limited to this meaning.

While the existing definition for EDPs recommended in this thesis is one that encompasses both internationally and internally displaced persons, for the purpose of convenience, they have been referred to separately throughout the remainder of the thesis. EDPs, in the context of this paper, refers only to those who are forced to migrate across international borders as a result of environmental factors, while the term IDP will be used for persons displaced internally. This is purely for convenience and does not suggest that the two must not be part of the same definition.

³⁰ Brown – IOM 2008 (n 12)
In addition, the paper will limit itself to migration within countries in Asia as final or intermediary destinations of persons fleeing climate change, with selective illustrations from some countries to drive the argument. Reference to other jurisdictions such as the EU, Australia, the African Union, or the US are incidental for the purpose of context, and will not be delved into in depth.

While there is more data relating to Internally Displaced Persons (IDPs), obligations of States when these individuals leave their home States are unclear and undefined in the international legal system. The paper will focus on the absence of a framework governing obligations of States towards persons fleeing slow onset environmental changes or environmental persecution and will cover a number of interrelated areas of law, juxtaposing regional legislation of a few States against international obligations.

1.2.3 Relevance

Of the 25 cities worldwide that are most at risk as a result of a 1 meter rise in sea levels, 17 are in the Asia-Pacific region, and half the population of Asia, i.e., approximately 2.4 billion people, live in flood plains and low-lying coastal zones that are low lying.\(^\text{31}\) In a region that already faces a number of geopolitical tensions and economic disparities in addition to environmental stresses owing to its topography, an escalating situation with the potential to trigger an exodus is of especial relevance. Due to their geographical proximity to a large number of at-risk regions, Asian countries are likely to face the brunt of the oncoming crisis, either as final destinations, or as intermediate stops of convenience.

Environmental displacement being a multi-causal phenomenon, broader classifications and regulations with some form of clarity will be essential in dealing with the influx of persons migrating into other countries. A mere regional framework will do little without international cooperation, as many Asian countries already have high population densities and insufficient resources for these numbers. It therefore becomes essential that the region is able to manage, to some extent, its population in order to maintain world order.

1.3 Methodology, Sources and Structure

1.3.1 Methodology

\(^{31}\) 'Migration And Climate Change In Asia And The Pacific' (UN Economic and Social Council 2017) <https://refugeesmigrants.un.org/sites/default/files/bangkok_8nov_report.pdf> accessed 1 September 2019
The research in this thesis will be descriptive, analytical, non-normative and conceptual. It deals with the problem of cross-border migration as a result of environmental change. This phenomenon is multi-causal; therefore, the research is also interdisciplinary.

It is descriptive in that it explores the various sources of international law as they are and how they apply to the subject of the thesis. It is also non-normative as the purpose is not to create new, binding rules, but to understand the circumstances that surround the issue, and to attempt to maintain status quo while finding a potential solution.

The analytical approach allows for the examination of existing positive law on the subject, or the lack thereof, and the problem at hand. The absence of such law allows for the creation of possible conversation and literature regarding the protection of Environmentally Displaced Persons. The conclusions will be based on existing doctrines, principles and frameworks, with a few functional recommendations practiced in the administration of governing bodies.

The absence of a uniform definition or legal framework across the region or globally makes it near impossible to have a crystallized analysis on the subject based on a categorization of the types of EDPs or the steps taken to protect them. As a result, the analysis in this thesis will rely on further division of the continent into smaller regions where necessary and examine the international law and policy applicable in the areas of environment, labour, human rights and asylum law. It will also delve into the area of international relations to examine the viability of any potential mechanisms that might arise. Various areas of law will be interlinked in the subsequent chapters divided on the basis of sub-regions, in order to provide a macroscopic view on the subject.

1.3.2 Sources

A number of sources have been used in the thesis including doctrines, international legal instruments, and domestic legislation. Legal and scientific journals and books, as well as a combination of internet sources have also been relied on to assist in the analysis of existing literature. But as stated previously, the absence of legislation means that the analysis will rely on doctrine and legal principles, and a number of secondary sources as well as general policy leanings of various nation-States to arrive at a conclusion.

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1.3.3 Structure

The research is divided into a number of parts. This introduction constitutes the first part. The second part of the paper will discuss the terminology associated with persons displaced by the environment in detail. The lack of determinate language defining them makes it difficult to place them squarely within existing protective mechanisms internationally. Distinctions and comparisons will be made with both internally displaced persons and with refugees to address a short-term solution that allows the incorporation of these individuals into existing frameworks.

The third section will examine the specific problems that the Asian region will face as a result of climate change and the ensuing displacement. It will also address the current refugee crisis in the region and the protection such persons receive. With its high population density, low per capita income levels, and existing mass migration-related setbacks caused by conflict, the risks and consequences of large-scale environmental migration on the region will be relatively high. This part of the thesis will be divided by region in order to provide insight into the sheer overburdening faced by developing countries as far as population is concerned. This section will also discuss the current protections provided to IDPs and attempt to identify an existing definition that is operational in the world that encompasses all aspects of environmental displacement.

The fourth part deals with the creation of a protection mechanism based on existing international law obligations that protect the rights of persons including refugees. While a number of Asian countries are not parties to the Refugee Convention, most have ratified the Conventions that provide for civil and political rights of persons including refugees. This section will first cover the human rights, environment law and labour law obligations of States to create regional and domestic policies for the protection of rights. Thereafter, regional cooperation mechanisms in Asia in relation to refugees and asylum seekers will be briefly analyzed to see if a scope for the widening of definitions exists.

Thereafter, various branches of international law from which principles for the protection of EDPs can be drawn will be explored. These include human rights law, environment law, and labour law. The error of merely applying these to EDPs without adaptation will also be addressed. This section concludes with assessing the viability of creating an international binding instrument in Asia.
The sixth part of the thesis will then provide a recommendation in terms of a possible solution. Considering regional tensions and diverging interests in the region, the creation of a new framework in a timely fashion with the agreement of all parties involved in unlikely. Instead, expanding existing machinery or treating it as an umbrella for a protocol-like regional mechanism would be an easier solution. As a result of its vulnerability to environmental risks, Asia has been attempting to create an early response and technology and knowledge sharing system in the region for disaster risk reduction (DRR), which includes environmental displacement related mechanisms. Apropos, this section will delve into the UN’s sustainability goals and disaster risk reduction guidelines first, followed by a brief of the regional consolidation of the international principles involved. This will be followed by a number of recommendations. The first will be the creation of a supranational institution for the negotiation of agreements between States at regional and sub regional levels in pursuance of responsibility sharing principles. The second, more region-specific recommendation will involve the creation of an organ within the DRR mechanism that specifically deals with redressal mechanisms and dispute resolution in relation to both, internal and international environmental displacement. Another concept that will be explored will be that of catastrophe bonds for the region to cover the debilitating costs that will follow if and when climate change related damage and migration become unavoidable.

The seventh and final section will conclude by providing an overview of the subject matter explored in this paper. The need for consensus on a definition for environmentally displaced persons is evident. It is the only way to avoid the protection paradox and to extend rights aimed to be universal, to a group of persons that are excluded from most protection mechanisms. The section will then briefly recap Asia’s unique circumstances compared to other continents, and summarize how this poses a distinct challenge for further migration in the region as a result of climate change. This will be followed by an abridgment of the recommendations for possible regional solutions for the long term without disrupting existing international relations negatively.
2. The Terminology Associated with Environmentally Displaced Persons

Environmental displacement can occur for a number of reasons. These include long-term gradual degradation of the environment, natural disasters, environmental destruction as a consequence of armed conflict, development projects, industrial accidents, etc.\(^{33}\) Previously, most movement caused by these factors has happened internally, within a country. But the question that arises is this - what happens when small/whole countries become uninhabitable?

2.1 The Environment as a Factor in Migration

It is only in recent years that there has been real acknowledgement of the magnitude of the problem. After an initial alarmist reaction at the time the phenomenon first surfaced in the late 20\(^{th}\) century, it is only now, when the effects of climate change have become glaringly apparent, that environmental displacement has come to light as a more serious concern. What was observed was that among the factors that drove individuals to migrate, literature on migration considered environmental conditions relevant initially, but later neglected these concerns and replaced them with political and economic factors.\(^{34}\) Only a few works acknowledged environmental migration as part of the larger migration dynamics.\(^{35}\)

The first term identifying individuals fleeing environmental disasters as a distinct group was coined by the UNEP expert Essam El-Hinnawi in 1985, where he used the term “environmental refugees”.\(^{36}\) This definition was wide enough to include temporary and permanent migration, internal displacement, and all kinds of environmental changes without distinction between those escaping natural disasters and those fleeing slow onset environmental damage. His work and the definitions and estimates by others at the time, received interest from media and society but were criticized as shock value inducing and short lived by other scholars.\(^{37}\) This was also


\(^{34}\) Etienne Piguet, 'Re-Embedding The Environment Into Migration Theory', *Remaking migration theory: intersections and cross-fertilisations* (2009)


\(^{37}\) Gemenne (n 35)
true of a definition and estimate by environmental scientist Norman Myers, who put forth 25 million as the number of persons displaced by environmental changes by 2002.\textsuperscript{38}

When it comes to classification of persons facing climate induced displacement, the need to distinguish between the causes of migration cannot be stressed enough as this will have a visible difference on the data as well as the conversation surrounding the subject.

\textit{2.1.1 The Difficulty in Making Estimates}

Multicausality and the resultant lack of a definition of EDPs make it nearly impossible to come up with an accurate quantification of the number of people that fall in this group. This difficulty in evaluating the number of individuals who are displaced by slow onset environmental changes results in most data put forth being predictions or estimations, with limited empirical data to support it. Many scholars argue that they exist mostly for the purpose of attracting media attention and for spreading awareness.\textsuperscript{39} Even so, these numbers are relevant as they play a role in developing policy on the subject. Any exaggeration in these figures, if indeed they are overestimated, does not discount the very real phenomenon that must be addressed before the situation goes beyond mitigation.

Environmental displacement is often a combination of environmental, social, and economic problems. Often, these are exasperated by actions or inactions of the State as we will see in the next section. This makes it difficult to pinpoint whether environmental factors are the displacing agent. In addition, these numbers vary over time based on changes in available technology that might either worsen the situation, or aid in the reduction of climate change-inducing emissions. Future adaptation strategies implemented by States and individuals will also play a role in the number of persons displaced. What is generally established, though, is that due to the inertia of the present climate system, the general effects that we can expect till 2050 are effectively cemented by current and historical global emissions rates and cannot be positively affected.\textsuperscript{40} This, however, does not mean an accurate determination can be made of

\textsuperscript{38} Norman Myers, 'Environmental Refugees: A Growing Phenomenon Of The 21st Century' (2002) 357 Philosophical Transactions of the Royal Society of London. Series B: Biological Sciences

\textsuperscript{39} Gemenne (n 35)

\textsuperscript{40} James Hansen, Makiko Sato, Reto Ruedy, Ken Lo, David W. Lea, & Martin Medina-Elizade ‘Global Temperature Change’ (2006) 103 Proceedings of the National Academy of Sciences of the United States of America 14288
the number of persons that will be affected. Despite this, establishing some form of distinction to aid in the creation of a framework goes a long way.

2.1.2 Distinguishing Between IDPs and EDPs

The distinction between IDPs and EDPs can be made on two grounds. First, the extent of movement in terms of distance from their original home, and second, the causes of displacement. The common denominator between the two definitions is that they arise from coerced or involuntary movement.

IDPs are formally defined as individuals or groups forced to flee their homes because of or so as to avoid the consequences of armed conflict, violations of their human rights, natural or human made disasters, or general violence of any kind, and who haven’t crossed an international border in order to do so.41

IDP is a non-exclusive categorization given to individuals who are displaced within the territory of their home country by causes not restricted to environmental effects. This decision to migrate internally may be inspired by economic, social or cultural reasons. They continue to be governed and protected by the existing domestic laws of their State.

Alternately, long term environmental degradation or natural disasters with more long-term effects result in persons needing to move for longer durations or permanently. In these situations, wide-ranging factors are considered by affected persons regarding their final destination and can lead them to seek to move across international borders in order to facilitate better living conditions. Countries are wary of the effect this will have on their existing infrastructure and economy. Further, there is the risk of a vicious cycle of environmental problems arising in the new areas as a result of mass migration.

It is prudent to note in the distinction between the two that while EDPs migrate as a result of environmental changes, displacement is often caused by a combination of factors that are not necessarily environmental; instead, they can be caused by other forces that either aggravate or are aggravated by environmental causes.

41 UNHCR 'Guiding Principles on Internal Displacement' (1999) 61 ICJ Rev 113
In the larger scheme of things, IDPs who migrate as a result of environmental factors fall within the meaning of EDP. For the purpose of this paper, the terms will be distinguished, and the term ‘EDP’ will be used to refer solely to persons moving across borders.

2.1.3 Types and Examples of EDPs

EDPs can be categorized using a number of criteria, the primary ones being the cause of and the duration of displacement.

2.1.3.1 Based on Cause of Displacement

There are three subcategories of people who fall within the meaning of EDPs. The first is environmental migrants, who voluntarily move as a result of environmental factors; the second is environmental displacees, who are forced to leave their homes as a result of environmental changes; and the third is development displacees, or persons who are moved in a planned manner as a result of changes in land use plans.42

2.1.3.2 Based on Duration of Displacement

It is generally accepted now that displacements as a result of sudden impact natural disasters such as volcanic eruptions, tsunamis, cyclones, etc., are more temporary and allow for persons to relocate back to their homes after mitigation and rebuilding efforts are complete.

Countries are more likely to be receptive of these individuals as the need for permanent resettlement does not arise. That said, sudden impact natural events are increasing in frequency in recent times and they can have an accelerating impact on already existing slow onset events and create aggravated circumstances.

In comparison, slow onset events render it near impossible for individuals to return to their home State. Consistent natural disasters, droughts, floods, salinization, inundation and other climate change-related impacts, or human caused disasters such as nuclear mishaps make entire

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regions uninhabitable, and migration in these circumstances is often permanent or long term till a solution can be found to undo such damage.

The investment by the receiving State in the case of long term EDPs will be greater as efforts will have to be made to integrate them into mainstream society.

The most frequently used and among the most critical occurrences to illustrate the effects of long-term environmental degradation on migration is the desertification of the African Sahel, a semi-arid land belt along the Sahara Desert. Uncontrolled population growth and the resultant overexploitation of resources led to the depletion of the land to the extent that it could no longer retain water.43 The nomadic farmers, through recurring droughts, moved further and further away from the desert, stripping the land bare as they went,44 leading to the rapid expansion of the Sahara and causing the displacement of approximately ten million people in that decade alone.45 The numbers have only increased, with conflict playing a large role, and neighboring African countries have sheltered these refugees who have almost no prospects of returning to their homes.46

The Pacific Islands, too, are more recent victims of climate change. The first of three Tuvalu islands sank in 1997, and the country is predicted to be the first nation to be ‘sunk by global warming’.47 It now seeks, rather unsuccessfully, agreements with Australia and New Zealand to migrate its citizens to these countries in case of an emergency evacuation.48 Australia and New Zealand have development obligations toward the Pacific Islands, and facilitate migration for family reunification or labour purposes. In addition, New Zealand also has a Pacific Access

43 Norman Myers and Jennifer Kent, 'Environmental Exodus: An Emergent Crisis In The Global Arena' (Climate Institute 1995)
44 Jessica B Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 NYU Envtl LJ 480
48 Lopez (n 36)
Category (PAC), which is a dedicated immigration scheme that grants permanent residency to a fixed number of islanders each year.\textsuperscript{49}

It might be time to consider similar agreements for other at-risk countries that will not be able to facilitate internal relocation for their citizens.

