

FORCED HUMAN DISPLACEMENT, THE THIRD WORLD AND INTERNATIONAL LAW: A TWAIL PERSPECTIVE

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Forced human displacement is a growing global concern. Its impacts are particularly felt in the Global South. The problem festers within an international legal environment that lacks both adequate and responsive rules, and strategies to address its root causes. International law, often looked upon to provide solutions to global challenges, has serious limitations when it comes to the issue of forced displacement. This article uses Third World Approaches to International Law ('TWAIL') to analyse the relationships between forced human displacement, international law and what TWAIL describes as 'the Third World'. This approach is relevant because much of Africa, Asia and the Middle East were under colonial rule when international responses and rules regulating forced displacement were developed in the early and mid-20th century. Following decolonisation, the newly independent states acceded to an international legal framework that had been shaped without their input. This 'non-inclusiveness' within international law of Third World voices and interests contributes to stark development inequalities. Accordingly, forced displacement remains the visible manifestation of the failure of the international community to address its root causes. The Syrian refugee crisis and the recent 'caravan' originating in Central America are powerful examples. The authors argue that a lasting solution should aim for a reformed international law that is comprehensive and preventive rather than narrowly tailored to advance politically expedient positions or to promote unilateral gatekeeping. A robust engagement with the progress of the Global Compacts on Refugees and Migration and the Sustainable Development Goals provides such opportunity to appropriately address forced displacement.

CONTENTS

I	Introduction.....	2
II	Forced Displacement Today	5
III	Third World Human Displacement and International Law	8
	A Forced Human Displacement and International Law	8
	B Existing Gaps in International Law	11
	1 Gap in Principles: Sovereignty, Territoriality and Non-Interference.....	12
	2 Gaps in the Law: Fragmentation, Post-Facto Orientation and Inadequacy	14
	C The Third World in Focus	15
IV	The Demands of Durable Solutions to Third World Displacement.....	21
	A Prevention and Addressing Root Causes.....	21
	B Comprehensive Response.....	23
	C A TWAIL Perspective on Prevention and Comprehensive Response.....	24
V	Conclusion	29

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I INTRODUCTION

Human populations have been forcibly displaced throughout history.¹ However, it was only in the 1920s that multilateral effort was forged to regulate the problem.² Institutional and normative experiments took place during the inter-war period in an effort to respond to episodes of forced displacement that engulfed Europe. For example, from 1921–51, nine institutional arrangements were put in place and a number of multilateral agreements were concluded, with the aim of providing international protection and assistance to displaced persons.³

The evolution of the multilateral initiatives culminated in the creation of the United Nations High Commissioner for Refugees ('UNHCR') as well as the adoption of the *Convention Relating to the Status of Refugees* ('*Refugee Convention*')⁴ and the 1967 *Protocol Relating to the Status of Refugees* ('*Protocol*').⁵ These remain the prominent legal and institutional frameworks dealing with displaced people. Since the creation of the UNHCR and the adoption of the 1967 *Protocol*, the evolution of institutional and binding legal frameworks governing forced displacement has slowed down, if not halted, at the global level. Notable exceptions in this regard pertain to: (1) the adoption of treaties by regional mechanisms — such as the African Union — on refugees and internally displaced persons;⁶ (2) the promotion of the rights of internally displaced persons ('IDPs') since the 1990s which led to the adoption of the *Guiding Principles on Internal Displacement*;⁷ and (3) the adoption of the recent *Global Compact on Refugees*⁸ and *Global Compact for Safe, Orderly and*

¹ Alexander Betts, Gil Loescher and James Milner, *UNHCR: The Politics and Practice of Refugee Protection* (Routledge, 2nd ed, 2012) 1; UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (Oxford University Press, 2000) 1 ('*The State of the World's Refugees 2000*').

² James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33(2) *International and Comparative Law Quarterly* 348, 351.

³ For a discussion on the institutions created during this period, see UNHCR, *The State of the World's Refugees 2000* (n 1) ch 1; Claudena M Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Clarendon Press, 1995) 142–5 ('*Refugees in Inter-War Europe*'). For a discussion on the agreements adopted during this period, see generally Hathaway (n 2).

⁴ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*').

⁵ *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Protocol*').

⁶ *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) ('*OAU Refugee Convention*'); *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, opened for signature 23 October 2009, 52 ILM 400 (entered into force 6 December 2012) ('*Kampala Convention*').

⁷ United Nations Commission on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Human Rights, Mass Exoduses and Displaced Persons — Addendum: Guiding Principles on Internal Displacement*, 54th sess, Provisional Agenda Item 9(d), UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) ('*Guiding Principles on Internal Displacement*').

⁸ United Nations High Commissioner for Refugees, *Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees*, UN GAOR, 73rd sess, Supp No 12, UN Doc A/73/12 (Part II) (2 August 2018) ('*Global Compact on Refugees*').

Regular Migration ('*Global Compact on Migration*')⁹ — all of which are in the domain of soft laws. Nevertheless, the existing system remains inadequate as the refugee framework continues to be challenged by mass displacements of both recurring nature (eg conflicts or disasters) and relatively recent phenomena (eg anthropogenic climate breakdown).¹⁰

The destructive aftermath of events that mainly took place in Europe provided a compelling reason for the initiatives undertaken to respond to forced displacement. Millions of people were displaced by the Russian Revolution, the First World War, the Greco-Turkish war, the rise of Nazism in Germany and the Second World War.¹¹ It can therefore be seen that the institutional and legal frameworks of the time were developed in consideration of the problem *as it existed* in continental Europe. The evolution of these frameworks also aligns with the changes observed in the economy, politics and relations of European countries among themselves and with the rest of the world.

As these international legal and institutional frameworks developed, much of Africa, Asia and the Middle East remained under colonial rule. Following decolonisation, newly independent states acceded to these frameworks of response, yet the frameworks were already outdated. Indeed, the frameworks had initially developed to liberally manage forced displacement *as it existed in* Europe, but later morphed to strictly regulate forced displacement *as it interacted with* Europe from the outside.¹²

This article seeks to analyse the relationship between forced human displacement, the Third World and international law by applying Third World

⁹ *Global Compact for Safe, Orderly and Regular Migration*, GA Res 73/195, UN GAOR, 73rd sess, Agenda Items 14 and 119, UN Doc A/RES/73/195 (11 January 2019, adopted 19 December 2018) ('*Global Compact on Migration*').

¹⁰ See, eg, Adrian Edwards, 'Forced Displacement Worldwide at Its Highest in Decades', *UNHCR* (News Report, 19 June 2017) <<https://www.unhcr.org/en-au/news/stories/2017/6/5941561f4/forced-displacement-worldwide-its-highest-decades.html>>, archived at <<https://perma.cc/H7SZ-5H49>>; 'Refugees', *United Nations* (Web Page) <<https://www.un.org/en/sections/issues-depth/refugees/>>, archived at <<https://perma.cc/TZN6-8G9E>>; Carolyn Beeler, 'UN Compact Recognizes Climate Change as Driver of Migration for First Time', *PRI* (online, 11 December 2018) <<https://www.pri.org/stories/2018-12-11/un-compact-recognizes-climate-change-driver-migration-first-time>>, archived at <<https://perma.cc/6BAS-H4M8>>; Laignee Barron, '143 Million People Could Soon Be Displaced Because of Climate Change, World Bank Says', *TIME* (online, 20 March 2018) <<https://time.com/5206716/world-bank-climate-change-internal-migration/>>, archived at <<https://perma.cc/5QC7-M77L>>.

¹¹ See Claudena M Skran, 'Profiles of the First Two High Commissioners' (1988) 1(3–4) *Journal of Refugee Studies* 277, 277; Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press, 1996) 34–6 ('*Beyond Charity*'). See generally Norman Bentwich, 'The League of Nations and Refugees' (1935) 16 *British Year Book of International Law* 114; John Hope Simpson, 'The Refugee Problem' (1938) 17(5) *International Affairs* (Royal Institute of International Affairs 1931–1939) 607; Peter Gatrell, 'Introduction: World Wars and Population Displacement in Europe in the Twentieth Century' (2007) 16(4) *Contemporary European History* 415.

¹² See Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press, 2014) 264–5, for a discussion on how the requirement of a full self-government under the *Treaty of Versailles* establishing the League of Nations ('LoN') was intended to exclude non-Western people. See, eg, George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20(1) *Refugee Survey Quarterly* 79, 114, citing Gervase Coles, 'Approaching the Refugee Problem Today' in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (Oxford University Press, 1989) 373, 374, 387, who criticises the system built on the 1951 *Refugee Convention* as 'old'.

Approaches to International Law (commonly referred to as 'TWAIL'). TWAIL scholars embrace the term 'Third World', not so much in a geographic or economic sense, but as a political term. For TWAIL scholars, the 'Third World' is employed to voice a dialect of opposition to an international system of laws that evolved in consideration of Euro-centric cultures, and continues to advantage and favour the West while disadvantaging subaltern nations.¹³ These scholars acknowledge that differences do exist among Third World countries.¹⁴ Most importantly for TWAIL scholars, however, the Third World represents a coalition of nations and people who self-identify and coalesce 'around a historical and continuing experience of subordination at the global level that they feel they share'.¹⁵

The relationship between the Third World and international law has been a topic of critical inquiry for some time and is particularly central to TWAIL.¹⁶ TWAIL is a critical method of looking at international law that attempts to understand its history, structure and process from the perspective of Third World peoples.¹⁷ It is concerned mainly with analysing the process of international law's development, its Eurocentric disposition, its conception of the 'rest' as opposed to the West, and exposing the ways through which international law continues to disadvantage Third World countries and their people.¹⁸ TWAIL undertakes this inquiry generally through a critical examination of the foundational principles of international law, such as sovereignty and universality, and specifically through an examination of the various areas of international law. For example, TWAIL scholars have critically analysed international law through

¹³ A similar sense is attached to the use of words such as the 'Global South' or 'the South' in this paper. Regarding the continued relevance of the term as an analytical tool see BS Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie et al (eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff, 2003) 47, 48–51 ('Third World Approaches to International Law'). See also Cedric Grant, 'Equity in International Relations: A Third World Perspective' (1995) 71(3) *International Affairs* (Royal Institute of International Affairs 1944–) 567.

¹⁴ Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997–98) 16(2) *Wisconsin International Law Journal* 353, 360: 'Such an approach does not deny the existence of differences between and within Third World countries, nor does it underestimate the importance of such differences. It speaks of the Third World not as a bloc, but as a distinctive voice'. See also Chimni, 'Third World Approaches to International Law' (n 13) 49.

¹⁵ Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective' (2005) 43(1–2) *Osgoode Hall Law Journal* 171, 174.