2.1.4 Distinguishing EDPs from Refugees

The term ‘refugee’ is at once too broad and too.\textsuperscript{50} While considering the language used to define EDPs, we must look at the characterization of refugees in international law. The Refugee Convention\textsuperscript{51} defines refugees as persons who are unable to, or for fear of persecution on the grounds of race, religion, nationality, membership of a social group or political opinion, unwilling to avail the protection of the country to which they belong. It is evident that this definition was not created with environmentally displaced individuals in mind – persecution, or the existence of a persecutor is central. This is the reason “environmental refugee” as a term is not suitable to classify these individuals.

Among the categories of EDPs, there are those who make the active choice to leave their homes as a result of prolonged hardships caused by environmental change, as discussed above. Even if those forced to migrate are brought within the ambit of international refugee law, the language of the law excludes persons who make this conscious choice. In addition, the term ‘environmental refugee’ would imply that nature is the only factor responsible, and thus ignores the hand that human activities play in creating these circumstances, making it difficult to mitigate the effects of these activities on the environment.\textsuperscript{52}

This definition is also open to State discretion and is being construed more and more narrowly over time.\textsuperscript{53} Refugees are provided temporary protection by the larger States and multinational

\textsuperscript{49} Gil Marvel Tabucanon, 'Migration for Environmentally Displaced Pacific Peoples: Legal Options in the Pacific Rim' (2012) 30 UCLA Pac Basin LJ 55
\textsuperscript{50} Jeremy McClancy and Gillian Bennett, Exotic No More: Anthropology on the Front Lines (University of Chicago Press 2002)
\textsuperscript{51} UN General Assembly, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)
\textsuperscript{52} Sireesha V Chirala, 'Acclimating to Climate Change: Filling the International Policy Void for Environmentally Displaced People' (2013) 35 Hous J Int'l L 359
\textsuperscript{53} Kara K Moberg, 'Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection' (2009) 94 Iowa L Rev 1107
Unions as demonstrated by the Temporary Protection Directive in the EU,54 the Immigration Act55 in the US, the Migration Act56 in Australia. Countries like China, India and others in Asia are signatories to the UN Refugee Convention,57 but do not have domestic refugee protection legislations though they accept refugees from neighboring countries liberally. The Directive on Subsidiary Protection58 in the EU extends protection to persons who fall outside the scope of the term ‘refugee’, but this too does not include EDPs.

The UNHCR distinguishes between them and refugees on the basis of the ability of their State to provide relief or assistance, even in limited capacities, without the need to look toward the international community.59 This criterion, in addition to the very specific language used to define refugees in most refugee law instruments, effectively excludes them from the terminology ‘refugee’ by only addressing the civil or political status of individuals.

2.2 Where EDPs and Refugee Law Converge

A wider interpretation of a number of terms in existing refugee law could be used to include EDPs. This would be a temporary solution while a specialized framework can be agreed upon.

2.2.1 Persecution

Applying a human rights law definition of the term ‘refugee’ would include EDPs as opposed to a definition through an immigration law perspective. In this definition, human rights abuses

54 Council Directive 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212 (European Union)
56 Migration Act 1958 (No. 62 of 1958) (Australia)
57 Refugee Convention (n 51)
58 Council Directive 2011/95/EU of 13 December 2011 on 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 (recast), [2011] OJ L 337 (European Union)
would also fall within the meaning of persecution, as required by most domestic immigration laws.60

While the Handbook on Procedures and Criteria for Determining Refugee Status states that there is no comprehensive definition to the term persecution, there is also no explicit denial in any international documents that a group of persons may be persecuted through environmental harm.61 One definition of persecution suggests that it exists when there is a systemic or sustained violation of rights indicating the failure of the State to perform its duty to protect.62 In addition, the language of the Protocol to the Refugee Convention63 also suggests that such status can be claimed even in the absence of persecution if the State is unable to provide aid.64

Cases of environmental persecution could include situations where governments consistently make policy decisions that have an adverse effect on the environment, thus negatively affecting the lives of members of a certain social group, and thereafter fail or refuse to mitigate the situation.65 Instances of persecution also exist in circumstances where environmental destruction is used as a tool of war. This can be in the form of burning crops, poisoning wells, and other acts intended to cause harm to individuals reliant on the environment and resources.66 The most suitable illustration of this is when the marshes of southern Iraq were drained by the government, in order to, scholars maintain, commit genocide of the Shi’a Muslim tribes that lived in them.67 In such a situation, such persons should, ideally, be able to claim all rights and protections they are entitled to as refugees facing political persecution.

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63 UN General Assembly, Protocol Relating to the Status of Refugees (adopted on 31 January 1967) 606 UNTS 267
64 Lopez (n 36)
65 Kozoll (n 61)
66 Dana Zartner Falstrom, 'Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment' (2002) 13 Colo J Int'l Envtl L & Pol'y 1
67 Lopez (n 36)
2.2.2 Social Group

In addition, in the definition in the Refugee Convention, the use of the term ‘social group’ could include individuals who are exposed to suffering by virtue of their social group as a result of environmental degradation or State actions that affect the environment. If the definition of social group is wide enough to include these persons, they can be brought under the umbrella of refugee protection instruments – EDPs as a group of persons who are unable to protect or preserve their environment for lack of political power. This is an extension of the concept of vulnerability, as proposed by the United Nations Office for Disaster Risk Reduction, which includes the circumstances of an individual or community that make them more susceptible to a hazardous event. Vulnerability and the ability to adapt are factors that determine the extent of damage caused by an event, and whether a person will be forced to migrate.

2.2.3 Events Affecting Public Order

The Convention of the Organization of African Unity (OAU) expands the definition of the term through the phrase ‘events seriously affecting public order’, to apply the convention to persons displaced by environmental factors but does not provide adequate remedy. The Cartagena Declaration on Refugees contains similar language, but it distinguishes between refugees and migrants, and EDPs would have to show a level of persecution to be brought under its ambit. It is of note that these are among the only documents that are able to include such persons and have been applied as such, and even these only provide temporary protection.

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68 Havard (n 60)
71 Organization of American States, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted on 22 November 1984) <https://www.refworld.org/docid/3ae6b36ec.html> accessed 25 August 2019
3. The Specific Problem of Asia

The effects of climate change are disproportional as a result of the global wealth and development disparity. Asia is home to a significant number of vulnerable populations: in 2010 and 2011, more than 42 million environment and climate related displacements were witnessed in Asia, more than any other region in the world.\textsuperscript{72} The IPCC also projects that climate change will result in higher precipitation in the region, with increased exposure to extreme weather events each year.\textsuperscript{73}

The Refugee Convention only requires States to provide protection once an individual is within their territory, and States attempt to evade this through high security to prevent entry through their borders.\textsuperscript{74} This pushes the burden onto poorer nations with more porous borders. These countries already face conflict and instability due to the lack of integration between nationals and culturally and ethnically diverse refugees, as well as due to the burden mass migration creates on their resources and environment.\textsuperscript{75} It has been observed by the German Advisory Council on Global Change that the general trend as regards cross border migration will be in the form of South-South movement.\textsuperscript{76}

There have been multiple instances in the past of widespread casualties as a result of damage to the environment caused by natural or manmade activities. Examples of this are the displacement caused by the Three Gorges Dam Project in China,\textsuperscript{77} industrial accidents such as


\textsuperscript{74} Moberg (n 53)


\textsuperscript{76} David Hodgkinson, Tess Burton, Heather Anderson and Lucy Young, 'The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change' (2010) 36 Monash U L Rev 69

\textsuperscript{77} Falstrom, (n 66)
those in Bhopal, the Chernobyl and Three Mile Island.\textsuperscript{78} In Iraq, a water shortage since 2005 has led to a 70\% decrease in population in Northern Iraq, with people migrating to find new sources of water.\textsuperscript{79} The general tendency is to find refuge in places that one has ethnic, cultural or historical ties to, and this leads to migration within the continent.\textsuperscript{80}

Though these numbers could be refined by actual rise in sea levels and advancements in mitigation strategies, the assumption is that the number of “climate refugees” by the year 2050 would be 141 million in Asia.\textsuperscript{81} That said, any numbers relating to EDPs are subject to dispute so long as there is no consensus on definitions, and each set of numbers will represent a different reality.

3.1 Vulnerability

EDPs in Asia are vulnerable especially because, in many instances, they do not have institutional support from their developing States to mitigate the effects of natural disasters. After Bangladesh, India is most vulnerable, followed by Nepal in 4\textsuperscript{th} place, the Philippines in 6\textsuperscript{th} place, Afghanistan in 8\textsuperscript{th} place, and Myanmar in 10\textsuperscript{th} place.\textsuperscript{82} Vulnerability is a factor of exposure, sensitivity and the capacity to adapt combined.\textsuperscript{83} Exposure and sensitivity can be a result of a number of factors such as geographic location, development, poverty, and social conditions.

3.1.1 Geographic Vulnerability

Geographically, Asia is a region that faces numerous environmental events by virtue of its location on the Earth.\textsuperscript{84}

Every year, many regions are ravaged by natural disasters such as cyclones, droughts, earthquakes and famines. Furthermore, the mega-deltas of Asia have been identified by the

\textsuperscript{78} Havard (n 60)
\textsuperscript{79} Nicole Angeline Cudiamat, 'Displacement Disparity: Filling the Gap of Protection for the Environmentally Displaced Person' (2012) 46 Val U L Rev 891
\textsuperscript{80} Brown – IOM 2008 (n 12)
\textsuperscript{81} Frank Biermann and Ingrid Boas, 'Preparing For A Warmer World: Towards A Global Governance System To Protect Climate Refugees' (2010) 10 Global Environmental Politics
\textsuperscript{82} ADB Final Report 2012 (n 72)
\textsuperscript{83} William Neil Adger, 'Vulnerability' (2006) 16 Global Environmental Change
\textsuperscript{84} ADB Final Report 2012 (n 72)
IPCC as among those most at risk.\textsuperscript{85} The Bengal region shared by Eastern India and Bangladesh surrounds the delta created by the rivers Ganges and Brahmaputra. Both rivers having origins in the Himalayas, drain a large fraction of Asian territory and carry sediments eroded from the mountains. The resultant fertility of the soil in the region, therefore, has given rise to cities with the world’s highest population densities, placed precariously on some of the lowest terrain, some only a foot or two above sea level. In addition, a large margin of the land in this region consists of bays and marshes that reach far inland and can barely be considered dry land.

According to the UNDP, Bangladesh will be among the countries to be most affected by climate change due to its high population density in coastal areas.\textsuperscript{86} About 10\% of Bangladesh goes underwater seasonally.\textsuperscript{87} This means that a sea level rise of even a foot or two in this century, or 45 cm as predicted by the IPCC, will permanently inundate about 10\% of the country, and will lead to the displacement of millions of individuals living on the delta. A one meter rise will lead to a loss of 21\% of the territory of the country. Lower adaptive capacities also mean that the impact of natural events with similar or lower intensity will cause greater damage in a country like Bangladesh as compared to a developed nation.\textsuperscript{88} In addition to the presently occurring Rohingya refugee crisis, over 700,000 Bangladeshis are displaced each year on average as a result of natural disasters.\textsuperscript{89} By 2050, the number of persons displaced by climate change is likely to reach 13.3 million.\textsuperscript{90}

Countries like Cambodia and Vietnam will face loss of livelihood and habitat caused by seawater intrusion into agricultural and residential regions.\textsuperscript{91} Approximately 1.7 million people

\textsuperscript{85} Vikram Odedra Kolmannskog, ‘Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration’ (Norwegian Refugee Council 2008)

\textsuperscript{86} ’Bracing For Climate Change In Bangladesh By Climate Adaptation UNDP On Exposure’ (UNDP, 2018) <https://undp-adaptation.exposure.co/bracing-for-climate-change-in-bangladesh> accessed 17 August 2019

\textsuperscript{87} Pollack (n 28)

\textsuperscript{88} Brown - IOM 2008 (n 12)

\textsuperscript{89} 'Bangladesh' (IDMC) <http://www.internal-displacement.org/countries/bangladesh> accessed 11 August 2019

\textsuperscript{90} Kanta Kumari Rigaud and others, 'Groundswell: Preparing For Internal Climate Migration' (The World Bank 2018)

\textsuperscript{91} Koko Warner, 'Environmental Change And Migration: Methodological Considerations From Ground-Breaking Global Survey' (2011) 33 Population and Environment
migrated away from the banks of the Mekong river as a result of climate change induced damage to soil and water sources.\textsuperscript{92}

The small island regions in the Indian Ocean also face the risk of submersion and associated migration to the mainland.\textsuperscript{93} In 2008, the Government of Maldives announced that it would invest a portion of its annual budget on buy property that could be used as a new homeland.\textsuperscript{94}

The Indian subcontinent and parts of China are at risk of flooding during the rains, and water shortage during dry spells as a result of glaciers melting, while countries like Nepal and Bhutan face the risk of glacial lake outbursts.\textsuperscript{95} 41 percent of the population in China (the most populated country in the world) lives in coastal areas.\textsuperscript{96} At the same time, the lowest water availability per capita in the world is in Pakistan, a highly water stressed country.\textsuperscript{97}

A large portion of Asia’s population, too, is concentrated in environmentally vulnerable areas. For example, of the ten megacities (these are a specific feature of Asian countries, with large population concentrations over large areas) in Asia, six are located along the coast, as is 60 percent of China’s wealth.\textsuperscript{98}

3.1.2 Economic Vulnerability

In addition to overpopulation, most Asian States face frequent natural disasters, droughts, famines, etc. Since these countries are reliant on agriculture, a combination of these events inevitably leads to loss of livelihood and associated poverty. More than half the population in

\begin{itemize}
\item \textsuperscript{93} Mikiyasu Nakayama and Nagisa Yoshioka and Hirotaka Fujibayashi and Carl Bruch, 'Factors Affecting Livelihood Re-Establishment of Climate Change Induced Transboundary Displaced Persons' (2016) 4 Int'l J Soc Sci Stud 40
\item \textsuperscript{94} Hodgkinson et al (n 76)
\item \textsuperscript{95} Brown - IOM 2008 (n 12)
\item \textsuperscript{96} Alan Dupont and Graeme Pearman, ‘Heating up the planet: Climate change and security’, (2006) 58 Lowry Institute for International Policy
\item \textsuperscript{98} Ibid
\end{itemize}
China and India are engaged in agriculture. Approximately 1.8 billion people live on less than $2 a day in Asia and the Pacific.\(^9^9\) Furthermore, it is often the case that these individuals live on more at-risk land and are more susceptible to the effects of natural calamities.\(^1^0^0\)

Among the cities most at risk of economic exposure to climate change by the year 2023 are Jakarta in Indonesia, Manila in the Philippines, and Baghdad in Iraq.\(^1^0^1\)

3.1.3 Social Vulnerability

Countries like Thailand and Malaysia are not parties to the Refugee Convention and choose to remain outside of it as a result of hesitation to promote integration as this comes with the rights to work and the possible right to citizenship.\(^1^0^2\) In Thailand, individuals living in camps for refugees from Myanmar and Burma face high levels of violence and poor education systems, with a high risk of landslides.\(^1^0^3\)

3.2 Regional Political Situation

Asia has a complex historical, cultural and political background that affects more than just the international relations of the countries in the region. Economic and political cooperation is yet to be established in a satisfactory manner here, despite the fast-growing trade between these countries.

Unlike in Europe, there is no supranational institution in Asia that governs policy and encourages a level of uniformity and cohesion. Regional organizations have small memberships that create blocs, and instruments of these bodies do not affect the sovereignty of the State parties. While the EU is a supranational organization, those in Asia such as ASEAN

\(^9^9\) ADB Final Report 2012 (n 72)  
\(^1^0^0\) Cudiamat (n 79)  
\(^1^0^2\) Penelope Mathew and Tristan Harley, 'Refugee Protection And Regional Cooperation In Southeast Asia: A Fieldwork Report' (Australian National University 2014) <https://core.ac.uk/download/pdf/156623449.pdf> accessed 15 August 2019  
\(^1^0^3\) 'Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers' (Human Rights Watch, September 2012); Mathew & Harley (n 102)
and SAARC are merely intergovernmental. Each country plays its own role, and there are constantly shifting power dynamics that affect long-term policy choices. China’s development and growth in the 21st century which has led to it becoming a major player in global economics and international relations; its emergence has hugely affected the development models followed by other neighbouring countries, especially those in the South East.

3.2.1 Cultural Composition and Tensions

Unlike other regions such as Europe, South America and Africa, multiple States did not come together to form one supranational union in Asia, and therefore the States here do not share common goals or policy directions. The large number of cultures that exist in the region mean that there is no homogeneous population over a large area. Minority communities find it difficult having their voices heard in political and social discourse and are often alienated.

Countries like South Korea and Japan limit the availability of visas into the country and their best efforts are applied to prevent chain migration. This ensures that there is a level of cohesion in the homogeneity that this creates, and the likelihood of an outsider adapting and being accepted with ease is low.

The lack of cohesion consistently leads to oppression and clashes in the region as is seen with the treatment of Uighur Muslims in China, India’s problem with lynching and the NRC in the North East, which has recently effectively rendered 2 million people stateless if they

105 Hong Liu, 'Transnational Asia And Regional Networks: Toward A New Political Economy Of East Asia' (2018) 1 East Asian Community Review
106 Dong-Hoon Seol and John D Skrentny, 'Why Is There So Little Migrant Settlement in East Asia' (2009) 43 Int'l Migration Rev 578
fail to prove their Indian citizenship,\textsuperscript{110} the exile of the Dalai Lama and Tibetans to India, the plight of the Rohingyas escaping Myanmar, the treatment of Tamils in Sri Lanka,\textsuperscript{111} and many other such instances.

In these scenarios, mass movement of culturally different people into other countries within the region with the intention to settle long term or permanently will likely lead to greater tensions with the domestic population and more competition for already scarce resources. Refugees or displaced persons in general in this region are likely to be subjected to manipulations that are \textit{realpolitik} as a result of the nature of the bilateral relations shared by these countries.\textsuperscript{112}

\subsection*{3.2.2 Geopolitical Circumstances}

In 2017, the United States exited the negotiation to create the Trans-Pacific Partnership, leaving the reins with China to take more charge of regional agreements without the involvement of the US, promoting the role of China in the region and the narrative of “Asia for Asians”.\textsuperscript{113} The souring of China’s relationship with the United States has led to the country creating stronger relationships with others in the region through the One Belt One Road (OBOR) initiative.\textsuperscript{114} The OBOR, is an ambitious project lead by China to create trade and cultural corridors through the Asia-Pacific, African and European regions, and facilitate trade and exchange of culture.

The Indo-Pacific Strategy between the US, Australia, India and Japan is meant to counterbalance this growing influence of China in Europe and Africa.\textsuperscript{115} Russia and China are now considering integrating Russia’s Eurasian Economic Union with the OBOR to create a

\begin{itemize}
  \item \textsuperscript{111} Immigration and Refugee Board of Canada, 'Sri Lanka: Treatment Of Tamils In Society And By Authorities; The Eelam People's Democratic Party (EPDP), Including Relationship With The Tamil Population' (Immigration and Refugee Board of Canada 2017)
  \item \textsuperscript{112} Pia Oberoi, 'Regional Initiatives on Refugee Protection in South Asia' (1999) 11 Int'l J Refugee L 193
  \item \textsuperscript{113} Andres Serbin, 'Contending Geopolitical Narratives and Global Tectonic Shifts' (2018) 42 Fletcher F World Aff 193
  \item \textsuperscript{114} Divesh Kaul, 'Trans-Pacific Partnership Trump(ed): Was TPP That Bad an Acronym in New U.S. Trade Terminology’ (2018) 27 Tul J Int'l & Comp L 1
  \item \textsuperscript{115} Serbin (n 113) 199
\end{itemize}
Eurasian economic and political corridor. This could lead to major changes in the political, economic, and military dynamics of the region and the world moving forward.

India vehemently opposes the OBOR for the closer economic and political relationship it will establish between China and Pakistan. Furthermore, long standing disputes over territory also continue to exist in many parts of the continent. The disputed territories of Kashmir and Siachen between India, Pakistan and China, the regions of Tibet administered by China, the conflict in Myanmar, and the territorial dispute in the South China Sea are all illustrations of continuing conflicts in the region. In addition, water sharing agreements in the region are fragile and tensions have been rising with the recent change in weather patterns and increasing demands. Long standing instability in the neighbouring Middle East also has an impact on regional politics in Asia.

This makes it difficult to establish common ground on many issues that have an impact on national security, integration, territory, resource allocation, etc. Nonetheless, there are a number of regional cooperation machineries that exist, that pave the way for potential instruments.

3.2.3 International Migration

Most Asian countries have high emigration rates. At the same time, migration into the South East Asian countries is limited by visa restrictions. While labour migration is possible, family reunification is not a prevalent concept.

The degree of urbanization varies between Central Asia on the one hand and South and South East Asia on the other. As a result, income and job market disparities between Asian regions already lead to migration across borders. The migration of persons from Bangladesh to India, especially to the North Eastern regions is arguably the single largest international migration

116 Ibid 200
119 Seol & Skrentny (n 106)
120 ADB Final Report 2012 (n 72)
flow in the world. Periodically, transboundary migration in the region has been triggered by conflict, and this is likely to be exacerbated by environmental factors.

The demographic of Central Asia is impacted by large scale migration in the region following the collapse of the USSR. Skilled labour migration is the norm between the countries in Asia, with each country’s growing requirements for labour resulting in facilitation of mobility for purely this purpose.

This indicates that involving labour migration as a long-term solution to forced displacement could be beneficial. Individuals facing slow-onset climate change would be incentivized to migrate to find employment and will therefore be considered an asset at their destination, in comparison to a situation where migration is forced by circumstances, and the individual either does not have the ability or resources to find employment during temporary protections provided elsewhere. As this is often more true for skilled labour, and countries are more hesitant to accept unskilled migration, value can be found in assisting individuals that may be potentially affected by environmental displacement in gaining vocational training.

3.2.4 The Current Refugee Situation

In addition to existing migration, most Asian countries, especially the South Eastern ones, are destinations for refugees from regions in mainland Asia with higher poverty, violence and conflict. The region has generally seen a tightening of immigration due to security concerns and rising tensions, especially in the countries on the mainland Asian continent. Stricter immigration control in countries like Saudi Arabia in the Middle East and Bangladesh, that were previously preferred destinations due to proximity, have led to a sharp increase in the number of individuals choosing the maritime route to countries further South East such as Thailand and Malaysia.

The Rohingyas, an ethnic minority group that has been rendered stateless in Myanmar, in particular are having trouble being mainstreamed into these countries, many of which are not parties to the Refugee Convention. The general practice is to have detention centres where many refugees are held for lack of any official designation as provided by the government.

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121 ADB Final Report 2012 (n 72)
122 Seol & Skrentny (n 106) 584
123 Mathew & Harley (n 102)
In many of these countries, refugees are detained, and have limited access to adequate living and working conditions, or education. The aspect of adequate standards of living and working conditions will be discussed in the following section on international law principles in the context of rights violations that suffice as reasons to accept transboundary migrants, as well as in context of the treatment of persons once they have entered the territory of a country other than their home country.

3.2.4.1 South Asia – India, Pakistan, Bangladesh, Sri Lanka, Nepal

India is home to refugees from Sri Lanka and Tibet, who are recognized. There are also Rohingya refugees and individuals from Bangladesh who are mostly protected by NGOs while the government attempts to deport them. There is no domestic legislation on the subject, including the treatment of persons detained for being illegal aliens or “foreigners”.124

Pakistan is home to millions of Afghani refugees, hundreds of thousands of whom were repatriated in 2016 and 2017.125 As recently as 2018, Pakistan gave these refugees 30 days to return to their homeland, despite the ever-increasing instability and threats to life in Afghanistan.126

Bangladesh is home to the world’s largest refugee camp in Cox’s Bazar, where hundreds of thousands of Rohingya refugees are sheltered.127 While it attempted to repatriate a number of these refugees, it failed to do so as a result of the failure of Myanmar to guarantee the safety of these individuals.128

These three countries account for the majority of the refugee population in the region, and none have comprehensive domestic laws on the subject.

3.2.4.2 South East Asia – Thailand, Malaysia, Indonesia

Many Rohingya refugees from Thailand were towed out to sea in boats without motors and left adrift. Several boats were rescued near the Andaman and Nicobar Islands in India; Thai officials were later found to be involved in handing them over to traffickers as well. In response to their reception in South Asian nations, Malaysia is now a destination where Rohingyas are journeying to. The UNHCR lacks the capacity to register the asylum seekers fast enough to match the rate at which they are arriving in Thailand.

Similarly, while Malaysia accepts a constant flow of asylum seekers, it considers itself a transit country; it does not officially recognize the status of refugees provided by the UNHCR as an extension of its refusal to be a party to the Refugee Convention. As a result, these individuals have no access to the formal work sector and public education systems.

Indonesia, too, is not a party to the Refugee Convention. It also does not have a refugee status determination system at the national level. The country perceives refugees as a security threat and economic burden, keeping them from working legally, but the UNHCR card that designates the status of refugee does provide some protection.

3.2.4.3 East Asia – China, Japan, Mongolia, Taiwan, South Korea, North Korea

Presently, wealthier countries like Japan and South Korea receive fewer migrants than other highly developed countries in the world. The systems are exclusive enough that most labour migration instruments do not provide family members with visas to accompany the individuals. Moreover, these countries have rigid mechanisms that accept very few refugees each year. The

129 Mathew & Harley (n 102)
130 ‘Thailand’ (UNHCR 2013) <https://www.unhcr.org/528a0a330.html> accessed 16 August 2019
131 Mathew & Harley (n 102)
132 Ibid
134 Mathew & Harley (n 102)
135 Seol & Skrentny (n 106)
general tendency appears to be that of following developmental state patterns, focusing on maximization of profits while minimizing burdens in terms of social costs.

As an exceptional case, in the 70s, Japan accepted thousands of Indo-Chinese refugees due to international pressure but has since closed its doors again and implemented strict immigration policy. The country is now attempting to increase the number of refugees it accepts from merely 30 annually, to a hundred in a few years’ time.

South Korea has ratified the Refugee Convention and created a status recognition system for asylum seekers, but the number of international refugees it shelters is very low, and there is no separate domestic law addressing refugees. The country has generally been more friendly to refugees from North Korea, terming them South Koreans in the Constitution, but has never attempted to make access easy for non-Korean refugees.

Mongolia is not a party to the Refugee Convention but follows general international law principles of non-refoulement. Despite this, the number of refugees in this developing country are near negligible.

China acceded to the Refugee Convention and its Protocol in 1982 (not applicable in Hong Kong), by which time it had already accepted hundreds of 260,000 Indochinese refugees and some Lao and Cambodian refugees. Despite the creation of a new Exit-Entry Administration Law, no regulations exist for its implementation, nor is there a comprehensive legislation on asylum, and the government provides no assistance to refugees.

136 Ibid
138 Seol & Skrentny (n 106)
140 ‘Mongolia’ (IOM) <https://www.iom.int/countries/mongolia> accessed 19 August 2019
142 Law of 2012, Exit and Entry Administration Law of the People's Republic of China, Order No. 57, 1 July 2013 (China)
143 UNHCR China Factsheet (n 141)
abovementioned Act merely deals with the documentation required by refugees and persons seeking asylum.

3.2.4.4 Central Asia – Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan

Central Asian countries occupy a complicated location on the continent, surrounded by volatile countries such as Iran, Afghanistan, Pakistan, China and Russia. The region, therefore, witnesses large-scale trafficking of drugs, people, and arms given its geopolitically advantageous location for foreign military bases, as well as massive oil reserves.

Many complications also arise due to policies that find their roots in Soviet-era rules, and the political past associated with these countries, with migration related policies being complicated by the fact that the region was basically an unregulated corridor for migration in Eurasia.

There is little conversation about human rights in the region as a result of trade relations and strategic militarization.

3.2.4.5 Middle East/West Asia

A brief look at this part of the world at this time seems appropriate in order to gain insight into the Asia’s capacity to accept large numbers in case of an emergency. The Middle East is ordinarily considered a separate bloc with very different policy objectives and economic strategies compared to the rest of the continent. It witnessed the creation of the first intergovernmental organization in Asia - the League of Arab States, now consisting of 22 States.

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145 Yelena Nikolayevna Zabortseva, 'From The “Forgotten Region” To The “Great Game” Region: On The Development Of Geopolitics In Central Asia' (2012) 3 Journal of Eurasian Studies

146 Orchard C (n 144)

147 Ibid

Most Arab countries are not parties to the Refugee Convention. Even so, the League provides for various regional refugee protection machineries through the Arab Charter on Human Rights, the Cairo Declaration, and the Arab Convention on Regulating Status of Refugees in the Arab Countries. Most of these countries are also parties to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

Despite the seeming cohesiveness, the Arab countries are continuing to attempt to find balance between the various ethnic and sectarian communities. Present instability in Yemen, Syria, and Iraq among others leads to the movement of millions of refugees amongst these countries as well as to the neighboring countries of Turkey, Jordan, Lebanon, and Egypt. While several GCC countries provide funding to some extent for relief efforts, the number of individuals granted refugee status in these countries is not proportional. Lebanon and Jordan are at the forefront in receiving refugees, but with growing fears that the instability and resultant displacement are long term and will have an effect on the demographic balance, most receiving countries are now finding means to limit refugee flow, prevent integration into mainstream society and send them back to their countries of origin.

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153 UN General Assembly, International Covenant on Civil and Political Rights (adopted on 16 December 1966) 999 UNTS 171


155 ‘Middle East’ (UNHCR) <http://reporting.unhcr.org/node/36> accessed 19 August 2019


The emergence of the Islamic State has also led to the displacement of many people within their own country.\textsuperscript{158}

The region has precedent regarding situation-specific legislation in the form of the Casablanca Protocol,\textsuperscript{159} which was meant to address the rights of Palestinian refugees. As it has become evident that existing regional frameworks have proven insufficient in dealing with the crisis at hand, a similar mechanism will have to be created. As of 2018, approximately 40 percent of the world’s displaced population belonged to the Arab region.\textsuperscript{160}

In the absence of innovative solutions, with its own refugee crisis causing further instability, this region will likely be unable to sustain an influx of environmentally displaced persons.