¹⁶ Though some scholars believe the term 'Third World' was first used in 1952, it is not uncommon to see TWAIL scholars stretching the term back and applying it to analyse the historical development of international law: Leslie Wolf-Phillips, 'Why "Third World"?: Origin, Definition and Usage' (1987) 9(4) *Third World Quarterly* 1311, 1311–12. A parallel scenario is the civilised–uncivilised divide that has been used to capture the existence of hierarchy in the international arena.

¹⁷ BS Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8(2) *Melbourne Journal of International Law* 499, 499.

¹⁸ See, eg, Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2(1) *Chinese Journal of International Law* 77, 96–7.

their analysis of the international economic order,¹⁹ the human rights framework²⁰ and the environment.²¹ The concept of the ‘civilising mission’ is often used as a broad analytical framework to further those inquiries.²² The subject of forced displacement is one such area that requires a critical reflection given the ever-increasing number of displaced persons, the disproportionate impact on Third World countries and the failure of international law to adequately respond to the problem.

Part II of this article will discuss the nature and scope of forced displacement today as primarily affecting people in the Third World. This is followed by a critical examination of the relationship between international law and Third World displacement in Part III. This part also highlights the existing international legal framework and its gaps. The fourth part discusses the need to complement traditional durable solutions with comprehensive and preventive approaches in order to address Third World displacement.

II FORCED DISPLACEMENT TODAY

Forced displacement discourses situate states in relation to their contact with forcibly displaced persons, their responsibilities in causing displacement and

¹⁹ See, eg, Mohammed Bedjaoui, *Towards a New International Economic Order* (UNESCO, 1979) 48–9 (arguing for the instrumentality of international law in advancing an economic order that favours developed economies at the expense and through the exploitation of the Third World); James Thuo Gathii, ‘Third World Approaches to International Economic Governance’ in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish, 2008) 255 (highlighting the traditional Third World concerns on international economic governance by referring to three Third World approaches that were advanced at different times); Shedrack Agbakwa, ‘A Line in the Sand: International (Dis)Order and the Impunity of Non-State Corporate Actors in the Developing World’ in Antony Anghie et al (eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff, 2003) 1, 7, 16 (on the pressure on Third World countries to pursue the same economic policies as neo-liberal Western nations, the relocation of sovereign economic powers in international institutions who further play a role in perpetuating dependency); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 235 (identifying the resistance of the Third World to the economic system inherited upon independence and how ‘[t]he West responded by negating the Third World campaign’ and by ‘elaborating a new transnational law’).

²⁰ TWAIL scholars recognise the underlying merits of the human rights regime. That said, they are critical about a number of issues in its operation. See, eg, Agbakwa (n 19) 11, 17 (arguing the focus on private rights as opposed to social and economic rights permits pursuit of the neo-liberal agenda); Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42(1) *Harvard International Law Journal* 201 (‘Savages’) (uses the savage-victim-saviour metaphor to analyse and critique the Eurocentric origins of the human rights discourse and its presumed neutrality and universality); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003) ch 7 (analysing and critiquing the constitution of ‘the human rights discourse as the sole discourse of resistance’).

²¹ See Usha Natarajan, ‘Third World Approaches to International Law (TWAIL) and the Environment’ in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar, 2017) 207.

²² See Anghie and Chimni (n 18) 85: ‘The “civilizing mission” operates by characterizing non-European peoples as the “other” — the barbaric, the backward, the violent — who must be civilized, redeemed, developed, pacified.’ See generally Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 19); Antony Anghie, ‘Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations’ (2002) 34(3) *New York University Journal of International Law and Politics* 513; Mutua, ‘Savages’ (n 20).

their obligations with respect to protection and assistance.²³ It has proved to be a persistent challenge and current data shows a rising trend. The UNHCR reported that there were 68.5 million forcibly displaced persons around the world at the end of 2017.²⁴ This consisted of 25.4 million refugees, 40 million internally displaced persons and 3.1 million asylum seekers. This marked a 2.9 million increase from that reported at the end of 2016. The report identified persecution, conflict and generalised violence as the most prominent causes of displacement.²⁵

Most of these movements occur within the Third World itself. Statistics indicates that most displacement cases currently originate and culminate in the Global South. At the end of 2017, 68% of refugees came from five countries in the Global South — Afghanistan, Myanmar, Somalia, South Sudan and Syria — and developing countries hosted 85% of forcibly displaced persons.²⁶ The Internal Displacement Monitoring Centre ('IDMC') reported that in the first half of 2018, there were 5.2 million new internal displacements related to conflict and violence.²⁷ The 10 most affected countries are all in the Third World.²⁸ Similarly, there were 3.3 million new internal displacements associated with disaster events, which also mostly affected Third World countries.²⁹

The high number of displaced persons and the disproportionate impact of forced displacement on Third World countries enables a dominant narrative to emerge that blames the Global South for being dysfunctional and erases the historical context. As we will see the reality is much more complex and structurally imposed. Despite the reality of the disproportionate impact of forced displacement on Third World countries and their people, the overwhelming mainstream and media attention is: (1) away from the movement of displaced persons that occurs within the Third World; and (2) away from a critical analysis of the causes that lead to these movements.³⁰

²³ See generally Pavle Kilibarda, 'Obligations of Transit Countries under Refugee Law: A Western Balkans Case Study' (2017) 99(1) *International Review of the Red Cross* 211 (discussing the obligations of transit countries under the *Refugee Convention*); Katharina Senge, 'Co-responsibility between Countries of Origin, Transit and Destination: Lessons from Spain's Experience with Migration' (2018) 17(1) *European View* 66 (elaborating the concept of responsibility sharing in migration among countries of origin, transit and destination); Ogenga Otunnu, 'Population Displacements: Causes and Consequences' (2002) 21(1) *Refugee* 2 (highlighting states as the major sources of displacements).

²⁴ UNHCR, *Global Trends: Forced Displacement in 2017* (Report, 25 June 2018) 2 <<https://www.unhcr.org/5b27be547.pdf>>, archived at <<https://perma.cc/Z2GV-23C6>>.

²⁵ *Ibid.*

²⁶ *Ibid.* 2–3.

²⁷ Internal Displacement Monitoring Centre, *Internal Displacement in 2018: Mid-Year Figures* (Report, 12 September 2018) 2 <<http://www.internal-displacement.org/sites/default/files/publications/documents/201809-mid-year-figures.pdf>>, archived at <<https://perma.cc/B9P7-R9VE>>.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ See Sai Felicia Krishna-Hensel, 'Introduction' in Sai Felicia Krishna-Hensel (ed), *Migrants, Refugees, and the Media: The New Reality of Open Societies* (Routledge, 2018) 1. Even when the causes of forced displacement are highlighted, such references tend to focus on internal causes that picture the state of origin as the major problem in disregard of external factors that are equally determinative in terms of precipitating forced displacement. For more analysis on this point, see BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) *Journal of Refugee Studies* 350.

In the first instance, mainstream attention is devoted to a tiny fraction of movements that lead from the South to the North. Those that make it to the borders of Western countries receive major media coverage, most often unfavourable and depicting displaced persons as ‘invaders’ and describing them as ‘flooding’ receiving countries with little or no mention of the reasons for their move.³¹ Moreover, stories of criminal conduct by refugees or asylum seekers are highlighted in such a way that they become central considerations when it comes to designing policy. This gradually leads to the dehumanisation of forcibly displaced persons and for narratives to emerge that justify the often hostile actions that states take based on a narrow focus on border ‘protection’.³² This leaves the problem largely unattended.

As a practical consequence of this, refugee, migration and asylum policy of Western states continues to be driven by placing the utmost focus on movements to the North.³³ The Mediterranean Migration Project (‘MEDMIG’) has critiqued the tendency to focus solely on the origins and destinations of displaced persons in disregard of the comprehensive analysis required to understand the roots of the problem and responsibilities of states.³⁴ MEDMIG noted that the number of displaced persons who reach Europe makes up a ‘tiny fraction’ of global movement.³⁵ The report identified that ‘[i]n 2015 an estimated 1,011,712 refugees and migrants crossed the Mediterranean to Europe in search of safety and a better life’ and that ‘[n]early 4,000 people are thought to have died trying to make this journey’.³⁶ The report also stated that overall, ‘[m]ore than three

³¹ It is to be recalled that the Hungarian Prime Minister Viktor Orban described refugees as ‘Muslim invaders’: Harriet Agerholm, ‘Refugees Are “Muslim Invaders” Not Running for Their Lives, Says Hungarian PM Viktor Orban’, *Independent* (online, 9 January 2018) <<https://www.independent.co.uk/news/world/europe/refugees-muslim-invaders-hungary-viktor-orban-racism-islamophobia-eu-a8149251.html>>, archived at <<https://perma.cc/FL2F-F6UA>>. For an example of references of refugees ‘flooding’ into countries, see, eg, RedR Australia, ‘Bendigo Woman Assists Child Refugees in Europe’ (Media Release, 11 March 2016) <<https://www.redr.org.au/news/media/bendigo-woman-assists-child-refugees-in-europe/>>, archived at <<https://perma.cc/8RH8-U6JF>>.

³² Krishna-Hensel (n 30) 4.

³³ BS Chimni argued this point in his analysis of the shift from refugee studies to forced migration studies:

In contrast to the present focus on forced migration, Refugee Studies occupied centre stage in the period of the cold war. The concentration on the international refugee regime in this period, as we all know, also reflected western interests; the refugee symbolically denounced the world of ‘actually existing socialism’. The current interest in all types of displaced persons, accompanied by attempts to establish a new system of global governance for the displaced, is no different.

BS Chimni, ‘The Birth of a “Discipline”: From Refugee to Forced Migration Studies’ (2009) 22(1) *Journal of Refugee Studies* 11, 17 (emphasis omitted). He further argued that ‘it cannot be overlooked that the move to Forced Migration Studies has come about at a time of greater flow of refugees from the third world to the western world, in particular since the end of the cold war’: at 19.

³⁴ Heaven Crawley et al, *Destination Europe? Understanding the Dynamics and Drivers of Mediterranean Migration in 2015* (Final Report, November 2016) 64 <<http://www.medmig.info/wp-content/uploads/2016/12/research-brief-destination-europe.pdf>>, archived at <<https://perma.cc/MN6Z-TT5D>>.

³⁵ *Ibid* 13.