\textbf{3.3 Protection of Internally Displaced Persons}

Internally displaced persons are a recognized class of persons in need of protection by multiple domestic legal instruments under a framework provided for in international law. That said, unlike the refugee status, ‘IDP’ does not confer a legal status, and is used purely as a descriptor.\textsuperscript{161}

\textit{3.3.1 International Instruments}

While the principle of sovereignty of States means that no State can be coerced to follow an international instrument, no matter how binding, international law functions on the practice of mutual respect and recognition. In pursuance of the same, State Parties to binding international law instruments are bound by the provisions of said instrument. It is because of this that despite international law’s proverbial lack of teeth in terms of enforcement, that States do not ratify instruments they do not intend to uphold in any way or form.

There is no international treaty placing obligations on States to provide protection to EDPs, but there are non-binding soft law instruments and regional conventions. These are the non-binding

\textsuperscript{158} \textit{Ibid}
\textsuperscript{159} League of Arab States, Protocol for the Treatment of Palestinians in Arab States (Casablanca Protocol) (adopted on 11 September 1965) <https://www.refworld.org/docid/460a2b252.html> accessed 20 August 2019
\textsuperscript{160} Yahya and Muasher (n 157)
Guiding Principles on Internal Displacement\textsuperscript{162} and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention)\textsuperscript{163}. We will discuss the former, which is applicable in Asia.

\subsection*{3.3.1.1 The Guiding Principles}

The Guiding Principles on Internal Displacement\textsuperscript{164} were adopted in 1998 and have since gained considerable traction in the international community despite the non-binding nature of the document. Unlike other instruments, the Guiding Principles form a soft law instrument created by a group of independent experts, not affiliated to the UN for the purpose. At the time they were created, it was believed that these guiding principles would be sufficient to assist States in applying human rights principles to IDPs. It allowed for the sidestepping of extended negotiations, reservations or blocking of a treaty on the subject, while at the same time creating a framework\textsuperscript{165}.

The UNHCR uses these as the international standard for the treatment of IDPs. The Principles deal with protections against and during displacement,\textsuperscript{166} create a framework for humanitarian assistance, protection at the time of return to their homes, and guidelines for integration when they are forced to resettle elsewhere. These guidelines provide insight into the roles of all entities involved, whether they be UN personnel, government officials, or members of NGOs. Basic human rights as envisaged in existing international human rights instruments are reaffirmed.

The underlying principle of these guidelines is the obligation of the State to provide for its citizens, to not discriminate against them, and to assist them so far as rehabilitation goes\textsuperscript{167}. It also sets forth the need for international assistance in circumstances where a State is unable to provide the same.

\begin{flushleft}
\textsuperscript{162} UNHCR Guiding Principles (n 41) \\
\textsuperscript{163} African Union, Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (adopted on 23 Oct. 2009) Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1 (Kampala Convention) at arts. 9, 10 & ll \\
\textsuperscript{164} UNHCR Guiding Principles (n 41) \\
\textsuperscript{166} Guiding Principles (n 41) at Principles 5 to 23 \\
\textsuperscript{167} Guiding Principles (n 41) at 3.1
\end{flushleft}
The success of the Guiding Principles lies in the fact that it finds its core in existing international law created through the consensus of States, even though the document itself was created by an independent group of experts. Notwithstanding the fact that the principles cannot be used to hold States accountable, the binding principles associated to them can be. This is validated by the use reaffirmation of these principles by Treaty Bodies, the UN General Assembly and Security Council.168

3.3.2 Problems Associated with Internal Migration

But internal migration comes with its own problems. It leads to overburdening in regions with already large concentrations of people competing for resources and leads to political conflict which results in further destruction of land. As was discussed before, countries like Bangladesh, Nepal, Myanmar, etc., face a greater danger of environmental displacement with large numbers of persons living in high risk regions, without the resources to mitigate large scale damage effectively. Furthermore, developing countries are unable to provide resources or assistance in the event of large scale displacement as was seen in the case of India during the floods in Bihar in 2004, where indigenous tribes have been unable to access aid ever since.169 This is the case even today, as Bihar is consistently at risk of flooding170 and the State is unable to cope with the extent of damage each year. This is true for many parts of India where debilitating floods are a frequent phenomenon every year at the time of monsoon.

Between 1st January to 31st December 2018 alone, disaster related internal displacement in Asian countries has been high – approximately 435,000 people in Afghanistan, 3,802,000 in Philippines, 2,675,000 in India, 298,000 in Myanmar (Burma), 853,000 in Indonesia, 2,100 in Pakistan, 100,000 in Sri Lanka, 78,000 in Bangladesh, 37,000 in Cambodia, 12,000 in Nepal, 37,000 in Cambodia, and 1,400 in Hong Kong SAR, China have been displaced as a result of disasters.171

168 Kälin (n 165)
169 Moberg (n 53)
3.3.3 Responsibility Sharing

Global climate change is the result of collective activity, as opposed to those of regions that face the brunt of the consequences.

In circumstances of regular mass displacement as experienced by developing countries as a result of climate change, the international law principle of international cooperation and assistance must be applied to aid such countries. This principle must be applied in consonance with the generally accepted view that States have the primary duty to provide for their citizens so as to prevent international migration.172

A similar outlook toward the internal displacement crisis would create a more common responsibility towards this vulnerable group. This will also create the basis for a framework of mitigation that aims to reduce transboundary migration to escape loss of habitat, in pursuance of the international law principle requiring that States be responsible for preventing forced migration.173

The UNHRC’s Guiding Principles are based on existing international human rights and humanitarian protections that individuals are entitled to. In furtherance of the same goals, a legally binding international instrument for the protection of these individuals with mechanisms for international aid will ensure that States are more proactive in rehabilitating these individuals within their own territories.

3.3.4 The Influence of the Guiding Principles in Asia

Internal displacement is among the most pressing issues affecting human rights and other social, political, economic, and cultural rights in Asia, with the major causes being conflict and development projects.174 Most Asian countries are also parties to basic civil and political rights conventions such as the ICCPR, ICESCR, the UDHR175, among others. While the protection of fundamental human rights is enshrined in the laws of most countries, there is a lack of a

172 Guiding Principles (n 41)
173 Hodgkinson et al (n 76)
175 UN General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III)
direct incorporation of these principles specifically on the subject of IDPs in the form of legislation, despite the large number of internal displacements these countries witness annually.

Internal displacement is considered a domestic matter and IDPs are forced to depend on their home State for support, even when none exists. The concept of sovereignty allows States to handle these circumstances internally while violating human rights with impunity and barring international assistance to their IDPs.\textsuperscript{176} Countries like India reject such assistance due to an underlying fear that this will increase international interference in the affairs of weaker States.\textsuperscript{177} This is done while ignoring that in pursuance of the same national sovereignty, States have the obligation to exercise their legislative powers to create laws to address specific circumstances such as these to protect the rights of their citizens.

That said, a number of experts believe that the failure of a State to implement these principles as a matter of domestic law has less to do with a lack of political will, and more to do with the lack of capacity.\textsuperscript{178} Even when a robust domestic policy is created, the States do not have the capacity or resources to implement it, as was seen in the case of Afghanistan.\textsuperscript{179}

India is among the only countries in the world to fully recognize the problems associated with displacement and create specific policy frameworks.\textsuperscript{180} There are multiple focused legislations on different aspects of displacement. Amongst these are the National Rehabilitation and Resettlement Policy\textsuperscript{181} (for persons displaced by development projects), The Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act (LARR),\textsuperscript{182} as well as legislation that deals with disaster related displacement through the National Disaster Management Act (NDMA).\textsuperscript{183} The existence of policy does not, however,

\textsuperscript{176} Thomas George Weiss and David A Korn, \textit{Internal Displacement: Conceptualization And Its Consequences} (Routledge 2006) 5
\textsuperscript{177} Tanushree Rao, ‘Protecting Internally Displaced Persons in India’ \textlanglehttps://www.e-ir.info/2013/07/15/protecting-internally-displaced-persons-in-india/\rangle accessed 20 August 2019
\textsuperscript{178} Gabriel Cardona-Fox, \textit{Exile Within Borders: A Global Look at Commitment to the International Regime to Protect Internally Displaced Persons}, (Koninklijke Brill NV 2019) 182
\textsuperscript{179} Phil Orchard, ‘Implementing the Guiding Principles at the domestic level’ Forcmed Migration Review Online \textlanglehttps://www.fmreview.org/GuidingPrinciples20/orchard\rangle accessed 20 August 2019
\textsuperscript{180} ‘India’ (IDMC) \textlanglehttp://www.internal-displacement.org/countries/india\rangle accessed 20 August 2019
\textsuperscript{181} India: National Rehabilitation and Resettlement Policy, 2007
\textsuperscript{182} India: The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013
\textsuperscript{183} India: Disaster Management Act, 2005
indicate adherence to the principles of the Guiding Principles. In India, while legislation exists on rehabilitation, compensation and resettlement, its implementation at the ground level is questionable. With no timeframes set for rehabilitation, and vague resettlement provisions, the actual positive effects of such laws are often unseen or provided for after years, sometimes following intervention by the courts.

Another country that has specific domestic policy on IDPs is Bangladesh, with a National Strategy document.\textsuperscript{184} In Sri Lanka, India, Indonesia, the Philippines and Nepal, national human rights institutions have been used to supervise the distribution of aid and to address other IDP issues.\textsuperscript{185} Japan and Thailand provide specific guidelines for entitlements specific to disasters and consequent assistance.\textsuperscript{186} Most countries in the region, including China, focus more on disaster risk reduction as a mechanism to deal with the increasing numbers of internal displacement. This will be discussed in the following sections.


\textsuperscript{186} Ibid
4. The Basis for Regional EDP Rights in Asia

4.1 Existing International Law Instruments and Principles

In combating the protection paradox, the intangible aspects of climate change should be overlooked to an extent in order to fulfill the core purpose of human rights law – protection. In furtherance of the same, existing jurisprudence should be used to best suit the needs of vulnerable groups in the interim while a more comprehensive framework is created.

With this in mind, we will look at the various international law principles and instruments that can be applied to EDPs to facilitate migration and offer protection. Their shortcomings will be examined in the following section to reaffirm the need for greater political will to create specialized law.

4.1.1 Customary International Law and Human Rights Law Instruments

Customary international law is a body of law created by generally accepted practices in law. This means that even if a State is not party to a particular treaty or convention, it can be bound by a similar principle in customary law.

In the case of human rights, a number of customary principles are based on widely ratified treaties and conventions that have existed for decades such as those in the UDHR, the ICCPR and the ICESCR, etc. These documents provide for rights such as the right to life, dignity, liberty, security, freedom of movement, asylum, family, social security, and education among others. Six specific rights violations have been identified in the case of climate change related effects on humans: the right to life, right to self-determination, and the rights to food, water, health, and shelter. Forced displacement may violate some or all these rights based on the level of vulnerability of the affected persons and the actions or inaction of the State in such circumstances.

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189 Roger Zetter & James Morrissey, Environmental stress, displacement and the challenge of rights protection in Susan F. Martin, Sanjula Weerasinghe, Abbie Taylor (eds), Humanitarian Crises and Migration: Causes, Consequences and Responses (Routledge 2014) 68
When environmental persecution occurs, other rights such as the right to health and full enjoyment and utilization of natural resources under the ICCPR and ICESCR may also be violated. However, it is worth here were a number of reservations by ICCPR parties in regard to this clause.

4.1.1.1 Human Rights Instruments Protecting Specialized Groups

Other human rights instruments are relevant in that they protect specialized groups, who are, incidentally, also considered vulnerable toward becoming EDPs. These treaties include, but are not limited to the Convention on Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the Refugee Convention, which has been discussed in previous sections.

These conventions are important in the case of EDPs, as not only are these groups considered especially vulnerable, they are also likely to face greater difficulties after displacement as a result of their status.

Of relevance is the fact that even though EDPs don’t fall specifically within the UNHCR frameworks, the organization has iterated that it has an interest in such displacement and is able to provide assistance to this group of vulnerable individuals.

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190 ICCPR (n 153) Art 6(1)
193 UN General Assembly, Convention on the Rights of the Child (adopted on 20 November 1989) 1577 UNTS 3
195 Kerstin Rosenow-Williams & François Gemenne, Organization Perspectives on Environmental Migration (Routledge 2015) 98
4.1.1.2 The Conventions on Statelessness

Most human rights instruments including the ICCPR, ICESCR, CEDAW, CRC, and the CRPD, as well as the UDHR provide the right to nationality in one form or another.\(^{196}\)

The Convention on the Status of Stateless Persons\(^{197}\) is meant to ensure the enjoyment of minimum rights of persons who do not enjoy the nationality of any State. Such a circumstance can arise under a number of conditions such as State succession, conflict or discriminatory national laws, as well as in the case of displacement.\(^{198}\) With displacement, statelessness often occurs due to the loss or absence of valid documentation.

In context with the scope of this paper, statelessness can also arise when States stop existing as a result of inundation or other climate change-related catastrophes. This Convention guarantees these individuals a number of basic human rights such as those to education, shelter and employment, as well as the right to travel documents and an identity, and administrative assistance.\(^{199}\)

In pursuance of the same, The Convention on the Reduction of Statelessness\(^{200}\) provides safeguards against not being assigned nationality at birth, or the loss of nationality at any stage thereafter.\(^{201}\)

4.1.1.3 The Principle of Non Refoulement in Refugee Law

This principle holds significance in human rights, refugee and humanitarian law, and is recognized as customary international law. Ergo, States must respect the obligation even when


\(^{197}\) UN General Assembly, Convention Relating to the Status of Stateless Persons (adopted on 28 September 1954) 360 UNTS 117


\(^{199}\) What is Statelessness? (n 196)

\(^{200}\) UN General Assembly, Convention on the Reduction of Statelessness (adopted on 30 August 1961) 989 UNTS 175

they are not signatories to conventions that lay down the requirement,202 and there are no exceptions to its application.203 It finds mention in the Convention Against Torture,204 and the Convention against Forced Disappearances.205 It is also part of regional agreements such as the Inter-American Convention on the Prevention of Torture,206 the Charter of Fundamental Rights of the European Union,207 and the American Convention on Human Rights.208 The principle has also been crystallized in non-binding legal texts such as the Cartagena Declaration on Refugees.209

It is enshrined in Article 33 of the Convention Relating to the Status of Refugees,210 which states that no refugee can be forced to return to “frontiers or territories” where his “life or freedom” would be under threat as a result of his “race, nationality, religion, membership of a social group or political opinion.” Refoulment can be in the form of any means used for forced removal, including refusing admission at the border.211

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204 UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984) 1465 UNTS 85, Article 3


206 Organization of American States (OAS), Inter-American Convention to Prevent and Punish Torture (adopted on 9 December 1985) OAS Treaty Series, No. 67

207 European Union, Charter of Fundamental Rights of the European Union (adopted on 26 October 2012) OJC 326, 26


210 UNGA Convention on Status of Stateless Persons (n 197)

211 UNHCR Advisory Opinion (n 203)
The principle, as under this Convention, does not mean that the person must be granted asylum, but that they must be provided access to the territory and a fair and efficient asylum procedure.\textsuperscript{212}

Courts have interpreted the threats mentioned in the non-refoulment provisions to include cruel, degrading or inhuman treatment or violations of the right to life, as well as degrading living conditions,\textsuperscript{213} which are all also applicable to persons who are displaced by environmental factors.

As far as customary international law goes, non-refoulment is part of principles such as prohibition of torture or arbitrary deprivation of life, which are considered \textit{jus} \textit{cogens}, and the UNHCR has observed that it fulfills the criteria required to become customary, and that States have accepted the principle as binding, as evidenced by reference to it in domestic judgments and legislations.\textsuperscript{214}

\textbf{4.1.2 Environment Law Instruments and Principles}

Through the environment law perspective, a number of instruments and principles play a role in ascertaining the obligations of a State. Primary among them is the UNFCCC, supported by international law principles such as the no-harm principle, the precautionary principle, the polluter pays principle, the common but differentiated responsibilities principle, and the national responsibility principle. Also of relevance are the solidarity principle and the respective capabilities principle.\textsuperscript{215} These will be discussed in light of regional machinery in the following chapters.

\textit{4.1.2.1 The UNFCCC}

The corpus of law regarding environmental change lies in the United Nations Framework Convention on Climate Change its Conference of Parties.\textsuperscript{216} While there are other international organizations that might be suitable for the governance of EDP rights, the UNFCCC is among

\begin{flushleft}
\textsuperscript{212} \textit{Ibid}
\textsuperscript{213} OHCHR Principle of Non-Refoulment (n 208)
\textsuperscript{214} UNHCR Advisory Opinion (n 203)
\textsuperscript{215} Maxine Burkett, 'Reading Between The Red Lines: Loss And Damage And The Paris Outcome' (2016) 6 Climate Law 120
\textsuperscript{216} UN General Assembly, United Nations Framework Convention on Climate Change (adopted on 9 May 1992) 1771 UNTS 107
\end{flushleft}
the only forums where measures in relation to the funding and planning of solutions for EDPs is already discussed and emphasized.217

With the exception of Taiwan and Hong Kong, all other Asian countries are party to the UNFCCC, making the potential implementation of EDP specific laws or guidelines more viable.

4.1.3 The Role of Trade and Labour Law Instruments

Pascal Lamy, the Director General of the WTO until 2013 once claimed that the principles of the WTO were based on values which were the same as those encapsulated in human rights instruments such as those of non-discrimination, individual freedom, and welfare through cooperation.218 A closer look at these principles, however, indicate that the freedoms under the WTO are narrow and limited to a specific class of people, specifically, those of foreign traders conducting businesses in other countries.

At the same time, a number of developed countries have been including clauses relating to human rights in their Preferential Trade Agreements to include rights such as those of privacy, access to information, due process, and affordable healthcare.219 The possibility, therefore, of using these PTAs to nudge EDP-friendly legislation in Asia is slim.

The International Labour Organization (ILO) is better suited to implement human rights as this is part of its fundamental objectives. The ILO Declaration on Fundamental Principles and Rights at Work220 provides for rights such as those of collective bargaining, the elimination of forced or compulsory labour, and the right against discrimination in employment.

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218 Sarah Joseph, Blame it on the WTO?: A Human Rights Critique (Oxford University Press 2011) 33


Labour related migration flow over time can ease the stresses that would be created by waves of mass migration. This also allows countries to have access to labour on their own terms while contributing to the economy with little burden on social infrastructures.

In Asia, many displaced persons living in camps do not have access to employment opportunities and are therefore unable to contribute toward their own welfare. In addition, almost all Asian countries have some form of detainment mechanism for migrants believed to be international or illegal, and these individuals are either refused equal opportunities for labour or are forced to provide labour for less than what is paid to nationals.221

As discussed in previous sections, in East Asia, while labour migration is prevalent, migration chains are avoided by denying visas to family members and only providing short term work permits to outsiders, except in special circumstances.

While the principles in the ILO Declaration are binding on countries even if they haven’t ratified related treaties and conventions, making it expressly evident through EDP-centric legislation that these principles also apply to these individuals would aid in more transparency and uniformity in dispersion of the populations evenly across countries without dilution of rights.

4.2 Shortcomings of International Law Instruments as Regards EDPs

4.2.1 The ICCPR and ICESCR

That said, protections under both the ICCPR and the ICESCR fall short in relation to EDPs. According to each, in order to claim a violation of rights, causation must be shown. Climate change being a multi-causal phenomenon makes it difficult to attribute a rights violation to one specific activity or incident. Furthermore, such claims can only be made once the violation has occurred. In the case of EDPs, this would mean that claims under the Covenants can only be made once the individual’s entire home has been destroyed,222 by which time seeking redressal provides little relief as the damage is irreparable, especially in the case of slow onset events.

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221 Mathew & Harley (n 102); see also Laskar (n 124)
222 Moberg (n 53)
There is evidence of stronger claims being rejected by the UN Human Rights Committee based on technicalities.\textsuperscript{223} The ECtHR, too, has been interpreting the meaning of the right to life narrowly, restricting the rights of a person affected by environmental catastrophes.\textsuperscript{224}

In addition, the economic, social and cultural rights enshrined in the ICESCR are perceived as non-justiciable and the difficulty in enforcing them creates further problems. The scope for implementation of these rights in domestic jurisdictions will be discussed in the following sections.

\textit{4.2.2 The Refugee Convention}

As discussed in previous sections, the Refugee Convention also places responsibility on States to protect non-citizens only after they are within the territory of the country. This forces individuals to face grueling conditions in order to enter countries illegally, while States increase protection at their borders to prevent a situation where they must provide protection.\textsuperscript{225} The instrument has remained unchanged since its inception, except for the inclusion of an Optional Protocol, meaning it has not evolved to encompass changing meanings of the term ‘refugee’ and the causes of such status.

When applied to natural disasters, terms such as ‘voluntary migration’ and ‘displacement’ also pose a problem in identifying the unique causes of this type of movement compared to others, and the consequently unique needs of such communities.

Within the Refugee Convention framework, the UNHCR normally only recommends approximately less that 1 percent of the world’s entire refugee population for permanent settlement annually.\textsuperscript{226} The ideal goal has always been repatriation for all refugees.\textsuperscript{227} This poses an especial problem for EDPs whose homes are no longer inhabitable: returning to their home countries which are often developing and unable to provide resettlement assistance in poses the risk of further vulnerability and rights violations.

\begin{footnotesize}
\begin{enumerate}
\item Sumudu Atapattu, ‘The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law’ (2002) 16 Tul Envtl LJ 65
\item Alison Lindsay Shinsato, ‘Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria’ (2005) 4 Nw Univ J Int'l Hum Rts 186
\item Moberg (n 53)
\item Havard (n 60)
\item \textit{Ibid}
\end{enumerate}
\end{footnotesize}
4.2.3 The Framework Convention on Climate Change

While the UNFCCC specifically deals with climate change and has been attempting to incorporate action to assist EDPs, this convention would be difficult to fully apply to EDPs. The main obstacles facing it are the obligations it creates between States and its inability to provide for the creation of obligations of States as against individuals. As a result, bringing claims under its auspices would prove complicated.

4.2.4 Trade and Labour Law

As was the case with the UNFCCC, rights and obligations under the WTO are vested only in the States, although indirectly, individuals can make claims; States bring forward claims on behalf of their traders when minimum standards are violated, but even this is done for the benefit of larger corporations as opposed to small ones that are insignificant within the WTO framework due to the disproportional return on investment in bringing proceedings.

In addition, while developed countries place human rights clauses in order to influence legislation in other countries, developing countries are wary of this mechanism as they prove expensive to implement. They are also hesitant to apply trade instruments to influence Sovereign functions.

4.3 Application of Principles Involving ‘Non-Justiciable Rights’ in Domestic Law in Asia

Article 25 of the UDHR provides for the right to a “standard of living adequate for the health and well-being” of oneself and their family. This includes access to food, housing, clothing social services and medical care as necessary. This right is also available in Article 11 of the ICESCR. The other rights in the Covenant may be understood as arising from this central right. It is often argued that since these are social, cultural and economic rights, they are not justiciable as they are perceived as obligations of the State which are aspirational goals, as

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228 Hodgkinson et al (n 76)
229 Joseph (n 218)
230 Aaronson & Chauffour (n 219)
opposed to rights against the State.\textsuperscript{232} We will consider their implementation by focusing on the core right of an adequate standard of living.

If one were to equate this right to the right to life provided in the ICCPR, which is considered justiciable by virtue of being a civil and political right, State action that entails the implementation of this right is comparable to that which would be involved in implementing the right to an adequate standard of living. Both would involve the creation of new systems and programs to improve the quality of life of an individual.\textsuperscript{233}

While this is subjective to domestic legislation, it is possible to enforce economic, social and cultural rights as an extension of political and civil rights. The interaction between these rights is examined in the following sections with respect to a few Asian countries where the lines between the rights are blurred. Illustrations of the creation of distinct rights, and the absence of rights will also be provided.

In the countries where the rights have been expansive, some of these provisions are restricted by territorial jurisdiction, though they may be considered as a basis for the creation of wider principles relating to EDPs after they have migrated into another country.

\textit{4.3.1 India}

In India, the Constitution provides for the Fundamental Right to life, which is available to every person – citizen and alien.\textsuperscript{234} While the language of the Article only mentions the right to life and liberty in that it cannot be deprived except by procedure established by law, the Supreme Court of the country has expanded the meaning of the provision through a number of judgements over many decades. In \textit{Sunil Batra v Delhi Administration},\textsuperscript{235} the Court held that the right to life was inclusive of the right to one’s health in order to enjoy their life, as well as protection of their culture, traditions, and other aspects that made life worth living. The Court went so far as to extend the right to peaceful sleep within the meaning of ‘right to life’. Similarly, in \textit{Maneka Gandhi v Union of India},\textsuperscript{236} the Court held that the right to life includes

\textsuperscript{233} Bailey (n 231)
\textsuperscript{234} India: Constitution of India, 26 January 1950, Article 21
\textsuperscript{235} India: Supreme Court, \textit{Sunil Batra v Delhi Administration}, AIR 1978 SC 1675
\textsuperscript{236} India: Supreme Court, \textit{Maneka Gandhi v Union of India}, 1978 AIR 597
the right to live with human dignity, and in *Francis Coralie v Union Territory of Delhi*, it held that this right to human dignity included the right to adequate shelter, basic necessities and carry on activities of human expression freely. Over the years, a number of rights such as that of shelter, social security and protection, and the right to a clean environment have also been brought with the ambit of this right and protected by the courts.

The fact that these rights are available to persons in general, and not just to citizens, would allow for them to be extended to EDPs as well.

**4.3.2 Bangladesh**

The Constitution of Bangladesh, in Article 31, provides that every citizen has a right to protection against acts that negatively affect their life, liberty, body, etc., unless this is done in accordance with law. The Constitution also has a provision comparable to Article 21 in the Indian Constitution, stating that a person’s life or liberty cannot be deprived except in accordance with procedures established by law.

In *Farooque v Government of Bangladesh*, the Supreme Court stated that the right to life described not just an elementary life, but a qualitative one. It went on to include a healthy atmosphere within this right and stated that one must be able to exercise this right free of environmental hazards.

In the case of Bangladesh, though, such a right is exclusive to citizens due to the language of the provision. While this may not be applied to EDPs, it may be used to reaffirm Bangladesh’s obligation to ensure that its citizens are provided with sufficient aid and mechanisms to achieve and maintain a habitable environment; however, it could also be to ensure the quality of life.

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237 India: Supreme Court, *Francis Coralie v Union Territory of Delhi*, 1981 AIR 746
239 India: Supreme Court, *Calcutta Electricity Supply Corporation (India) Ltd v Subhash Chandra Bose*, AIR (1992) 573
240 India: Supreme Court, *Vellore Citizens Welfare Forum v Union of India*, AIR 1996 SC 2721
241 Bangladesh: Constitution of the People’s Republic of Bangladesh, 4 November 1972
242 Bangladesh: Supreme Court, *Farooque v Government of Bangladesh*, 17 BLD (AD) 1997
243 Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004) 107
of individuals affected by environmental hazards in order to minimize the need for transboundary migration.

4.3.3 Pakistan

In Pakistan, Article 9 of the Constitution provides the same right to life in language similar to that in the two aforementioned provisions. The Supreme Court, in considering whether development project-related effects fell under this Article, found that Article 9, when read with Article 14 regarding the inviolable right to dignity and privacy of home, was to be interpreted as including the rights to shelter, food, education, healthcare, unpolluted environment, etc. This widening of the right to life has also been extended to mean an adequate standard of living.

Like India, the Pakistani Constitutional provision applies to persons in general, and is not restricted to citizens.

4.3.4 Thailand

Section 4 of the now defunct Constitution of Thailand, 2007 stipulated human dignity as the basis of human rights in the country. While the title of the chapter on rights referred only to Thai people, a number of the rights in many parts of the Constitution refer to ‘human dignity’, extending the rights beyond citizens.

244 Pakistan: Constitution of the Islamic Republic of Pakistan, 10 April 1973
245 Pakistan: Supreme Court, Shehla Zia v Water and Power Development Authority (WAPDA), PLD 1994 SC 693
These rights mean little at present since the military coup of 2014.\textsuperscript{249} The present constitution restricts rights guaranteed under the ICCPR, let alone the ICESCR.\textsuperscript{250} With major violations of the right to life widespread under the current regime, its extension to protect additional rights seems unlikely.

4.3.5 Other Countries

As per the 1945 Constitution of Indonesia,\textsuperscript{251} civil, political, economic, social and cultural rights are listed individually in Chapter XA titled ‘Human Rights’, in provisions 28 through 28J, and the right to a healthy environment is listed among these.\textsuperscript{252} Economic and social rights such as assisting those that are ‘inadequate’ are listed in a separate chapter XIV in Article 34. The distinct provisions may be seen in two ways – first, the separation of the rights as political and civil on the one hand and economic, cultural and social on the other. Second, as placing all rights on an equal footing that allows them to be implemented through similar procedures.

In Myanmar, a healthy environment is more an obligation of both the State\textsuperscript{253} and the citizens\textsuperscript{254}, and is not treated as extension of a civil right such as the right to life and personal freedom as provided for in Article 353. Similar, more general obligations on conservation exist in the Chinese Constitution, but there is no mention of an adequate standard of living.\textsuperscript{255}

The general observation is that the development of jurisprudence that blurs the lines between civil and political rights, and economic, social, and cultural rights is more prominent in South Asia as opposed to other Asian countries.


\textsuperscript{251} Indonesia: Constitution of the Republic of Indonesia, 1945

\textsuperscript{252} Indonesia: Constitution of the Republic of Indonesia, 1945, Article 28F

\textsuperscript{253} Myanmar: Constitution of the Republic of the Union of Myanmar, (2008), Article 45, 9

\textsuperscript{254} Ibid, Article 390(b)

\textsuperscript{255} China: Constitution of the People’s Republic of China, 4 December 1982, Articles 269
4.4 Regional Cooperation – Asia

4.4.1 ASEAN

The Association of South East Asian Nations (ASEAN) was created in 1967 for the purpose of working toward regional economic cooperation and long term stability, and consists of three communities: the Political Security Community, the Economic Community, and the Socio-cultural Community. The member States are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. From 2008, ASEAN has been governed by the ASEAN Charter.