³⁶ *Ibid* 12 (citations omitted).

quarters (77%) of respondents explicitly mentioned factors that could be described as “forced migration”.³⁷

The report further analysed that the crisis was mainly ‘policy driven and sustained by the failure of the EU to put in place adequate and humane responses to deal with this unprecedented but also foreseeable movement of people’.³⁸ This leads us to the second point. Research identifies recurring conflicts, political instability, persecutions, disasters and economic underdevelopment as the prominent causes of forced movements.³⁹ However, analysis often focuses on the immediate causes and the responses to displacement with little or no reflection on underlying factors. The majority of the analysis conducted on displacements arising from the conflicts in South Sudan and Syria, the instability in Afghanistan and Somalia and the persecution of the Rohingya people reflects this point.⁴⁰ Such short-sighted policy focus provides the justification for increased securitisation of refugee movements, interdiction, offshore processing and detention, and a focus on border protection aimed at stopping refugees and migrants from ever reaching the North.⁴¹ All of this is enabled by the absence of a comprehensive international legal framework and the fragmented and unresponsive nature of the one that exists.

III THIRD WORLD HUMAN DISPLACEMENT AND INTERNATIONAL LAW

There are gaps in international law that affect the governance of forced displacement as a global challenge. These gaps severely affect Third World countries and people. This part briefly discusses the existing international law rules applicable to forced displacement and describes the general gaps that exist in international law before proceeding to analyse the relationship between Third World displacement and international law based on TWAIL.

A Forced Human Displacement and International Law

States have adopted international law rules that seek to govern issues of global concern. History witnesses that such adoptions, particularly on matters of human rights, often occurred in the wake of events that shook the public

³⁷ Ibid 8. Interviews were conducted on ‘500 refugees and migrants travelling via the Central and Eastern Mediterranean routes: 205 in Italy (Sicily, Apulia, Rome, Piedmont, Bologna) and 20 in Malta (Central Mediterranean route); 215 in Greece (Athens, Lesbos) and 60 in Turkey (Izmir, Istanbul) (Eastern Mediterranean route)’; at 18.

³⁸ Ibid 9.

³⁹ Alexander Betts, *Forced Migration and Global Politics* (Wiley-Blackwell, 2009) 1; Loescher, *Beyond Charity* (n 11) 180–2.

⁴⁰ See, eg, Timothy Calica, ‘Improving the Refugee Crisis in Syria: A Comparative Analysis of Regional Refugee Policies’ (2017) 40(1) *Loyola of Los Angeles International and Comparative Law Review* 115, 132–7 (discussing the traditional solutions to the Syrian refugee crisis); Raouf Mazou, ‘Somali Refugee Crisis: A Regional Approach to Foster Durable Solutions’, *Georgetown Journal of International Affairs* (Blog Post, 13 July 2017) <<https://www.georgetownjournalofinternationalaffairs.org/online-edition/somali-refugee-crisis-a-regional-approach-to-foster-durable-solutions>>, archived at <<https://perma.cc/5JAS-CE9V>>. But see Christa Charbonneau Kuntzelman, ‘South Sudan: Solutions for Moving beyond an “Ethnic Conflict”’ (2013) 3(1) *International Research and Review* 81 (arguing the need to produce mechanisms to address the proximate and root causes of conflict in order to prevent displacement).

⁴¹ See generally Arthur C Helton, ‘Refugees and Human Rights’ (1992) 15 *In Defense of the Alien* 143.

conscience and exposed flaws existing within international legal and institutional frameworks. A case in point is the adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*') and the *Universal Declaration of Human Rights* ('*UDHR*')⁴² following the Holocaust.⁴³ The *Genocide Convention* sets out to define and criminalise genocide and provide for the responsibilities of states in its prevention and punishment.⁴⁴ Meanwhile the *UDHR* recognises the need to promote the inherent dignity of 'all' members of the human race.⁴⁵ However, the plight of forcibly displaced persons throughout history has never triggered the adoption of comparably comprehensive rules in international law.

The rules that exist within international law seek only to address certain aspects of forced displacement. The *Refugee Convention* and its 1967 *Protocol* remain the sole normative frameworks governing the protection and assistance of forcibly displaced persons globally.⁴⁶ These normative frameworks have severely limited applications. In this regard, Guy Goodwin-Gill noted that

[t]he 1951 *Convention* does not deal with the question of admission, and neither does it oblige a state of refuge to accord asylum as such, or provide for the sharing of responsibilities ... [t]he *Convention* does not address the question of 'causes' of flight, or make provisions for prevention; its scope does not include internally displaced persons, and it is not concerned with the better management of international migration.⁴⁷

Apart from the *Refugee Convention* and its 1967 *Protocol*, rules that regulate forced displacement in the context of other phenomena are scattered across international humanitarian, criminal and human rights law. For example, the 1949 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* ('*Geneva Convention IV*') and the 1977 *Additional Protocol II to the Geneva Conventions* ('*Additional Protocol II*') prohibit the act of forcibly displacing civilians during armed conflict.⁴⁸ *Geneva Convention IV* prohibits 'deportations of protected persons from occupied territory to the territory of the

⁴² *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('*UDHR*').

⁴³ Philip Spencer, *Genocide since 1945* (Routledge, 2012) 1–8; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999) 37.

⁴⁴ *Genocide Convention* (n 42) arts II–V.

⁴⁵ *UDHR* (n 42) Preamble, art 1.

⁴⁶ Treaties have, however, been adopted under the auspices of the African Union (formerly the Organisation of African Unity) pertaining to refugees and internally displaced persons. The application of these treaties is limited to continental Africa. See, eg, *OAU Refugee Convention* (n 6); *Kampala Convention* (n 6).

⁴⁷ Guy S Goodwin-Gill, 'The International Law of Refugee Protection' in Elena Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 36, 45.

⁴⁸ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) arts 49, 147 ('*Geneva Convention IV*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 17 ('*Additional Protocol II*').

Occupying Power or to that of any other country, occupied or not ... regardless of their motive'⁴⁹ while *Additional Protocol II* prohibits parties to a conflict from ordering the displacement of civilians or compelling civilians to leave their territory.⁵⁰ However, this prohibition is not the principle but rather an exception within the framework of international humanitarian law that legitimises measures taken to achieve valid military objectives.⁵¹ Hence, imperative military reasons override such prohibition, as does the safety of civilians.⁵²

Under the *Rome Statute of the International Criminal Court*, '[d]eportation or forcible transfer of population' constitutes a crime against humanity when 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.⁵³ Similarly, '[u]nlawful deportation or transfer or unlawful confinement' and the 'transfer ... by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory' constitutes a war crime.⁵⁴

International human rights law also has rules pertaining to forced human displacement. Some of these rules are specific norms directly applicable to displacement while others provide a general framework of protection. The specific rules include the recognition of 'the right to seek and to enjoy in other countries asylum from persecution'.⁵⁵ The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*Convention against Torture*') also provides a specific norm of protection from refoulement, which complements the similar rule existing in the *Refugee Convention*.⁵⁶ The *Convention against Torture* provides that states shall not 'expel, return ("refouler") or extradite' a person to another state where the person may be subjected to torture.⁵⁷ Refugee scholars have highlighted this rule as providing one of the strongest legal bases for complementary protection to displaced persons.⁵⁸ Human rights law also guarantees the freedom of movement within the territory of a state in which a person is lawfully present.⁵⁹ This right includes

⁴⁹ *Geneva Convention IV* (n 48) art 49.

⁵⁰ *Additional Protocol II* (n 48) art 17.

⁵¹ David James Cantor, 'Does IHL Prohibit the Forced Displacement of Civilians during War?' (2012) 24(4) *International Journal of Refugee Law* 840, 841.

⁵² This is explicitly provided in *Additional Protocol II* (n 44) art 17.

⁵³ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) arts 7(1)(d).

⁵⁴ *Ibid* arts 8(2)(a)(vii)–(b)(viii).

⁵⁵ *UDHR* (n 42) art 14(1). See also *Declaration on Territorial Asylum*, GA Res 2312 (XXII), UN GAOR, 22nd sess, 1631st plen mtg, UN Doc A/RES/2312 (XXII) (14 December 1967).

⁵⁶ *Refugee Convention* (n 4) art 33(1).

⁵⁷ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3(1) ('*Convention against Torture*').

⁵⁸ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 113.

⁵⁹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(1) ('*ICCPR*').

the freedom to leave the territory of a state and has been interpreted to include protection against all forms of forced internal displacement.⁶⁰

Human rights law further provides a general framework of substantive and procedural protection in the treatment of all individuals, including displaced persons. Though international law recognises the sovereign authority of states to determine who can enter their territory, this right is by no means without constraints. Apart from the specific obligations imposed on states in this regard, such as the prohibition of refoulement, the human rights framework also imposes general obligations upon states once the individual has come in contact with the state. These include protection from discrimination, the right to liberty and security of the person, the right to a fair trial, equality before the law and other rights that provide foundational protections for vulnerable displaced persons.⁶¹ Of course it must be acknowledged that states have mixed records when it comes to compliance with their human rights obligations, and that individuals and vulnerable communities generally have very limited capacity to make or enforce rights claims against states.⁶²

B *Existing Gaps in International Law*

The existing normative frameworks under international law have been discussed above. However, the tendency to look upon international law ‘as the source of a pre-packaged programme of reforms’⁶³ that can provide solutions to forced human displacement — particularly when it involves the transnational movement of people — overlooks its serious impairments to achieve what is being called for. Forced human displacement poses unique challenges to the existing state-centric international legal order founded upon the notion of territorial sovereignty.

This section highlights two types of gaps that exist in international law pertaining to the regulation of forced human displacement. The first gap is in principles. There exists a measure of tension between certain foundational principles of international law and the phenomenon of forced displacement. The second gap is in the law. The existing legal framework regulating forced displacement is fragmented, post-facto in orientation and inadequate.

⁶⁰ See, eg, *ibid* art 12(2); Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [2].

⁶¹ See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 296–325.

⁶² See, eg, Jessica Wright, ‘The Cost of (Non)Compliance: An Exposé of the United States’ Immigration Detention Policy and Its Failure to Comply with International Standards on Torture’ (2017) 12 *Intercultural Human Rights Law Review* 315; Ian Brownlie, ‘The Individual before Tribunals Exercising International Jurisdiction’ (1962) 11(3) *International and Comparative Law Quarterly* 701; Jane McAdam, ‘Australia and Asylum Seekers’ (2013) 25(3) *International Journal of Refugee Law* 435; Violeta Moreno-Lax, Kaldor Centre for International Refugee Law, *The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia* (Policy Brief No 4, May 2017).

⁶³ Anne Orford, ‘A Jurisprudence of the Limit’ in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006) 1, 2.

1 Gap in Principles: Sovereignty, Territoriality and Non-Interference

The first challenge encountered in analysing forced displacement and international law is the discord between the two. Territorial sovereignty is a cornerstone principle of the international legal order. It secures to states the sovereign power to govern affairs that take place within their territory and entitles them to seek to cooperate with other states in respect of matters that transcend national boundaries.⁶⁴ International law, therefore, best functions when all the elements within a state — the territory, the people and the administration — are controlled and represented by the singularity of the state in the international fora.

At its core, forced human displacement involves the compelled movement of people who often cross national boundaries due to circumstances threatening lives and safety.⁶⁵ Such transboundary movement inevitably juxtaposes the individual, who has the right to *seek* asylum,⁶⁶ with a state that, by virtue of its territorial sovereignty, has no obligation to *grant* asylum and is empowered to secure its territory. The traditional position held in this regard considers the right of asylum as belonging to the state and not the individual.⁶⁷

Forcibly displaced persons, therefore, challenge the traditional thinking based on territoriality by breaking their bond with one sovereign and appearing before or entering the territory of another.⁶⁸ Claudena Skran points out:

Refugees also present a challenge to conventional ways of thinking about international politics. Since the *Treaty of Westphalia* in 1648, the international system has been made up of sovereign, territorially-based political units called states. ... Refugees do not fit neatly into the state-centric paradigm, which assumes that each individual belongs to a state. By severing their ties with their

⁶⁴ James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 203–5, 251–2.

⁶⁵ Note that territory is the distinguishing factor between refugees and internally displaced persons ('IDPs'). As such, international assistance and protection is geared more towards refugees who have crossed international boundaries while the concerned state is seen as the principal duty-bearer for IDPs within its territory. See Francis M Deng, 'Dealing with the Displaced: A Challenge to the International Community' (1995) 1(1) *Global Governance* 45, 51: 'The responsibility for meeting these needs for protection and assistance [of IDPs] rests first and foremost with national governments.'

⁶⁶ The right of an individual to seek asylum is enshrined in numerous international and regional instruments including *UDHR* (n 42) art 13(2) and *ICCPR* (n 59) art 12(2). See Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5(1) *Duke Journal of Comparative and International Law* 1, 3.

⁶⁷ See Kay Hailbronner, 'Refugees and Asylum: The West German Case' (1985) 8(4) *Washington Quarterly* 183, 183; Goodwin-Gill and McAdam (n 61) 358–69. See also Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12(1) *Melbourne Journal of International Law* 27, 47:

[T]he right to leave a country is not paralleled by a concomitant right to enter any country other than one's own. Thus, immigration remains within the sovereign domain of states, limited only by the principle of *non-refoulement* in refugee and human rights law, which prevents states from returning people to places where they would be at risk of persecution or other serious human rights violations, or where there is no other state that will admit them, such as where a person is stateless.

⁶⁸ Barbara Harrell-Bond, 'Refugees and the International System: The Evolution of Solutions' (Paper, Refugee Studies Centre, June 1995) 2 <<https://www.rsc.ox.ac.uk/files/files-1/r-refugees-international-system-1995.pdf>>, archived at <<https://perma.cc/S5ZZ-54Y7>>.

home countries, refugees can no longer depend on the diplomatic protection of their governments; yet they do not automatically and immediately become part of another state. Thus, refugees fall between the cracks of the state system: they are individuals operating internationally, without direct ties to one particular state.⁶⁹

The traditional thinking based on territory also has implications for the analysis of the responsibilities of actors for the displacements they cause. Scholars generally distinguish between root and proximate causes of displacement whose origin can be domestic, external or a combination of both.⁷⁰ Where domestic causes are concerned, the reach of international law is presumably constrained by virtue of sovereignty and the principle of non-interference in the domestic affairs of states.⁷¹ Therefore, where widespread human rights violation exists within a state, or where disaster strikes or ethnic conflict ensues, the primary responsibility to protect the human rights of the displaced and to respond to the situation lies with the state. Where external causes are concerned, however, international law does not place direct responsibilities upon the external actors with respect to the displacement their actions cause.

Even the success of placing primary responsibility upon the state for displacements occurring within its territory is uncertain owing to the socio-political frictions, economic constraints or institutional failures that led to the displacement in the first place. When the state plays an active role in causing the displacement of its citizens, either by persecuting them, violating their human rights, or failing to protect them from harm, mechanisms are needed to enable international law, primarily concerned with the regulation of extra-territorial matters, to play a role.⁷² These challenges have led some scholars to advocate for the conception of 'sovereignty' as a 'responsibility' and the doctrine of the 'responsibility to protect'.⁷³ These conceptions and doctrine are in turn highly criticised by the Third World as pretexts for unwarranted intervention.⁷⁴

⁶⁹ Skran, *Refugees in Inter-War Europe* (n 3) 3.

⁷⁰ External causes refer to the actions of foreign actors that result in displacement elsewhere. Root causes refer to the structural and deep-rooted socio-economic, legal and political conditions in a state that may exist over a long period. These include inequality, political repression, marginalisation and ethnic tensions in a society. Proximate causes on the other hand refer to sudden events that threaten the lives and safety of people. These include, for example, the actual break out of a conflict or genocide, or the occurrence of a natural hazard. See Christina Boswell, 'Addressing the Causes of Migratory and Refugee Movements: The Role of the European Union' (Working Paper No 73, UNHCR, 25 December 2002) 4–5; Susanne Schmeidl, 'Exploring the Causes of Forced Migration: A Pooled Time-Series Analysis, 1971–1990' (1997) 78(2) *Social Science Quarterly* 284, 287–9.

⁷¹ *Charter of the United Nations* arts 2(1), (7) ('UN Charter').

⁷² Invoking the doctrine of state responsibility is one such approach proposed by scholars. See, eg, Chaloka Beyani, 'State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law' (1995) 7 (Special Issue) *International Journal of Refugee Law* 130.

⁷³ See generally Francis M Deng et al, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution, 2010); Alex J Bellamy, *The Responsibility to Protect: A Defense* (Oxford University Press, 2015).

⁷⁴ For critics of the doctrine see generally Rama Mani and Thomas G Weiss (eds), *Responsibility to Protect: Cultural Perspectives in the Global South* (Routledge, 2011); Philip Cunliffe (ed), *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (Routledge, 2011).

2 Gaps in the Law: Fragmentation, Post-Facto Orientation and Inadequacy

Another difficulty in trying to regulate forced displacement in international law is the fact that relevant norms on the subject, highlighted above, are found scattered in various discrete areas of international law. There is no single body of international agreement — like the *Genocide Convention*,⁷⁵ the 1926 *Slavery Convention*,⁷⁶ or the *Convention against Torture*⁷⁷ — that comprehensively deals with the subject. Moreover, the existing refugee framework is reactive in disposition. It comes into play *after* displacement has occurred. Its rules are triggered and enacted only *after* displaced persons have crossed national boundaries. Even then, the primary concern is to provide assistance and protection to refugees.⁷⁸

On the other hand, rules and norms that are preventive in orientation and have strategic capacity to address the roots of forced human displacement — such as the *Charter of the United Nations* ('UN Charter'), human rights law and international humanitarian law — operate under separate international law regimes. The major causes of forced displacement, such as conflict, human rights violations, persecution, poverty, gross inequality and climate change, are addressed by a diverse collection of international and domestic legal regimes. This fragmentation creates issues of conflict and hierarchy.⁷⁹ The failure of the preventive regimes, manifested through violations of their norms, exacerbates the crisis of forced displacement.⁸⁰ Therefore, the international legal framework needs to reform and consolidate preventive mechanisms internally.

The inadequacy of the existing legal framework based in the *Refugee Convention* and its 1967 *Protocol* is another challenge. There is a consensus

⁷⁵ *Genocide Convention* (n 42).

⁷⁶ *Slavery Convention*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927).

⁷⁷ *Convention against Torture* (n 57).

⁷⁸ See Thea Philip, 'Climate Change Displacement and Migration: An Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a Way Forward for Australia' (2018) 19(2) *Melbourne Journal of International Law* 639, 654. See generally Guy S Goodwin-Gill, 'The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region' (2018) 30(4) *International Journal of Refugee Law* 674.

⁷⁹ This point was noted in the summary conclusions of the Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law organised by the UN High Commissioner for Refugees ('UNHCR') and the International Criminal Tribunal for Rwanda ('ICTR'): 'Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Arusha, Tanzania, 11–13 April 2011' (2011) 23(4) *International Journal of Refugee Law* 860, 861.

⁸⁰ See, eg, David L Cheng, 'Émigrés of the Killing Fields: The Deportation of Cambodian Refugees as a Violation of International Human Rights' (2005) 25(1) *Boston College Third World Law Journal* 221; Claire Henderson, 'Australia's Treatment of Asylum Seekers: From Human Rights Violations to Crimes against Humanity' (2014) 12(5) *Journal of International Criminal Justice* 1161.

among refugee scholars on this point.⁸¹ The definition of ‘refugee’ under the *Refugee Convention* is narrow⁸² and the *Refugee Convention* has not established an entity with authority to ‘resolve interpretive questions in a definitive fashion’.⁸³ The regime also fails to address the crucial concern of responsibility sharing among states.⁸⁴

Binding international law rules are also absent regarding internal displacement (there are almost twice the number of IDPs as refugees). According to the IDMC, there were 40 million internally displaced persons at the end of 2017.⁸⁵ Of these, 76% of the global conflict IDPs are found in just 10 Third World countries.⁸⁶ This fragmentation and such inability to deal with complex issues points towards the need for a new set of rules that capture the different kinds of displacements and widen the scope of response. Model instruments that comprehensively address forced displacement include the *Guiding Principles on Internal Displacement* and the *African Union Convention for the Protection and Assistance of Internally Displaced Persons* (‘*Kampala Convention*’).⁸⁷ These instruments define internal displacement, prohibit arbitrary displacement and prescribe the obligations of states before, during and after displacement. The *Kampala Convention* further establishes a Conference of States Parties to follow up its proper implementation.⁸⁸

C The Third World in Focus

As a consequence of territorial sovereignty, state autonomy is a critical concern when it comes to forced displacement and migration, particularly with

⁸¹ Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (Martinus Nijhoff, 1997) 62 (‘[c]ritical appraisals of the 1951 *Convention* definition have focused on its deficiencies due to its “political” nature and limited applicability as well as the fact that it does not correspond with the contemporary reality’); Jill I Goldenziel, ‘Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants, and States’ (2017) 35(1) *Berkeley Journal of International Law* 47, 54 (‘[t]he end of the Cold War led to a rise in civil conflict that was unforeseen by the drafters of the 1951 *Refugee Convention*. ... The 1951 *Refugee Convention* is unequipped for such a massive change in forced migration’); Luara Ferracioli, ‘The Appeal and Danger of a New Refugee Convention’ (2014) 40(1) *Social Theory and Practice* 123, 125 (‘[t]he current *Refugee Convention* is inapt to tackle the different vulnerabilities’).