4.4.2 The ASEAN Human Rights Declaration

At the time it was adopted in 2012, the ASEAN Human Rights Declaration was heavily criticized for falling below international standards of human rights protection.

Even though it provides for the right to receive asylum under Article 16, the Member States have been reluctant to put related rights on the formal agenda due to concern that it would violate the principle of non-interference as provided for in the Charter.

4.4.3 Comprehensive Plan of Action for Indochinese refugees

The Comprehensive Plan of Action was created at a conference attended by 75 countries from around the world. The plan was the result of the failure of the mechanism created by the

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258 Association of South East Asian Nations, Charter of the South East Asian Nations (adopted on 20 November 2017) 2644 UNTS 223


1979 Geneva Conference⁶³ on Indochinese refugees to provide for temporary refuge in South East Asian countries and resettlement in the West.⁶⁴ Resettlement rarely happened, and the policy faced pushback after rampant overcrowding and pressure on the receiving developing countries, leading to refusal to accept any more refugee boats by Thailand.⁶⁵

This new conference, meant to create a region-wide, uniform, and consistent status determination and protection mechanism, allowed for a few changes: screening of refugees based on region, detention while status adjudication was pending, and consideration of the idea of forced return to Vietnam, in contrast with the compulsory non-refoulement requirement in the preceding conference.⁶⁶

Despite cooperation and enabling language, the plan fell short on a number of core human rights principles, as noted above. Forced repatriation and the labelling of these refugees as illegal economic migrants unless they fulfilled many rigorous criteria, all amounted to less than humanitarian treatment of the refugees.⁶⁷

What can be observed is that South East Asian countries, considered developing nations, see themselves purely as first asylum countries and have a history of turning away refugees, detaining them, and screening/refusing refugee status. Many of these practices continue even today, despite periodically liberal acceptance of asylum seekers at first instance. However, much of the discontent of receiving States also lies in internal security concerns and the failure or refusal of the global community to share the burden.⁶⁸ Despite this, the Comprehensive Action Plan is considered a remarkable instrument that set the standard for future individual status determination and cooperation between States and international organizations.⁶⁹

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⁶³ UN General Assembly, Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General (7 November 1979) A/34/627
⁶⁵ Arthur C Helton, 'Asylum and refugee Protection in Thailand' (1989) 1 Int'l J Refugee L 20
⁶⁸ Towle (n 264) 540
⁶⁹ Ibid 569
Once its objectives had been met, the plan was discontinued in 1996.\textsuperscript{270}

\textbf{4.4.4 The SAARC}

The South Asian Association for Regional Cooperation was set up through a Charter in 1985 to promote “peace, stability, amity, and progress in the region”,\textsuperscript{271} and aims to facilitate a life of dignity for the people of the region.\textsuperscript{272} It comprises of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.\textsuperscript{273}

However, the SAARC has been relatively inactive in recent years after its last summit in Pakistan was boycotted by other members, and is very close to becoming redundant if it does not hold a summit soon.\textsuperscript{274}

\textbf{4.4.5 The South Asian Declaration}

Regionally, there exists a non-binding South Asian Declaration on Refugees. The UNHCR set up an Eminent Persons Group in 1994, which involved Bangladesh, India, Nepal, Pakistan, and Sri Lanka, none of which are parties to the Refugee Convention.\textsuperscript{275} The Declaration was adopted in 2004.\textsuperscript{276}

Through this document, the EPG aimed to create a model law on refugees, which could later be incorporated into domestic legislation. The model law acknowledges the multidimensional flow of migration in the region and the issues the lack of a regional framework poses, and

\begin{footnotesize}
\begin{enumerate}
\item South Asian Association for Region Cooperation, Charter (\textit{SAARC}), paragraph 1 <http://www.saarc-sec.org/SAARC-Charter/5/> accessed 27 August 2019
\item \textit{Ibid} Article I(a)
\item ‘About SAARC’, (\textit{SAARC}) <http://saarc-sec.org/about-saarc> accessed 27 August 2019
\item UNGA Convention on Status of Refugees (n 51)
\item Eminent Persons Group (EPG), Regional Consultation on Refugee and Migratory Movements in Asia, January 2004 <https://shodhganga.inflibnet.ac.in/bitstream/10603/28291/17/17_appendices.pdf> accessed 26 August 2019
\end{enumerate}
\end{footnotesize}
recommends a structure that includes definitions, customary law principles of asylum and guidelines for the procedure for determination of refugee status, among other elements.

There is little to no literature to suggest that the Declaration has had an impact on domestic laws in the region.

4.4.6 The Almaty Process

Initiated by the UNHCR for Central Asia at a conference in 2011, this process unites the four Central Asian countries of Kazakhstan, the Kyrgyz Republic, Tajikistan and Turkmenistan and their neighbouring countries; Uzbekistan, also a Central Asian country, does not participate in the process.

The three main issues it aims to address are emergency preparedness, statelessness, and security, along with a number of related issues addressed through Regional Consultative Processes. Despite this, the countries in this region are somewhat in limbo, and with prioritization of security concerns, they have poor records as far as treatment of migrants and refugees go, including refoulment to seriously high risk countries; the process faces serious funding problems, and Russia has since withdrawn from it.

4.4.7 The Gulf Cooperation Council (GCC)

The GCC consists of six Gulf countries, all ruled by monarchies. The members are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. Iraq is the only country in this region that is not a member.

The purpose of the Council is to facilitate integration and interconnectivity, and to create more uniform regulations in various fields to encourage unity in the region.

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277 South Asian Declaration, Ibid Art 4
278 Ibid Article 6
279 Ibid Article 12
280 Orchard C (n 144)
281 Ibid
282 Ibid
4.4.8 The Bali Process

The title of this instrument is the Conference on People Smuggling, Trafficking in Persons, and Related Transnational Crime.284 The countries involved include Australia, Thailand, Malaysia, and other countries in Asia and the Pacific.285

While it originated as a process meant to address issues relating due to migration caused by developmental disparities between the global North and South, when it was revived in 2009, the focus shifted to regional disparities. Accordingly, the purpose of this instrument became to address aspects of migration such as control and policing, and it became less humanitarian and more securitization oriented.286

There also exist several Regional Cooperation Processes in South East Asia led by the IOM which led to the Bangkok Declaration, Manila Process and other such instruments related to migration.287

As the Bali Process developed, Australia attempted in successive meetings to establish the narrative or burden sharing by other countries in the region that deterred further migration into the continent.288 A bilateral agreement was reached with Malaysia for the exchange of recognized refugees with those that were irregular, but when it came to the implementation of this Agreement, it was struck down by the High Court of Australia due to a domestic law that required that any transfer of refugees could only occur if equivalent protections were available in the destination country.289

287 Kneebone (n 286) 599
288 Ibid
4.4.9 The Nansen Initiative

Initiated by the governments of Norway and Switzerland, the Nansen Initiative conducts regional consultations to create an international agenda for protection of persons displaced across boundaries as a result of disasters.\textsuperscript{290}

The South East Asia regional consultation took place in 2014, and the South Asia rounds in 2015. The conclusions of the discussions included recommendations of cooperation at the stage of rehabilitation of persons displaced by disasters, especially vulnerable sections, and the development of national policies on the subject, as well as standard operating policies.\textsuperscript{291} Also among the recommendations was the necessity to recognize the specific needs of those who are displaced across borders and to allow them admission on humanitarian grounds.\textsuperscript{292} The need to integrate disaster migration into international processes such as the UNFCCC and World Humanitarian Summit was also highlighted.\textsuperscript{293}

In the South East Asian context, the recommendations also suggested including policy on international displacement within the ASEAN disaster management mechanism, AADMER, and the protection of migrants abroad as a result of disasters.\textsuperscript{294}

The initiative is among recent developments that could have a sizeable impact on the conversation surrounding international disaster related displacement, fitted to regional contexts.

\begin{itemize}
\item \textsuperscript{290} Francois Gemenne and Pauline Brucker, 'From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration Can Learn from the Governance of Internal Displacement' (2015) 27 Int'l J Refugee L 245 246
\item \textsuperscript{292} Ibid
\item \textsuperscript{293} Ibid
\item \textsuperscript{294} ‘Human Mobility in the Context of Disasters and Climate Change in South East Asia, Outcome Report’ (The Nansen Initiative 2014) <https://www.nanseninitiative.org/south-asia-consultations-intergovernmental/> accessed 28 August 2019
\end{itemize}
4.5 Will a Treaty be Viable in Asia?

Despite offers by the UNHCR to assist States and other actors toward its creation outside the Refugee Convention, as far as an international treaty goes, there is little to no political support in the international community. Despite the existence of an international institution like the UN, such a mechanism has proven elusive.

Through forums including the Bali Process, SAARC, ASEAN, and other institutions and mechanisms, some of the countries in Asia have previously expressed interest in cooperating on the subject of refugees, though they have continued to act unilaterally.

The creation of a human rights treaty is a fairly complicated process in itself, due to divergent interests relating to internal economies, security concerns, etc, and would result in time-consuming negotiations. Even if provisions were finalized, ratification poses a considerable problem, with it becoming increasingly difficult for human rights treaties to get ratifications internationally. In Asia, where most countries are not even parties to the Refugee Convention, expecting fetterless participation in a treaty on migration appears to be fallacious, as the countries in the region evidently have reservations on the effects that such ratification will have on their sovereign powers.

Considering the possibilities and likelihood of such an instrument being blocked due to political rivalries in Asia, a fresh, binding instrument does not appear viable. An effective non-binding soft law instrument is said to find its success by virtue of it being “in the twilight between law and politics”.

Like the Guiding Principles on IDPs, most rights and principles associated with EDP protection already exist to some extent in international law instruments that these countries are parties to. Extending these using an existing functioning mechanism, or a combination thereof, to forward the objective of protection for regionally displaced persons appears to be a more expeditious long-term solution.

295 Kerstin Rosenow-Williams & François Gemenne, Organization Perspectives on Environmental Migration, (Routledge 2015) 98
296 Mathew & Harley (n 102)
297 Kälin (n 165)
298 Ibid
299 Daniel Thürer, ‘Soft law’ in Max Planck Encyclopaedia of Public International Law (MPEPIL 2002)
5. Creating a Comprehensive Framework

As concluded at the end of the last chapter, creating a framework in Asia should focus along the lines of existing frameworks and tried and tested mechanisms, to build under a larger umbrella of realistic and functional regional cooperation.

At the UN Sustainable Development Summit in 2015, the 2030 Agenda for Sustainable Development was adopted. The UN’s 17 Sustainable Development Goals are adopted by all UN Members, and aim to encourage the protection and conservation of the environment as an important coefficient to development.300

Along with these goals, the next 15-year plan was also adopted – the Sendai Framework for Disaster Risk Reduction, which is an integral part of sustainable development.

5.1 The Umbrella of Disaster Risk Reduction

A hazard becomes a disaster as a result of a combination of factors. The level of severity of a disaster relies on the exposure, vulnerability, preparedness and management of resources and development.301 Disaster Risk Reduction is a systematic mechanism, set up to reduce the risk and impact of natural and man-made events so as to mitigate the severity of the disaster and its effect on persons.302 DRR mechanisms also play a role in displacement, as they reduce vulnerability and increases resilience.

5.1.1 The Sendai Framework

The Sendai Framework replaced the Hyogo Framework for Action, which expired in 2015. The purpose of the new plan is evident from its title – ‘The Sendai Framework for Disaster Risk Reduction.’ DRR is a long-term process that involves reduction of vulnerability by bringing in sustainability and durability by considering environmental factors right from the planning stage.

301 ‘What is Disaster Risk Reduction?’ (UNDRR) <https://www.unisdr.org/who-we-are/what-is-drr> accessed 28 August 2019
302 Ibid
The Sendai Framework has seven global targets, a few among which include the reduction of disaster related mortality rates and of the number of persons affected as a whole, to curb economic loss caused by disasters and the damage caused to basic infrastructures, and to set up early warning systems and encourage cooperation.\textsuperscript{303}

“Building back better” is among the priorities of the Framework.\textsuperscript{304} Within this priority, the Framework encourages swift and effective responses at the national and local levels to instances of displacement through the provision of shelter, food, and other supplies as needed.\textsuperscript{305} While the Sendai Framework does not explicitly mention EDPs, its principles may be wholly applied at an international level by regional organizations.

5.1.2 Implementation of DRR Frameworks

Internationally, DRR is handled through the UN Office for Disaster Risk Reduction, which formulates the UN’s sustainable development goals as well as its periodic disaster risk reduction frameworks.

The disaster risk reduction framework must be implemented regionally, and more importantly, locally, as per specific circumstances to ensure maximum effectiveness. In pursuance of the same, Asia has multiple institutions meant to put into effect the risk reduction mechanisms recommended by the UN. ASEAN’s Agreement on Disaster Management and Emergency Response\textsuperscript{306} is one such regional implementation tool, as is the Asian Ministerial Conference on Disaster Risk Reduction. The purpose of these institutions is to encourage technology and knowledge sharing in order to meet the ultimate goal of reducing the effects of disasters, including displacement.

Managing climate change adaptation through disaster risk reduction has also been recommended at the regional meetings of the Nansen Initiative.\textsuperscript{307}


\textsuperscript{304} Ibid

\textsuperscript{305} Ibid Priority 4, principle 33


\textsuperscript{307} The Nansen Initiative, Climate Change 2015 (n 291)
Many countries in Asia apply the guidelines provided by the Sendai Framework to their strategy for disaster risk reduction or mitigation after an event either through legislation, or through national policies.\textsuperscript{308}

5.1.3 EDP Protection Within the DRR Regime

As DRR is a mutually beneficial goal, countries in Asia cooperate considerably to reduce casualties. In 2016, at the Asian Ministerial Conference on Disaster Risk Reduction, an Asia Plan for the implementation of the Sendai Framework was adopted.\textsuperscript{309} The goals meant to be achieved by 2020 include increased cooperation between States toward knowledge exchange and technology sharing. Effective DRR must necessarily result in social and economic security among others, which will have a direct impact on the need to migrate.

5.1.3.1 The DRR Framework is an Amalgamation of a Number of Actors

In addition, risk reduction played an important part at the most recent ministerial conference due to the crisis that has been exacerbating an existing crisis – the additional vulnerability of already displaced Rohingya refugees as the camps where they seek shelter are inundated by floods.\textsuperscript{310} Building on this momentum, the creation of a long-term plan for EDPs seems like a an optimistic path for the foreseeable future.

5.1.3.1.1 International Actors

As already discussed, the SAARC has been dormant for a few years, with meetings being postponed or cancelled due to tensions, especially between India and Pakistan.\textsuperscript{311} Despite this, it is argued that the SAARC is most equipped for regional cooperation in South Asia, with 18

\begin{itemize}
\item\textsuperscript{308} Rajesh K. Mall and others, 'Disaster Risk Reduction Including Climate Change Adaptation Over South Asia: Challenges And Ways Forward' (2018) 10 International Journal of Disaster Risk Science
\end{itemize}
Summits and a permanent secretariat and a network of conventions, regional centers and mechanisms. It is to be seen if the 2020 meeting takes place, and if it does, a strong regional cooperation mechanism will be revived.

Even without the SAARC, the DRR forums in Asia are the ideal choice for EDP protection mechanisms as DRR is a combined effort, and the platforms have multiple stakeholders comprising of States, International bodies, NGOs and intergovernmental organizations. For example, the International Strategy for Disaster Reduction (ISDR) – Asia Partnership Forum, also known as the IAP forum, is an informal forum which includes not only the above mentioned actors, but also bilateral and multilateral donors. Regular assessment of progress, as well as provision of further assistance is done through this body.