⁸² Kourula (n 81); Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University Press, 2013) 13–4.

⁸³ James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 3.

⁸⁴ Goodwin-Gill, ‘The International Law of Refugee Protection’ (n 47) 45. See also Rebecca Dowd and Jane McAdam, ‘International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law’ (2017) 18(2) *Melbourne Journal of International Law* 180. Rebecca Dowd and Jane McAdam state that ‘the international community still has a long way to go before equitable responsibility sharing becomes a reality — notwithstanding states’ repeated rhetorical commitments to the principle’: at 199.

⁸⁵ Internal Displacement Monitoring Centre, *2018 Global Report on Internal Displacement* (Report, 16 May 2018) 48 <https://reliefweb.int/sites/reliefweb.int/files/resources/201805-final-GRID-2018-embargoed_0.pdf>, archived at <<https://perma.cc/AD7G-EAR4>> (‘*GRID 2018*’).

⁸⁶ *Ibid.*

⁸⁷ *Guiding Principles on Internal Displacement* (n 7); *Kampala Convention* (n 6).

⁸⁸ *Kampala Convention* (n 6) art 14.

respect to the admission of displaced persons into the territory of a state.⁸⁹ Accordingly, as can be seen from the history of multilateral engagement with the refugee problem, states have resisted assuming major legal obligations in this regard.⁹⁰ When forced displacement was a huge problem within Europe, European states provided solutions through the League of Nations ('LoN').⁹¹

Alongside the existing gaps in international law and the measure of resistance from states that contribute to the global displacement crisis, the Third World experiences additional layers of disadvantage due to its relationship to international law. This can be seen from two angles. First, the international law rules that developed in the early- and mid-20th century to regulate and respond to forced displacement were focused on displacement as it existed only in Europe. Third World displacement is therefore largely invisible under existing rules. Secondly, the Third World struggles to thrive in an international legal framework that is skewed in favour of the interests of Western states. It promotes the prosperity of the West while leaving the Third World facing an upward struggle.

TWAIL scholars argue that the development of international law is closely tied to colonialism. Antony Anghie points to 'the colonial origins of international law' and challenges the traditional conception of international law that considers the discipline as having been born out of the need to govern relations between sovereign states.⁹² Anghie argues:

European states were sovereign and equal. The colonial confrontation, however ... was not a confrontation between two sovereign states, but rather between a sovereign European state and a non-European society that was deemed by jurists to be lacking in sovereignty — or else, at best only partially sovereign. ... [W]hat passes now as the defining dilemma of the discipline, the problem of order among states, is a problem which, from the time of its origins, has been peculiar to the specificities of European history. And ... the extension and universalization of this European experience, which is achieved by transmuting it into the major theoretical problem of the discipline, has the effect of suppressing and subordinating other histories of international law and the peoples to whom it has applied.⁹³

Anghie's contention regarding the universalisation of specific European history can be demonstrated by analysing the topic of forced human displacement. The inauguration of a formal multilateral initiative to address forced displacement is traced to the LoN.⁹⁴ No such formal undertaking existed at the international level previously. There are three relatively distinctive periods to analyse the development of laws and institutions regulating forced displacement: pre-LoN, LoN and United Nations eras. Considering the

⁸⁹ E Tendayi Achiume, 'Reimagining International Law for Global Migration: Migration as Decolonization?' (2017) 111 *AJIL Unbound* 142, 142.

⁹⁰ Gil Loescher, 'The International Refugee Regime: Stretched to the Limit?' (1994) 47(2) *Journal of International Affairs* 351, 351 ('The International Refugee Regime').

⁹¹ See Erika Feller, 'The Evolution of the International Refugee Protection Regime' (2001) 5 *Washington University Journal of Law and Policy* 129, 130. See generally Skran, *Refugees in Inter-War Europe* (n 3).

⁹² Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 19) 3.

⁹³ *Ibid* 5.

⁹⁴ Gilbert Jaeger, 'On the History of the International Protection of Refugees' (2001) 83(843) *International Review of the Red Cross* 727, 727.

relationship between international law and the Third World during these periods, therefore, helps us to understand how Third World displacement was addressed while the rules of international law evolved.

In considering the pre-LoN period, forced human displacement is thought to have existed since antiquity.⁹⁵ Historical evidences show that people have always been on the move, either voluntarily or forcibly, in search of resources, better living or environmental conditions, escaping conflicts, fleeing persecutions or avoiding environmental hazards.⁹⁶ This is true of all parts of the world and all societies. However, forced movements have displayed distinctive features across the world, occurring in diverse social, political and environmental settings.

In Westphalia Europe, recognised by territoriality and sovereignty principles, forced movements were characterised in the context of relations between states with relatively defined territories. Religious conflict was the major cause of displacement at the time. The flight of the Huguenots, French Protestants who fled France following the revocation of the *Edict of Nantes* that granted religious tolerance, is one such example.⁹⁷ The Huguenots defied ordinances that prohibited them from leaving France and fled across Europe in search of safety. The liberal immigration stance that existed in Europe before the First World War⁹⁸ and the openness of states to people with similar religious beliefs meant that persecuted people stood a good chance of finding refuge based on the willingness of individual states to receive displaced persons.⁹⁹

In the rest of the world, where the Westphalian approach did not apply, similar movements were characterised in the context of communal and ethnic relations. Migration, and perhaps forced displacement, existed in Africa 'long before regular contact with Europe'.¹⁰⁰ In his 2011 Nansen Lecture, Chaloka Beyani noted the positive effect that migration had in pre-colonial Africa in terms of 'resolving protracted conflicts as defeated communities migrated

⁹⁵ Refugee and migration scholars usually mention this point at the start of their discussions. See, eg, Betts, Loescher and Milner (n 1) 1 ('refugee flows date back to pre-modern times'); UNHCR, *The State of the World's Refugees 2000* (n 1) 1 ('[t]hroughout history, people have had to abandon their homes and seek safety elsewhere to escape persecution, armed conflict or political violence'); David Hollenbach, 'Introduction: Human Rights and New Challenges of Protecting Forced Migrants' in David Hollenbach (ed), *Driven from Home: Protecting the Rights of Forced Migrants* (Georgetown University Press, 2010) 1, 1 ('[p]eople have been driven from their home by wars, unjust treatment, earthquakes, and hurricanes throughout human history. The reality of forced migration is not new'). For brief historical examples of displacement, from ancient to modern times, see generally Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Martinus Nijhoff, 2012) ch 2; F Jacques-da-Silva, 'The World Refugees and the United Nations' (1966) 19(4) *Pakistan Horizon* 330. See also *Global Compact on Migration*, UN Doc A/RES/73/195 (n 9) para 8 ('[m]igration has been part of the human experience throughout history').

⁹⁶ See generally Dawson and Farber (n 95).

⁹⁷ See Aristide R Zolberg, Astri Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press, 1989) 5.

⁹⁸ Bentwich (n 11) 115; Hathaway (n 2) 348.

⁹⁹ David van der Linden, *Experiencing Exile: Huguenot Refugees in the Dutch Republic, 1680–1700* (Ashgate, 2015) 2; Betts, Loescher and Milner (n 1) 7–8.

¹⁰⁰ Michael J Schultheis, 'Refugees in Africa: The Geopolitics of Forced Displacement' (1989) 32(1) *African Studies Review* 3, 3.

elsewhere in search of peaceful environments, security, livelihoods, water, and resources'.¹⁰¹

However, colonialism and its introduction of borders in the Third World significantly altered relations among communities. First, the colonial invasion itself induced displacement of communities by forcefully claiming territories.¹⁰² Glen Peterson argued that the colonial project, with its unapologetic bias against the people of the colonial world and its view of them as objects of governance, was 'not peripheral or incidental, but central to the historical formation and evolution of the international regimes governing refugees and forced migrants'.¹⁰³ Secondly, the introduction of borders inhibited movements for communities and remains one of the causes of conflict between and within Third World countries. Beyani stated that

[c]reation of the colonial states did not just constrain migration in time and space; it also destroyed existing economic, social, and political ties, denied communities ownership of resources and access to them. Colonial domination and control thus forcibly displaced many communities from their lands and source of livelihood, restricting their residence to specific areas in which economic productivity and livelihoods were poor.¹⁰⁴

Thirdly, anti-colonial struggles also resulted in massive displacements.¹⁰⁵ The 1960s saw a shift of international focus from Europe to Africa with respect to the management of forced displacement. It is estimated that the number of displaced persons in Africa jumped from 300,000 to 700,000 between the years 1963–66.¹⁰⁶ Fourthly, as argued by Tendayi Achiume, colonialism, by enabling European migration to the Third World, created a 'structure of co-dependence' that later resulted in a decolonisation 'understood as international movement that responds to the asymmetrical benefits structure of co-dependence in the contemporary global order and seeks to achieve a more equitable relationship between centre and periphery'.¹⁰⁷

¹⁰¹ Chaloka Beyani, 'Migration in Africa: An Enduring Phenomenon?' (Nansen Lecture, Johannesburg, 15 September 2011) 1 <<http://www.un.org.za/wp-content/uploads/2011/09/beyani.pdf>>, archived at <<https://perma.cc/6MCC-UGJV>>.

¹⁰² Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *Postcolonial Studies: The Key Concepts* (Routledge, 3rd ed, 2013) 87.

¹⁰³ Glen Peterson, 'Forced Migration, Refugees and China's Entry into the "Family of Nations", 1861–1949' (2018) 31(3) *Journal of Refugee Studies* 274, 274 ('Forced Migration').

¹⁰⁴ Beyani, 'Migration in Africa: An Enduring Phenomenon?' (n 101) 1–2.

¹⁰⁵ Mekuria Bulcha, 'Historical, Political and Social Causes of Mass Flight from Ethiopia' in Peter Nobel (ed), *Refugees and Development in Africa* (Scandinavian Institute of African Studies, 1987) 19, 20–1; Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press, 2009) 5; Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (n 30) 359.

¹⁰⁶ Susan Kneebone and Felicity Rawlings-Sanaei, 'Introduction: Regionalism as a Response to a Global Challenge' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn Books, 2007) 1, 5.

¹⁰⁷ Achiume (n 89) 142, 143. Achiume argues international law's stringent protection of the state's right to exclude noncitizens is the 'root of international law's dysfunctional relationship with international mobility' and that reimagining the relationship between the state and noncitizens as a feature of state sovereignty remains a challenge: at 142. She further proposes the reconceptualisation of this relationship as a decolonisation understood as a 'geopolitical reordering of benefits of a global order defined by interdependence forged in the colonial era': at 145.

The creation of the LoN ushered in a new era for global politics and multilateral relations. International law undertook rapid development as the LoN furnished the institutional forum needed. International cooperation on the topic of forced displacement was one of the areas that the LoN, no matter how reluctantly, set out to support, during an inter-war period that brought rapid changes in policy, laws and institutional frameworks.¹⁰⁸

However, states did not assume major obligations towards displaced persons. Their actions within the LoN were highly reserved and the LoN was not granted authority that would constrain the sovereign power of states on the matter.¹⁰⁹ The episodes of displacement during this period were treated on an ad hoc basis and attempts to come up with a general framework to regulate displacement were limited. Displacement was generally seen as a temporary problem that could be solved once and for all.¹¹⁰

The same trend continued after the UN was created. The LoN era sentiment that human displacement is a temporary crisis requiring temporary measures remained with a focus on displacement occurring in Europe.¹¹¹ The refugee regime introduced by the UN, and based on the *Refugee Convention* and its 1967 *Protocol*, was a result of the evolution and experimentation of rules, policies and institutions in response to episodes of forced displacement in Europe during the inter-war period.¹¹² This led to the adoption of a narrower definition of a refugee with individualistic orientation. The individualistic orientation of the definition of 'refugee' under the *Refugee Convention* would not have worked within Europe in the inter-war period where forced displacement was characterised by group and mass movements.¹¹³ Today, however, an individualistic orientation presents states with the maximum opportunity to refuse entry now that times of mass displacement in Europe have passed.¹¹⁴

During this period of the development of international legal and institutional frameworks of response to forced displacement, much of Africa, Asia and the

¹⁰⁸ See Louise W Holborn, 'The League of Nations and the Refugee Problem' (1939) 203 *Annals of the American Academy of Political and Social Science* 124, 125.

¹⁰⁹ Michael R Marrus, *The Unwanted: European Refugees in the Twentieth Century* (Oxford University Press, 1985) 158.

¹¹⁰ Louise W Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951–1972* (Scarecrow Press, 1975) vol 1, 36 ('Refugees'); Bentwich (n 11) 115. This can also be seen from the fact that it was not until 2004 that the UN General Assembly decided to remove the temporal limitation on the operation of the UNHCR and prolong its operational mandate indefinitely ('until the refugee problem is solved'): *Implementing Actions Proposed by the United Nations High Commissioner for Refugees to Strengthen the Capacity of His Office to Carry Out Its Mandate*, GA Res 58/153, 58th sess, 77th plen mtg, Agenda Item 112, UN Doc A/RES/58/153 (24 February 2004, adopted 22 December 2003) para 9.

¹¹¹ See Holborn, *Refugees* (n 110) 35. Holborn noted: 'In setting up the [International Refugee Organisation], the UN members had considered the refugee problem as an immediate post-war problem and assumed that it could be solved in a limited time by international cooperation and financing.'

¹¹² Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 37, 52.

¹¹³ See Marrus (n 109). Michael Marrus discusses the refugee movements within Europe in the 20th century but notes that '[m]any refugees considered ... would not meet the current United Nations definition': at 11.

¹¹⁴ Zara Steiner, 'Refugees: The Timeless Problem' in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe 1919–1959: A Forty Years' Crisis?* (Bloomsbury, 2017) 21, 23.

Middle East were under colonial rule. The struggle for independence was also gradually intensifying. However, the forced displacements outside of Europe were invisible to the LoN and its predominantly European member states, and subsequently to the UN. The Third World and the displacement crisis that was occurring therein was disregarded by these multilateral engagements even though colonial Europe was directly responsible in many ways.¹¹⁵

An ongoing bias against Third World displacement is powerfully demonstrated by the self-serving shifts in the policy stance of Global North states. BS Chimni noted: 'In the post-1945 period the policy of Northern states has moved from the neglect of refugees in the Third World, to their use as pawns in Cold War politics, to their containment now.'¹¹⁶

In acceding to European norms and institutions after independence, the Third World embraced solutions fine-tuned to a European context. Third World displacement during struggles for independence, after independence and to some extent even today, resemble those of the inter-war period displacements.¹¹⁷ The existing legal framework is therefore simply not fit for purpose.

As a result, the Global South continues to host the highest number of displaced persons within a weak framework of responsibility sharing under international law.¹¹⁸ There is a growing inclination by major state actors to pursue unilateral protectionist approaches focused on the protection of their borders.¹¹⁹ Such approaches continue to propagate the problem. They also continue the failures that have existed since the LoN initiated multilateral

¹¹⁵ The adoption of the standard of civilisation requirement within the *Treaty of Versailles* also excluded most of the colonial nations from participation in the LoN. See, eg, Peterson, 'Forced Migration' (n 103) 283–6. See also Glen Peterson, 'The Uneven Development of the International Refugee Regime in Postwar Asia: Evidence from China, Hong Kong and Indonesia' (2012) 25(3) *Journal of Refugee Studies* 326, 327–8. Some authors have noted that refugee movements did exist outside of Europe during the inter-war period, though the LoN did not deal with them. Sir John Hope Simpson, *The Refugee Problem: Report of a Survey* (Oxford University Press, 1939) 1: Simpson acknowledged that, though his survey was concerned only with European refugees, refugee movements did exist outside of Europe.

¹¹⁶ Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (n 30) 350 (citations omitted).

¹¹⁷ Prominent refugee scholars have pointed to the similarities between the forced movements in inter-war Europe and in the Third World. See, eg, Skran, 'Profiles of the First Two High Commissioners' (n 11) 277 ('[i]n the Interwar Period, the European continent experienced mass refugee movements similar to those taking place in the developing world today'). See also Loescher, *Beyond Charity* (n 11) 32 ('[a]fter both world wars, Europe experienced refugee flows similar to those taking place in the Third World today').

¹¹⁸ Adrian Edwards, 'Forced Displacement at Record 68.5 Million', *UNHCR* (News Report, 19 June 2018) <<https://www.unhcr.org/en-au/news/stories/2018/6/5b222c494/forced-displacement-record-685-million.html>>, archived at <<https://perma.cc/CQ3D-PTT5>>.

¹¹⁹ States have taken unilateral measures aimed at discouraging potential asylum seekers from coming to their borders. Some of these measures pertain to interdiction on the high seas, offshore and inland detention, and externalisation of migration controls. See generally Peter Hilpold, 'Unilateralism in Refugee Law: Austria's Quota Approach under Scrutiny' (2017) 18(3) *Human Rights Review* 305; Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4(4) *Journal on Migration and Human Security* 190; Patrick van Berlo, 'The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality' (2017) 17(1) *Human Rights Law Review* 33.

engagement, namely the hesitation to tackle the root causes of displacement with an active sense of international cooperation.¹²⁰

IV THE DEMANDS OF DURABLE SOLUTIONS TO THIRD WORLD DISPLACEMENT

The traditional understanding of durable solutions within the refugee framework primarily focuses on voluntary repatriation, local integration or third country resettlement.¹²¹ These solutions are wholly concerned with the protection and assistance of people who are already displaced. Preventive approaches that aim to remove or minimise the root causes of forced displacement have not yet been integrated into the law.¹²² A preventive and comprehensive engagement before displacement occurs is sorely lacking. Without the adoption and implementation of a new approach, Third World displacement is likely to continue unabated.

A *Prevention and Addressing Root Causes*

Forced displacement does not occur in a vacuum. Rather, people are forced to flee due to a constant dynamic of root and proximate causes that affect lives and safety.¹²³ The awareness of the need to strategically deal with the root causes of forced displacement has existed since the appointment of the first two High Commissioners for Refugees: Fridtjof Nansen and James McDonald.¹²⁴ However, the two differed on whether this should form part of their mandate.¹²⁵ The consequent failure to seriously consider and devise mechanisms to address

¹²⁰ Alison Siskin, 'People Crossing Borders: An Analysis of US Border Protection Policies' (CRS Report No R41237, Congressional Research Service, 13 May 2010) 47.

¹²¹ Goodwin-Gill and McAdam (n 61) 489–500.

¹²² By 'law of forced displacement', we are mainly referring to the specific international agreements on the topic of displaced persons such as the 1951 *Refugee Convention* (n 4) and its 1967 *Protocol* (n 5), the *Kampala Convention* (n 6) and the *OAU Refugee Convention* (n 6). These international agreements are silent on the issue of prevention: see Goodwin-Gill, 'The International Law of Refugee Protection' (n 47) 45. However, the soft laws on the topic, such as the *Guiding Principles on Internal Displacement* and the recently adopted *Global Compact on Refugees* and the *Global Compact on Migration* have highlighted prevention as a crucial strategy: see *Guiding Principles on Internal Displacement* (n 7) principle 5; *Global Compact on Refugees*, UN Doc A/73/12 (n 8) [8]–[9], [85]; *Global Compact on Migration*, UN Doc A/RES/73/195 (n 9) paras 2, 16, 22, 24–7, 32–3.

¹²³ See Schmeidl (n 70) 286; Boswell (n 70) 7.

¹²⁴ Skran, 'Profiles of the First Two High Commissioners' (n 11) 278: 'the High Commission had the humanitarian responsibility to assist refugees and serve as their advocate in a world of states. At times, this meant dealing with the major cause of refugee movements — human rights violations perpetrated by governments.'

¹²⁵ Fridtjof Nansen generally desired to maintain neutrality and impartiality in the exercise of his mandate. He urged the LoN to take responsibility as regards the causes of displacement: see *ibid* 283. James McDonald was of the opposite view. He wanted the High Commissioner's office to actively engage with states to prevent the causes of displacement: see *ibid* 292, 294. McDonald particularly condemned the LoN for its failure to call upon Germany to desist from pursuing a policy of repression and persecution of non-Aryans. His call, which still resounds today, was to take actions to remove or mitigate the causes of forced human displacement: see Letter from James G McDonald, High Commissioner for Refugees (Jewish and Other) to Secretary General of the League of Nations, 27 December 1935, [5]–[6], [9], [15] <<https://www.wdl.org/en/item/11604/>>, archived at <<https://perma.cc/GD9Q-Q9N5>>. See also Harrell-Bond (n 68) 4.

root causes has contributed to the ever-rising number of displaced persons since the 1920s.¹²⁶

Therefore, together with the implementation of traditional solutions, devising strategies to preventively remove or minimise the root causes of displacement must be embraced as part of a durable solution. The existing international legal framework provides a foundation. The principle of prevention is already recognised in international law. International law itself can be understood as a project of prevention of global ills through the regulation of the relations of sovereign states with each other and the relation of states with their citizens. Arthur Helton stated that '[i]n some sense, the entire corpus of public international law can be seen as an effort in crisis prevention'.¹²⁷ The *UN Charter* and discrete areas of international law also enshrine the principle of prevention.¹²⁸ States likewise commit to work on the prevention of underlying causes of forced human displacement.¹²⁹ Two examples of the importance of preventive strategies that aim to address root causes are the recently adopted *Global Compact on Refugees* and the *Global Compact on Migration*.¹³⁰

¹²⁶ Loescher, 'The International Refugee Regime' (n 90) 352, 354–5, 365.