5.1.3.1.2 Domestic Implementation

At the domestic level too, DRR is all pervasive. To illustrate this, a quick perusal of the National Disaster Management Policy and Plan in India will illustrate how it involves periodic training for all actors that will play a part in DRR before and after a disaster, including affected persons. Especially in the case of the government, through the National Disaster Management Authority (NDMA), every ministry is assigned specific roles related to DRR, and guidelines are issued for the inclusion of DRR in all policy decisions. In addition to increasing resilience, the policy creates a response and relief mechanism for the rehabilitation of persons who are displaced. One of the functions of the NDMA is also to provide assistance to other countries facing disasters.

With the distribution of responsibilities between numerous departments, funding too finds origins from varying sources, instead of the burden being concentrated with one body. This

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312 Siddiqi (n 274)
313 '2018 ISDR Asia Partnership (IAP) Forum’ (UNDRR) <https://www.unisdr.org/we/inform/events/61009> accessed 28 August 2019
further illustrates the suitability of the DRR framework for carrying EDP protection mechanisms, as its foundations lie in burden sharing.

5.1.3.2 Migration as Adaptation

Adaptation in the context of humans, refers to a response to an external factor in such a way as to facilitate coping or survival. This could be in the form of a process or systemic change\textsuperscript{317}, or individual action. The core of DRR is adaptation – adaptation so that damage from environmental events can be limited, and adaptation so that human activities do not contribute to such disasters.

Countries have now begun to recognize the importance of adaptation in changing times.\textsuperscript{318} The UNFCCC’s National Adaptation Programmes of Action (NAPAs) are meant to allow least developed countries to identify specific adaptation needs, in order to receiving funding and assistance.\textsuperscript{319} This adaptation approach to climate change allows for a bottom up approach for national policies to be funded and supported at the international level.\textsuperscript{320} This is perfectly suited to the DRR framework where adaptation mechanisms are tailored to specific conditions, and often fall behind purely for lack of resources.

The world is also simultaneously moving toward accepting that migration is a form of adaptation\textsuperscript{321} – a means to ensuring the safety of oneself and one’s family. We have already looked at the history of migration as a survival tool throughout the history of human existence. Today, migration decisions are made more at a household level than at a community level.\textsuperscript{322} It is now contended that those who are unable to migrate, or unable to do so, will bear greater

\begin{flushleft}
\textsuperscript{318} Koh Kheng Lian and Lovleen Bhullar, ‘Governance on Adaptation to Climate Change in the Asean Region’ (2011) 2011 Carbon & Climate L Rev 82 87
\textsuperscript{319} Mariya Gromilova, ‘Finding Opportunities to Combat the Climate Change Migration Crisis: The Potential of the Adaptation Approach’ (2016) 33 Pace Envtl L Rev 105 142
\textsuperscript{320} Ibid 143
\textsuperscript{321} Robert McLeman & Barry Smit, ‘Migration As An Adaptation To Climate Change’ (2006) 76 Climatic Change
\textsuperscript{322} Ibid
\end{flushleft}
risks. It therefore becomes essential to include this form of adaptation within a framework meant for adaptation optimization.

5.1.3.3 Innovation

The International Centre for Climate Change in Bangladesh recently recommended in a report that climate funds be set up at local levels to finance resettlement. The Centre is also working to convert villages inland into climate resilient and migrant friendly towns that can accommodate larger populations, and encouraging students to move by offering scholarships.

Similar ideas to disperse populations from high risk regions to other towns within the same country by creating opportunities and incentives is one way to mitigate the impact that climate change will have in terms of damage as well as mass migration.

5.1.3.4 Cost Benefit Analysis of EDP Related Policies

Socio-political feedbacks play a role in decision making that has to do with the environment and climate.

The DICE Model, or the Dynamic Integrated Climate Economy Model, was one that came to be used by the US during the Obama Administration to perform a cost-benefit analysis of any new policies in terms of carbon emissions. As per the application of this analysis, minor commitments or small deviation to reduce emissions in policy making will have a negligible impact; with the modest commitments set forth in the Paris Agreement, even if they were

325 Ibid
326 Peter Howard and Michael A Livermore, 'Sociopolitical Feedbacks and Climate Change' (2019) 43 Fletcher F World Aff 119 127
327 Ibid 124
328 UNFCCC, Paris Agreement to the United Nations Framework Convention on Climate Change (adopted on December 12 2015) T.I.A.S. No. 16-1104
imposed stringently, there would be a temperature reduction of only 0.17 degrees by the year 2100.\textsuperscript{329}

Other integrated assessment models (IAMs) include PAGE (Policy Analysis of the Greenhouse Effect) and FUND (Climate Framework for Uncertainty, Negotiation and Distribution). Most such models show the effects of policies in positive light, magnifying the perceived positive effect they might have.\textsuperscript{330}

But in theory, they can be used to assess climate change related responses, and to attempt to predict the consequences of policy decisions in ways that are more realistic as well.\textsuperscript{331} It allows the weighing of climate change related policy decisions against other concerns which will have a social effect.\textsuperscript{332}

5.2 The Creation of Guidelines

In creating a framework for EDP protection a number of principles as already discussed must be incorporated. These include human rights such as the right to an adequate standard of living, which would include shelter, food, employment, and education among others. The Guiding Principles for the protection of IDPs draws from branches of both human rights and humanitarian law, and the guidelines for EDP protection must do the same. Burden sharing is an integral part of maintaining peace and stability and must be reflected in any instrument that is adopted.

As established, the core of DRR is adaptation. Adaptation also includes widening existing systems to allow new circumstances to be encompassed as required.\textsuperscript{333} Apropos, the DRR


\textsuperscript{330} Ibid


\textsuperscript{332} Ibid

\textsuperscript{333} Benoit Mayer, 'Environmental Migration: Prospects for a Regional Governance in the Asia-Pacific Region' (2013) 16 Asia Pac J Envtl L 77
Framework is flexible enough to absorb new institutions and legal principles for greater protection.

5.2.1 Extending the Responsibility to Protect

Also to be considered is the Responsibility to Protect (R2P), as set forth in the International Commission on Intervention and State Sovereignty (ICISS).\textsuperscript{334} Since this document was created before the advent of the “war on terror”, it has a more humanitarian approach to intervention than what is seen today.\textsuperscript{335} The basic conclusion of the document is that intervention in the form of extraterritorial jurisdiction by the international community is permissible when a population is “suffering serious harm”, and their State is unwilling or unable to assist in the prevention of such harm.\textsuperscript{336} Among the reasons for such suffering, one of those listed is state failure. At the time it was written, climate change was not a widely known phenomenon, but considering the objectives and foundations of the document,\textsuperscript{337} it may be argued that it would apply to suffering caused by environmental harm in circumstances where such harm were either propagated by the State or the State was unable to assist those affected by it. This is where such responsibility would arise in relation to EDPs, to create an international obligation to support domestic efforts of protection and assistance, as well as to extend protection to international migrants.

The DRR system must be equipped to influence States to assist their citizens in the event of a natural disaster, and provide such assistance by itself, if required.

5.2.1.1 The Amazon – An Eco-R2P First?

The most illustrative example at this time might be the situation unfolding in the Amazon at present. At the time of writing this, 76,000 fires were burning throughout the South of the


\textsuperscript{335} Linda A Malone, 'Responsibility to Protect Environmental Emergencies' (2009) 103 Am Soc'y Int'l L Proc 19 21

\textsuperscript{336} ICISS The Responsibility to Protect (n 334) Page XI

\textsuperscript{337} Ibid
Amazon. It is argued that a majority of the fires are intentional, or caused by deforestation to make room for the logging, agricultural and animal husbandry industries, with the current administration under the Brazilian President, Jair Bolsonaro encouraging such businesses and implementing fewer regulations. The fires continued to burn for weeks before international pressure by threats to end trade relations forced the administration to deploy the armed forces to put out the fires. The government also refused an offer of aid by the G7 to the tune of $22 million to fight the fires.

The Amazon is home to approximately 3 million plant and animal species, and is considered a huge factor in the global fight against climate change, acting as a carbon sink for a decade’s worth of human emissions. Not only will a number of animals die as a result of the fires, the habitats will be affected for years to come, having a negative impact on the biodiversity and balance in the region. This will also affect the indigenous communities that live in and off the forest.

This makes the situation in the Amazon a global issue and raises the issue of a confrontation between the sovereign rights of Brazil over its natural resources on the one hand as against overwhelming environmental and human interest implications globally – determining whether this amounts to “serious harm” under the requirements for intervention will rely on its interpretation by world leaders as the situation progresses, and the ability of Brazil to take control of the fires before matters get out of hand, if they haven’t already. Many times, legal instruments and definitions do not encompass more recent concerns and issues, and often the

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338 ‘See how much of the Amazon is burning, how it compares to other years’, (National Geographic) <https://www.nationalgeographic.com/environment/2019/08/amazon-fires-cause-deforestation-graphic-map/> accessed 29 August 2019
339 Ibid
343 Brazil to reject G7 offer (n 341)
344 Nagesh (n 342)
need arises to expand relatively closely associated laws and meanings within them to meet current needs.\textsuperscript{345}

Emmanuel Macron, the President of France, has iterated that while Brazil’s sovereignty has been restricted, the world cannot sit by and watch as Bolsonaro destroy everything.\textsuperscript{346} Whether external interference will be used to protect the amazon is yet to be seen.

5.2.2 Overcoming the Protection Paradox

As has been seen in previous sections, Asia is a complicated region where conflict and environmental harm go hand in hand. In such a situation, waiting till a definition specific to EDPs to create a framework appears to be fallacious, and is paradoxical.

On the one hand, the international community is beginning to accept that climate change related damage in the foreseeable future is very high, and likely to cause large amounts of displacement,\textsuperscript{347} and it wishes to address these effects. On the other hand, concerns of security and resource management or social cohesion keep countries from addressing the elephant in the room – what happens to millions of people who will have no choice but to leave their countries? In addition, no State wishes to take responsibility for the persons displaced, including the home State. This, coupled with the non-refoulment principle, means that the burden must be borne by the receiving State, who either tries to reduce the number of refugees it accepts, or provides the bare minimum assistance once they arrive.\textsuperscript{348} This results in refugees or asylum seekers continuing to be vulnerable, with settlement camps in geographically unstable regions.\textsuperscript{349}

Another effect of the paradox is that Western countries limit entry into their country, protected furthermore geographically by distance, while applying international pressure on countries neighbouring crisis countries to perform their humanitarian obligations.\textsuperscript{350}

\textsuperscript{345} Malone (n 335)
\textsuperscript{346} Brazil to reject G7 offer (n 341)
\textsuperscript{347} IPCC report 2018, (n 8)
\textsuperscript{349} Peters (n 310)
\textsuperscript{350} Roslund (n 348)
Finding a causal link between the environment and movement is often difficult, as it might be an exasperating rather than the direct cause. The over-reliance on creating a definition facilitates this hesitance to ease national borders. By excluding them from existing groups and delaying consensus, the goal of protection remains unfulfilled, with many individuals being considered illegal, as seen in the South East Asian instances already discussed. The fact that a group’s displacement cannot be pinpointed to one variable should not be reason not to offer protection – this is the basic tenet of international human rights. Burden sharing should be the underlying goal of any mechanism that takes form. Not addressing this growing concern would be ethically wrong.

In pursuance of the same, an inclusive but general meaning must be assigned to persons displaced by the environment, among other factors, and more weightage should be given to the risk that they face, than the cause of the risk. For the purpose of uniformity, the definition for EDPs used by the Norwegian Refugee Council may be used as it leaves enough room for discretion while also being directive.

5.2.2.1 The Norwegian Refugee Council Definition for EDPs – an Operational Possibility

The Norwegian Refugee Council (NRC) defines EDPs as persons who have been displaced and forced to move within their own country or have crossed an international border where environmental factors are a major cause, but not necessarily the only one.\footnote{Chirala, (n 55)} This definition, while including both EDPs and IDPs, creates an identity for individuals outside the meaning of migrants (implying an active choice to leave for reasons of convenience) and refugees (where the need for proved prosecution arises). Keeping in view this definition does not find extensive use outside of the Norwegian Refugee Council due to the wide meaning it assigns to the term, one could expand on this terminology to create an international document to protect all classes of persons displaced due to environmental destruction or deterioration. This would create real State obligations for IDP protection within their territories while simultaneously developing a special status and framework that addresses the circumstances of those who migrate across borders.

The definition also mirrors early definitions made by Myers and other environmentalists in the 20\textsuperscript{th} century, which were then dismissed for reasons including lack of data and hesitance to
accept greater liability associated with wider definitions.\textsuperscript{352} This should not hinder attempts to test the applicability of this definition in current times, since there has been a shift in the way the world views the magnitude of the problem of environmental displacement

\textbf{5.2.3 Institutions and Mechanisms}

A number of factors would have to be considered in relation to setting up separate EDP protection within the existing DRR Framework.

\textbf{5.2.3.1 Funding}

The IMF and World Bank have policies that allow funding to countries affected by disasters to a limited extent, but these often prove difficult either due to complicated procedure of a lack of coordination.\textsuperscript{353}

In addition, the involvement of the private sector in DRR policies at the regional level would greatly elevate the level of funding. There is already involvement of private donors at the IAP, and increasing such participation through incentives such as catastrophe risk bonds and other financial instruments could be of assistance. In fact, a regional institutional plan for catastrophe bonds rather than just at the national levels would allow for larger investment that could be concentrated toward national incidents, ensuring that no individual State is overburdened.

The Green Climate Fund is also a possible avenue, as recommended by Mikiyasu.\textsuperscript{354} It was established in 2010 by the UNFCCC to be used as an adaptation fund internationally, without placing responsibility for climate change on any specific countries.\textsuperscript{355} While any specific group cannot be prioritized, part of the funds may be allocated to the Asian region for adaptation, and can be used to fund the creation of the required EDP related institutions and training under the DRR mechanism.\textsuperscript{356}

\textsuperscript{352} Gemmene (n 35)
\textsuperscript{353} Daniel A Farber, 'Catastrophic Risk, Climate Change, and Disaster Law' (2013) 16 Asia Pac J Envtl L 37 47
\textsuperscript{354} Nakayama et al. (n 93) 46
\textsuperscript{355} Ibid
\textsuperscript{356} Ibid
5.2.3.2 Functions

The primary purpose of creating a mechanism within the international DRR Framework is to use existing institutions and forums to further the objective of EDP protection. Additional institutions to oversee such functions would be a necessary requirement. The functions of the institutions may be divided into a few categories:

5.2.3.2.1 Oversight

For this purpose, a forum at the regional-international level, similar to the IAP-forum, would be best suited. The involvement of sub regional coalitions like the ASEAN and SAARC must also be encouraged. The involvement of non-State actors and private funders could possibly enhance the levels of compliance and accountability. In the recommended hierarchy of DRR-EDP institutions, The overall oversight responsibility would lie with the UNDRR, with assistance on policy and funding related matters from the IOM, UNFCCC, UNEP and UNHCR.