¹²⁷ Arthur C Helton, 'A Note on the Legal Dimensions of Preventing Forced Migration' (2000) 94 *American Society of International Law Proceedings* 137, 137.

¹²⁸ Prevention is reflected in the determination 'to save succeeding generations from the scourge of war' under the Preamble, and the provision for the pacific settlement of disputes under ch VI: *UN Charter* (n 71) Preamble, ch VI. Prevention is also a principle in international human rights, humanitarian and environmental laws: see generally Nienke van der Have, *The Prevention of Gross Human Rights Violations under International Human Rights Law* (Springer, 2018). See, eg, Human Rights Council, *The Role of Prevention in the Promotion and Protection of Human Rights*, HRC Res 24/16, 35th mtg, 24th sess, Agenda Item 3, UN Doc A/HRC/RES/24/16 (8 October 2013) para 2 (duty to prevent human rights violation); *Velásquez-Rodríguez v Honduras (Merits)* (Inter-American Court of Human Rights, Series C No 4, 29 July 1988) [174] ('[t]he State has a legal duty to take reasonable steps to prevent human rights violations'); Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 96(895–6) *International Review of the Red Cross* 707 (obligation to prevent violations of international humanitarian law); Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 3rd ed, 2012).

¹²⁹ See, eg, *New York Declaration for Refugees and Migrants*, GA Res 71/1, UN GAOR, 71st sess, Agenda Items 13 and 117, UN Doc A/RES/71/1 (3 October 2016, adopted 19 September 2016) paras 12, 17, 20, 34, 64, 72.

¹³⁰ See *Global Compact on Refugees*, UN Doc A/73/12 (n 8) [8]:

Protecting and caring for refugees is life-saving for the individuals involved and an investment in the future, but importantly needs to be accompanied by dedicated efforts to address root causes. While not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements. In the first instance, addressing root causes is the responsibility of countries at the origin of refugee movements. However, averting and resolving large refugee situations are also matters of serious concern to the international community as a whole, requiring early efforts to address their drivers and triggers, as well as improved cooperation among political, humanitarian, development and peace actors.

See also *Global Compact on Migration*, UN Doc A/RES/73/195 (n 9) para 12:

This *Global Compact* aims to mitigate the adverse drivers and structural factors that hinder people from building and maintaining sustainable livelihoods in their countries of origin, and so compel them to seek a future elsewhere.

B Comprehensive Response

A self-contained, singular engagement with the problem of forced displacement will not yield positive results in the presence of multidimensional challenges that exacerbate inequality and widen the gap between the Global North and South. With little progress being made towards the swift resolution of international disputes, conflict and war will continue to displace people. If we do not address the international economic structures that continue to perpetuate economic inequality and poverty in certain sections of the globe, poverty and unemployment will continue to force people out of their countries. Until we stand up to the challenge of global climate change, environmental hazards, disasters, drought and desertification will continue to drive people out.

The solution to forced displacement cannot be attained merely through a selective legal reform. Though the inadequacy and unresponsiveness of international law rules plays its part in aggravating the crisis, the solution requires much more than targeted reforms to the regime governing forced displacement. Any contemplated legal reform needs to be comprehensive in its identification and dismantling of unequal structures that play a role in creating circumstances that compel people to flee. This in turn requires an unprecedented measure of willingness to cooperate strategically to address the root causes of forced displacement.

Current global initiatives such as the *Sustainable Development Goals* ('SDGs'),¹³¹ the *Global Compact on Refugees*¹³² and the *Global Compact on Migration*¹³³ recognise that engagement and cooperation are essential. A common feature of these initiatives is the preventive aspect they embrace and the comprehensive approach they pursue in their respective substantive areas of focus.

The resolution adopting the *SDGs* declares that its goals and targets are 'comprehensive, far-reaching and people-centred'.¹³⁴ Among others, states expressed their resolve to

end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources.¹³⁵

The *Global Compact on Refugees* is another important initiative. Adopted by the UN General Assembly on 17 December 2018,¹³⁶ the *Global Compact on Refugees* identified four objectives: '(i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity'.¹³⁷

¹³¹ *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th sess, 4th plen mtg, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015) ('*Sustainable Development Goals*').

¹³² *Global Compact on Refugees*, UN Doc A/73/12 (n 8) [2], [4].

¹³³ *Global Compact on Migration*, UN Doc A/RES/73/195 (n 9) paras 6–7.

¹³⁴ *Sustainable Development Goals*, UN Doc A/RES/70/1 (n 131) para 2.

¹³⁵ *Ibid* para 3.

¹³⁶ 'The Global Compact on Refugees', *UNHCR* (Web Page) <<https://www.unhcr.org/en-au/the-global-compact-on-refugees.html>>, archived at <<https://perma.cc/PQU3-B7MY>>.

¹³⁷ *Global Compact on Refugees*, UN Doc A/73/12 (n 8) [7].

The *Global Compact on Refugees* was born out of the *New York Declaration for Refugees and Migrants* ('*NY Declaration*') which also endorsed the need for a Comprehensive Refugee Response Framework ('CRRF').¹³⁸ The CRRF is a multi-stakeholder approach involving local, national and international actors that aims to 'protect and assist refugees and support the host states and communities' by promoting international cooperation and responsibility sharing.¹³⁹

The *NY Declaration* envisaged the CRRF as a model approach to be developed and implemented with respect to 'each situation involving large movements of refugees'.¹⁴⁰ The CRRF pays particular attention to responsibilities regarding reception and admission, support for immediate and ongoing needs, support for host countries and communities, and the pursuit of durable solutions. As of April 2019, 15 countries have started to roll out a CRRF approach to better handle their responsibilities as states of origin, transit and/or destination.¹⁴¹

Meanwhile, the *Global Compact on Migration* attempts to enhance states' cooperation on migration. The *Compact* identified 23 objectives, one of which is the need to '[m]inimize the adverse drivers and structural factors that compel people to leave their country of origin'.¹⁴² It clearly aims at a proactive engagement at the local, national and international level to 'create conducive political, economic, social and environmental conditions for people to lead peaceful, productive and sustainable lives in their own country'.¹⁴³ The *Global Compact on Migration* states that it is rooted in the *SDGs* and that in order to achieve these objectives, the *Compact* emphasises promoting the implementation of the *SDGs* and investing in programs that accelerate their fulfilment.¹⁴⁴

C A TWAIL Perspective on Prevention and Comprehensive Response

The need to address the root causes of forced displacement is particularly acute when considering the Third World. The scepticism of Third World scholarship towards international tools of governance is often based on the tendency of intergovernmental solutions to disguise hegemonic ambitions and further domination. One of the strongest TWAIL criticisms of international law concerns the use of international law as a hegemonic tool to advance the economic, social and political interests of the West at the expense of the rest.¹⁴⁵ TWAIL scholars have strongly argued that the foundation of the global inequity that we observe today was laid down in the colonial encounter and in the creation

¹³⁸ *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (n 129) paras 11, 69, 72.

¹³⁹ *Ibid* annex I ('*Comprehensive Refugee Response Framework*') para 1.

¹⁴⁰ *Comprehensive Refugee Response Framework*, UN Doc A/RES/71/1 (n 139) para 2.

¹⁴¹ These countries are Afghanistan, Belize, Chad, Costa Rica, Djibouti, Ethiopia, Guatemala, Honduras, Kenya, Mexico, Panama, Rwanda, Somalia, Uganda, and Zambia. UNHCR, *Two Year Progress Assessment of the CRRF Approach: September 2016 – September 2018* (Evaluation Report No ES/2018/07, December 2018) 17 <<http://www.globalcrrf.org/wp-content/uploads/2019/04/Two-Year-Progress-Assessment-of-the-CRRF-Approach-Sep-2016-Sep-2018.pdf>>, archived at <<https://perma.cc/7EGE-63QF>>.

¹⁴² *Global Compact on Migration*, UN Doc A/RES/73/195 (n 9) paras 12, 16, 18.

¹⁴³ *Ibid* para 18.

¹⁴⁴ *Ibid*.

¹⁴⁵ See Okafor (n 15) 176–7.

of an international legal framework that furthers the unequal structures introduced therein.¹⁴⁶ This built-in bias in favour of the West therefore continues to prosper the North while impoverishing the South.

The domination of Western states and institutions of the knowledge production in international law contributes to the problem.¹⁴⁷ Western nations also retain the power to push this knowledge into forums of decision-making, thereby crystallising and universalising them. The agenda of preventing and addressing root causes can also be framed in ways that seek to promote self-serving agendas. In his article, 'The Geopolitics of Refugee Studies: A View from the South', Chimni critiques the predominantly internalist explanation of the root causes of refugee flows and the 'refusal to take an externalist view'.¹⁴⁸ In this regard, he discussed the 'new agenda for democratic theory'¹⁴⁹ as pushing for the accountability of the state for its external actions. Chimni stated:

[The new democratic theory] squarely rejects the internalist explanation for this is overly deferential to the boundaries of nation-states, refusing to come to terms with the idea that external social forces often crucially shape internal policies of states. To recognize this fact of course means to take the idea of global distributive justice seriously. This is an idea which leading Western thinkers find difficult to endorse.¹⁵⁰

In her analysis of the post-Cold War collective security system and its embrace of humanitarian intervention as a tool, Anne Orford similarly noted the reluctance shown during this period to implicate international law and the activities of international institutions with respect to the role they played in destabilising nations.¹⁵¹ Orford noted that state or local actors were typically characterised as the principal threats to human rights, democracy and security,¹⁵² while international actors were characterised as the custodians of these values and as saviours whose intervention was necessary to remedy a crisis.¹⁵³

This tendency to put the blame on the 'other' continues to pervade the discourse on forced displacement, human rights, democracy and security. Chimni

¹⁴⁶ In this regard, Antony Anghie argues that many of the doctrines of international law were developed by the application of what he termed the 'dynamic of difference' which denotes 'the endless process of creating a gap between two cultures, demarcating one as "universal" and civilized and the other as "particular" and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society': Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 19) 4. Makau Mutua also observes that '[a]s demonstrated by early European scholarship, international law [was] developed in — and was instrumental in — the encounter between Europe and the rest of the world. The notion of sovereignty itself was the key to justifying, managing, and legitimizing colonialism': Makau Mutua, 'What Is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31, 33.