Nationally, the existing hierarchy of Courts and Disaster Management and Risk Reduction Authorities at multiple levels of governance would continue to be a part of the process, with additional institutions focused solely on EDP related data, research, assistance, and capacity building. The interaction between these bodies and the integration of the DRR frameworks overarching role in all policy decisions could lead to both, the consideration of long term solutions to reduce migration, as well as a mechanism to aid, rehabilitate and “build back better” for those who have been displaced despite best efforts.

5.2.3.2.2 Regular summits and conferences

The function of the DRR-EDP framework would also be to convene regular meetings of the various parties involved in risk reduction and management of migration to ensure cooperation, research, funding, and development of policy. A regular review of the success of existing policy must be prioritized, and the application of integrated assessment mechanisms to create better, more sustainable policy must be a frequent and consistently evolving process.

5.2.3.2.3 Multilateral Agreements

The regional and sub-regional bodies involved in the process must be encouraged to enter multilateral agreements with other countries and regional mechanisms to facilitate knowledge sharing, and to create mutually beneficial mechanisms for movement of persons to avoid the
illegal crossing of borders, smuggling of persons, and potential mass migration. Facilitation of legitimate passageways will reduce uncertainty and assist in more accurate data collection and application for better solutions.

5.2.3.2.4 Complaint Redressal and Dispute Resolution

The institutions created for this purpose would have to address matters of oversight and assign State Responsibility for violations. Additional complaint and dispute resolution mechanisms would also be required to ensure compliance, transparency and accountability both at the regional and national levels. The possibility of the creation of a tribunal related to environmental human rights protection could be considered at the regional level.

At the national and local levels, internal departmental complaint mechanisms must be created. In addition, national court systems would continue to play their role to uphold human rights and enforcement of laws as they already do.

Having an international appellate tribunal system would be a complicated process in the region as it would involve the dilution of sovereignty at some level, a matter of contention in the region, especially since most countries are still developing and continue to place development at the forefront of their policy objectives, with very little tolerance for international interference.

One solution to tackle the issue would be to make the jurisdiction of the tribunal subject to consent, and to give the decisions the status of recommendations. Assigning an other-binding jurisdiction to the Court/Tribunal would mean lesser infringement of sovereignty through a dispute adjudication/administrative review mechanism, with no constitutional review.\(^{357}\) In these situations, the validity of the laws are not brought into question, and merely the application of the laws to the affected persons is considered in relation to international obligations, leading to minimal sovereignty compromises.\(^{358}\)

Even though the power of a court or tribunal is limited by consent-based jurisdiction and limited enforceability powers, the system has the potential to create customary law that might


\(^{358}\) Ibid 44
become more prevalent and acceptable over time and the behaviour of States based on circumstances.

5.2.3.2.5 Sanctions

One factor that may be considered is the enforcement of sanctions at a regional level by naming and shaming States that fail to create domestic protections for their own citizens, as well as those that seek protection, but this would impact the participation that the regional instruments and institutions would receive from the States to begin with. There is a reason why the Asia-Pacific is the only region without a regional human rights Court -States in Asia are hesitant to accept liability for the failure to protect persons’ rights, especially those that are not their citizens. This may be attributed to their inability as a result of population sizes, limited resources or lack of institutional, economic, or administrative capacity. This unwillingness to accept liability can be seen in their failure to ratify the Refugee Convention.

5.2.3.3 Safeguards

5.2.3.3.1 Managing the Pull Factor

If the wider definition of EDP as suggested leads to a significant pull factor, the formalization and control of exit points as well as a screening process akin to the one used at the time of the Indochinese refugee situation may be employed, with the difference that it would not screen by region of origin, but through actual mechanisms of risk assessment. There exist techniques such as computerization and robust decision making methods, that make it possible to use visualization and data to identify scenarios, which can be used in such risk assessment.

In addition, providing avenues for slow and calculated migration over time would allow States to reduce the impact of sudden mass migration. Slow migration would allow systematic development of infrastructure to meet the burden. This could possibly be done by providing opportunities for family reunification, skilled labour migration, etc.

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359 Helton (n 266) 111
360 Farber (n 353) 49
Moberg recommends an Environmentally Based Immigration Visa (EBIV), which provides eligibility to not just those already suffering the impacts of environmental changes but also those who face the imminent risk of environment related displacement.  

5.2.3.3.2 Burden Sharing

Moberg also suggests a quota system for EBIV assignment, based on the contribution of States towards greenhouse gases.  

Many high latitude places will also likely become capable of sustaining greater populations as a result of climate change related change in patterns of precipitation and other weather conditions.  

To enable burden sharing, bilateral agreements between regional organizations in the West such as the European Union and those in the South would facilitate a healthy flow of populations from high risk regions in a systematic manner. In order to incentivize this migration, sending States could be held responsible for facilitating migration and providing some form of funding to the persons affected, so that receiving States do not bear the burden of supporting growing populations entirely. Sending States could also provide technical education to their citizens in high risk regions to make them eligible for labour migration if required.

The failure to share the burden has historically led to the failure of asylum and relocation programmes in the past as seen in the case of Indochinese refugees in section 4.5.2, and while regional mechanisms to manage migration must be established, the need for developing countries to participate in such efforts cannot be ignored. Participation at the commencement stages of climate related movement will play a sizeable role in reducing the effects of uncontrolled mass migration when developing countries become unable to bear the burden by themselves.

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361 Moberg (n 53) 1135
362 Ibid 1136
363 Brown – IOM 2008 (n 12)
5.2.3.3 International Human Rights

Principle 10 of the Rio Declaration states that affected citizens must be given the opportunity to participate in decisions that have to do with environmental issues. There are three fundamental rights laid down by this principle – those of access to information, participation and justice. In pursuance of the same, national level dispersion of information and creation of mechanisms for redressal must be created.

Other rights discussed in previous sections such as those of non-refoulment, non-discrimination, labour rights, education, shelter, adequate standard of living, etc should be ensured when the migration occurs within Asia. With the track record that Asia has in protection, a self-appointed regional supervision body such as the IAP forum must be set up.

These countries also have a history of detaining individuals they deem as illegal immigrants, as discussed in section 3.2.4. Keeping a check on such practices, as well as ensuring the rights of persons who have been detained would also fall within the purview of the regional EDP-DRR Institution. The right of return, also a right that falls within those provided for in the ICCPR, must be respected in the case of Stateless persons who have created a permanent home in the State they attempt to enter. Indefinite detention also affects such rights. The screening process would also have to be tempered to ensure that it does not result in statelessness.

Furthermore, most migration happens by persons who are able to afford it. Low income persons end up moving from one low risk area to another. While facilitating migration, the sending State must pay special attention to the interest of economically vulnerable persons.

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366 ICCPR (n 153) Article 12
367 Jessica Leal, 'Stateless with Nowhere to Go: A Proposal for Revision of the Right of Return according to the International Covenant on Civil and Political Rights' (2014) 46 Geo Wash Int'l L Rev 677 691
5.2.3.4 Transferring Risk – Catastrophe Bonds

Resilience building is greater than mere rapid response – insurance is a non-structural measure that plays a key role by spreading risk. Since private insurance often does not cover catastrophes or places them under the exclusion of “acts of God”, an alternative method of covering this risk must be used.

Catastrophe risk bonds are a means of transferring risk to capital markets. Investment banks, investment brokers and reinsurers enter reinsurance contracts wherein they agree to pay a certain amount at the end of a predetermined period in the event that a defined catastrophe occurs. If no such catastrophe takes place, they are liable to pay nothing, similar to others such as fire and life insurances. The value of the policy is determined by applying a number of variables such as the probability of the event and the reinsurance price. The principle amount is used to pay off the losses that are incurred due to a disaster.

In order for this method to be successful, a number of safeguard must be placed such as keeping a check on the premiums to allow them to continue to be affordable with long term returns while maintaining a stable source of compensation in the event of a catastrophe.

The concept of catastrophe bonds has existed for decades, and has also been recommended by the Asian Development Bank as a means to manage risks associated with disasters. Despite a capacity for reinsurance for risk related to catastrophe in Asia, its actual exploitation is considerably low despite the fact that capital markets are used extensively in developed countries to transfer risk.

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368 Farber (n 353) 41
369 Ibid 46
371 Ibid
372 Ibid
374 ADB Final Report 2012 (n 72)
375 ADB Main Report 2009 (n 373)
376 ADB Final Report 2012 (n 72)68
Catastrophe bonds would allow countries to be more independent instead of relying on international aid after a disaster. Combining it with existing DRR mechanisms also allow for swift action with a set plan for allocation.
6. Conclusions

The Asian Disaster Risk Reduction Centre’s Natural Disaster Data Book indicates that Asia is foremost in terms of four disaster related impact indices: occurrence, persons killed, persons affected and the damage caused. Large numbers of populations in this region live in vulnerable areas and face the very high risk of losing their homes to inundation and other climate change related dangers. Indonesia is now moving its capital from Jakarta, a large portion of which lies below sea level with many parts sinking at almost 20 cm a year; the new location is in the middle of Indonesia, and more protected from natural disasters. This is only one example of the effects that climate change will have on a continent where large portions of land are vulnerable to natural disasters, and the impacts are magnified by population density and poverty. The long term effects of this will be mass displacement from countries unable to sustain the influx of people in regions that have infrastructures that are already overburdened.

The purpose of this thesis has been to attempt to identify whether a new regional system should exist for EDP protection in Asia, or whether an existing mechanism would be better suited to absorb such migration and to regulate the same in a manner that will facilitate such movement without exacerbating existing tensions in the region.

Migration as a phenomenon has existed as a means of human survival since before the ice age. The demographics of all regions of the world today are a result of movement in search of conditions more favourable to survival. The present rate of climate change and the impact it will have in terms of sea level rise and resultant salinization and inundation of land and fresh water sources can no longer be attributed to alarmist literature; it is backed by numbers. In this regard, the scope of this thesis is limited to the effects of such changes to Asia.

I begin by discussing the problems associated with defining the term EDP and the resultant difficulty it creates in making estimates on the number of persons that fall within the category. EDPs, in this instance, have been distinguished from IDPs, who fall within the protection of domestic regimes, guided by a set of UN Principles. EDPs are further classified on the basis of

duration of displacement, as well as the cause of displacement. While they may be distinguished as a group from refugees as defined in the Refugee Convention, the two intersect within the refugee protection framework through wider interpretations of relevant language in terms of conditions that are applied to determine and assign such status.

A brief look at the specific circumstances in Asia that factor into regional policy making indicate that the people in the region are geographically, economically and socially vulnerable to climate change and related natural disasters. In addition, the cultural and geopolitical tensions in Asia make it a complicated process to reach an agreement on new policies, with each country embracing divergent policy objectives. A closer look at the sub regional level illustrates that the already existing treatment of asylum seekers in various countries is poor. The observation is that most countries in Asia, while accepting refugees, are not party to the Refugee Convention, and are unable to satisfactorily protect the basic rights of aliens seeking asylum in their country. One can go so far as to say, in many cases, the failure to protect rights extends to violation of rights by the State in the form of turning away refugees, or smuggling of persons through traffickers, or detention which hinder opportunities to maintain an adequate standard of living.

International instruments for the protection of IDPs have considerable impact on Asian policy considering its status as a soft law instrument. While domestic laws for EDP protection might exist in some countries, their implementation at the ground level is brought to question by the large numbers of persons who continue to be displaced without assistance or remuneration years after a calamity. Not only does internal displacement place pressure on existing poor infrastructures in developing countries, it creates conflict due to the cultural and social differences in the populations within these countries. The competition for limited resources also adds to the prevalent dissatisfaction associated with movement of fundamentally different populations to new regions, causing friction and resultant difficulties in readjustment and rehabilitation. Furthermore, internal migration often results in vulnerable individuals moving from one high-risk region to another, placing further burdens at the destination, which increases vulnerability, and this creates a vicious cycle of displacement and loss of habitat. The current IDP regulations and protections in Asia appear to be overburdened and underfunded.

Considering the lack of effectiveness of IDP protection in the region that falls within domestic jurisdiction, a regional EDP protection framework would have to rely on international legal instruments and principles that are part of both customary and treaty law, with a mechanism for accountability beyond the domestic level. Of relevance are more general human rights
conventions such as the UDHR, ICCPR, and ICESCR, as well as conventions that protect specialized groups such as women, children, disabled persons, and stateless persons. As far as international organizations go, the UNFCCC and UDHR, while not expressly having jurisdiction over EDP protection. Nevertheless, they continue to extend such protection within available means, and encourage discussion and assistance in the creation of a framework for EDPs.

Of note is that all these instruments, while being relevant to EDPs, fall short as regards the specific circumstances of EDPs. Many create obligations between States without involving individual redressal mechanisms, or require that rights be violated before redressal can be claimed. This would be too little too late in the case of large numbers of EDPs. Moreover, economic, cultural and social rights are given to be non-justiciable in nature. Despite this, we see examples of Asian countries that have either included these within their statutory/constitutional protections, or have expanded political and civil rights to encompass such other rights.

In addition, an examination of institutions and instruments in Asia that have previously been utilized for regional cooperation such as the ASEAN, the SAARC, the Bali Process, the Almaty Process, and the Nansen Initiative, suggest that there is scope for regional consensus on protection of citizens’ rights. This leads us to the question of whether a treaty or binding new regional instrument will be viable in Asia. The conclusion in this regard after considering the history of the region and existing geopolitical circumstances, is that the adoption of such an instrument would either be long drawn out, or blocked by countries as a result of rivalries and tensions.

In view of the same, I recommend the creation of a regional framework within the existing international framework of disaster risk reduction. A system that is based mainly on cooperation and goodwill, most Asian countries participate in knowledge sharing for this purpose as it is mutually beneficial. The DRR framework already contains provisions for assistance of persons who have been affected by natural calamities, and many counties already have domestic provisions for the enforcement of these guidelines. Another important aspect of the DRR mechanism is that it relies heavily on burden sharing between a number of actors. The expansion of this system at a regional level where there already exist cooperation frameworks that deal with different sides of the same coin, makes it easier than having to find consensus on an entirely new instrument.
I further go on to suggest funding, oversight and dispute redressal mechanisms that may find relevance in the creation of the framework. I have also mentioned specific safeguards that must be borne in mind while implementing such framework, in addition to the already mentioned existing international laws and principles. The hierarchy of organizations within this framework may be represented by the following chart.

**Figure 1: Hierarchy of Organizations within the DRR-EDP Framework**
The last of my recommendations is the spreading of risk at a regional level through a central body using catastrophe bonds. While catastrophe bonds have existed for decades and are extensively used in some developed parts of the world, the market for these have been underutilized in Asia. These bonds would not only facilitate channeling of regional funds in situations of emergencies, but they can also be implemented at a national level to promote independence and sovereignty following a disaster.

My concluding observation is that in many cases, the failure in protecting rights in Asia is the result of financial and administrative lack of capacity. To begin with, assistance to IDPs at a national level will play a huge role in the magnitude of cross-border migration. Thereafter, a systematic and disciplined international migration system will help maintain peace and stability in an already volatile region. Burden sharing will be key in ensuring the success of any course of action in the matter. Apropos, reliance on structural backbone in the form of an existing framework dealing with similar subject matter is the most prudent course of action. In this respect, the UNDRR, IOM and other UN bodies conduct extensive research and are in a position to aid regional efforts through funding and assistance in capacity building and knowledge sharing. While regional cooperation will be difficult to achieve in Asia, through voluntary participation in a regional mechanism, it may be possible to create customary practices that stand the test of time.
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