¹⁴⁷ See Anghie and Chimni (n 18) 86–7.

¹⁴⁸ Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (n 30) 361.

¹⁴⁹ Ibid 362, quoting Anthony McGrew, 'Democracy beyond Borders? Globalization and the Reconstruction of Democratic Theory and Politics' in Anthony McGrew (ed), *The Transformation of Democracy? Globalization and Territorial Democracy* (Polity Press, 1997) 231, 231.

¹⁵⁰ Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (n 30) 362 (citations omitted).

¹⁵¹ Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38(2) *Harvard International Law Journal* 443, 475–6.

¹⁵² Ibid 449.

¹⁵³ Ibid 482.

observed this with regard to the *Global Compact on Refugees*, which he characterised as a ‘one step forward, two steps back’ effort.¹⁵⁴ He noted that though the *Global Compact on Refugees* duly recognised the importance of addressing the root causes of refugee flows, it nevertheless failed to indicate ‘the responsibility of third States, in particular Western States, for recent outflows of refugees linked to their acts of intervention’.¹⁵⁵

The Syrian displacement crisis is a case in point.¹⁵⁶ One of its striking features is that ever since the start of hostilities in 2011, the conflict has seen the involvement of foreign powers in backing and arming different sides. Members of the UN Security Council have been divided in their response and have unilaterally backed opposing sides in the conflict.¹⁵⁷ In light of this, to characterise the Syrian displacement crisis as wholly resulting from the actions of internal actors and disregard the actions of foreign actors would be to mischaracterise it.¹⁵⁸ However, most literature on this topic is focused on the crisis the displacement caused in Europe.¹⁵⁹ They abstain from addressing the

¹⁵⁴ BS Chimni, ‘Global Compact on Refugees: One Step Forward, Two Steps Back’ (2018) 30(4) *International Journal of Refugee Law* 630.

¹⁵⁵ Ibid 630: ‘The major refugee outflows in recent years have been from Afghanistan, Iraq, Libya, and Syria, all of which have been the objects of armed intervention or responsibility-to-protect efforts of Western States.’

¹⁵⁶ The Syrian War has generated a large number of displaced persons and has been dubbed the ‘worst humanitarian disaster since the end of the cold war’: Benedetta Berti, ‘The Syrian Refugee Crisis: Regional and Human Security Implications’ (2015) 17(4) *Strategic Assessment* 41, 41, quoting Howard LaFranchi, ‘World Refugee Day: UN Calls Syria “Worst Humanitarian Disaster” since Cold War’, *Christian Science Monitor* (online, 20 June 2013) <<https://www.csmonitor.com/USA/Foreign-Policy/2013/0620/World-Refugee-Day-UN-calls-Syria-worst-humanitarian-disaster-since-cold-war>>, archived at <<https://perma.cc/5CC5-BFCP>>. According to the UNHCR, 5.6 million Syrians have been displaced out of their country and 6.6 million have been displaced internally since the conflict began in 2011: ‘Syria Emergency’, *UNHCR* (Web Page) <<https://www.unhcr.org/syria-emergency.html>>, archived at <<https://perma.cc/FT3J-K3XP>>.

¹⁵⁷ See ‘Syria: Events of 2018’, *Human Rights Watch* (Web Page) <<https://www.hrw.org/world-report/2019/country-chapters/syria>>, archived at <<https://perma.cc/G2Y7-B2EV>>. On the involvement of various foreign powers, see Julian Borger, ‘Syria: Who Are the Key Players in the Conflict?’, *The Guardian* (online, 14 April 2018) <<https://www.theguardian.com/world/2018/apr/14/syria-conflict-assad-putin-russia-iran-israel>>, archived at <<https://perma.cc/723U-DQER>>. On the arming of Syrian fighters, see David E Sanger, Eric Schmitt and Ben Hubbard, ‘Trump Ends Covert Aid to Syrian Rebels Trying to Topple Assad’, *The New York Times* (online, 19 July 2017) <<https://www.nytimes.com/2017/07/19/world/middleeast/cia-arming-syrian-rebels.html>>, archived at <<https://perma.cc/9F7R-7WKN>>.

¹⁵⁸ Anghie and BS Chimni have critiqued this tendency to de-emphasise international factors by citing the conflicts in Yugoslavia and Rwanda. See Anghie and Chimni (n 18) 89–90 (citations omitted):

In both cases ... it is clear that policies authored by international financial institutions (IFIs), the World Bank and the International Monetary Fund, in which powerful actors of the international system play a dominant role, were in part responsible for creating the wider environment in which these human rights violations took place. Thus any attempt to identify responsibility for these tragedies and to create systems of accountability should also inquire into the roles that these other international actors played in promoting and exacerbating the situation.

¹⁵⁹ See, eg, François Heisbourg, ‘The Strategic Implications of the Syrian Refugee Crisis’ (2015) 57(6) *Survival* 7; Berti (n 156); Nicole Ostrand, ‘The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States’ (2015) 3(3) *Journal on Migration and Human Security* 255.

crisis that generated and continues to generate displacement in the first instance. At the very least, in addition to the responsibility of the internal actors, a critical reflection on the matter should apportion collective responsibility to the Security Council for its failures to advance peace, and individual responsibility to the countries that arm opposing sides or actively use force to further their own foreign policy objectives.

Another example is the recent ‘caravan’ of Hondurans travelling on foot to the United States.¹⁶⁰ A highly partisan debate in the US continues to argue whether the portrayal of migrants as ‘criminals’ or as a ‘security threat’ is accurate or not. There has been extensive debate about the treatment of migrants at the border or after arrival but any discussion about the historical context of displacement from Central America is kept to the periphery. Bipartisan US efforts to destabilise Latin American countries to advance political and corporate interests have occurred for over a century.¹⁶¹ Most relevant to Honduras, the Obama administration (with Hillary Clinton as Secretary of State) tacitly supported the 2009 coup against the democratically elected government of Manuel Zelaya and supported a US ‘business-friendly’ post-coup government, under which the murder rate has skyrocketed, while repression and violence against activists, minorities and political opponents has thrived.¹⁶² This is what people in the ‘caravan’ are fleeing — however, a discussion of root causes does not fit the political narrative of either major US party.¹⁶³

The agenda of prevention needs to be framed carefully to enable us to dispense with the structural constraints in international law that continually feed growing inequality, marginalisation and North–South divide. These structural constraints can be seen in the norms governing the economic relations between the North and South, the practices of the Security Council in exercising its peace and security mandate, the unilateral use of force by nations as against its

¹⁶⁰ Matthew S Schwartz, ‘Honduran Caravan Crosses Guatemala, Traveling toward US’, *NPR* (online, 16 January 2019) <<https://www.npr.org/2019/01/16/685768698/honduran-caravan-crosses-guatemala-on-its-way-to-u-s>>, archived at <<https://perma.cc/8DSY-XFBK>>.

¹⁶¹ See generally ‘Dangerous Complacencies: Obama, Latin America, and the Misperceptions of Power’ (2011) 38(4) *Latin American Perspectives* 14, 18 (‘Dangerous Complacencies’). See also Jerry Flores, ‘Why Does the Migrant “Caravan” Exist? And How Did It Come to Be?’, *The Conversation* (online, 31 October 2018) <<https://theconversation.com/why-does-the-migrant-caravan-exist-and-how-did-it-come-to-be-105781>>, archived at <<https://perma.cc/Z2EQ-KGCM>>.

¹⁶² See ‘Dangerous Complacencies’ (n 161) 14–15.

¹⁶³ See generally Dana Frank, *The Long Honduran Night: Resistance, Terror, and the United States in the Aftermath of the Coup* (Haymarket Books, 2018). Mainstream media publications in the US and abroad have also pointed to the US’s actions in Central America as giving rise to the caravan: see, eg, Sarah Sklaw, ‘American Policy Is Responsible for the Migrant Caravan’, *The Washington Post* (online, 29 October 2018) <https://www.washingtonpost.com/outlook/2018/10/29/american-policy-is-responsible-migrant-caravan/?noredirect=on&utm_term=.95d0f5a5005b>, archived at <<https://perma.cc/QBS5-ZED8>>; Skylar Baker-Jordan, ‘The US’s Actions in Central America Are to Blame for the Migrant Caravan Leaving Honduras: Trump Has to Let Them in’, *The Independent* (online, 23 October 2018) <<https://www.independent.co.uk/voices/trump-migrant-caravan-where-mexico-honduras-guatemala-central-america-a8597741.html>>, archived at <<https://perma.cc/VA4M-CZJR>>.

prohibition and the inadequate response to climate change.¹⁶⁴ Without the willingness to confront such hard truths, we risk the construction of a glib narrative of prevention that only seeks to intervene to stop immediate crisis situations, but not proactively engage with the structural dimensions. This simply leaves the problem for another day.

In this regard, it is important to realise that the soft law initiatives discussed above all operate within a deficient framework of international law. Their potential to address social, economic and environmental challenges is dependent on the existing international legal framework that states rely on to define their rights and obligations. If we take, for example, the *SDGs*, it is clear that its goals and targets ‘did not emerge from, and were not inserted into, a normative vacuum’.¹⁶⁵ The same is true of the *Global Compact on Migration* and the *Global Compact on Refugees*. The preventive and comprehensive engagements they embody are constrained by the existing legal framework. Being in the domain of soft law, they do not formally expand the existing norms in international law. Instead, they appeal to the goodwill of states to implement their recommendations.

A comprehensive engagement with forced displacement also needs to face the challenge of the existing narrow definition of refugee under the *Refugee Convention*.¹⁶⁶ As it stands, the overly legalistic definition has effectively barred millions of forcibly displaced persons from securing the status of protected persons. The definition could not have worked in inter-war Europe where displacement was characterised by mass movement and was addressed as such. However, various actors have expressed concerns over the wisdom of opening the *Refugee Convention* for renegotiation as it may backfire by narrowing existing rights.¹⁶⁷ It is equally important to note that the problem of the international regime governing forced displacement is far beyond the narrow definition of the refugee. If the solution was a mere expansion of the definition, the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*,¹⁶⁸ which is praised for its wider definition of a refugee, should have resolved that continent’s challenges in this regard.¹⁶⁹ Instead, Africa continues to have a high portion of internally displaced persons.¹⁷⁰

Having said that, we share the concerns over renegotiating the *Refugee Convention*, considering rising nationalist rhetoric and restrictions on migration

¹⁶⁴ See generally Arthur C Helton, ‘The Legal Dimensions of Preventing Forced Migration’ (1996) 90 *American Society of International Law Proceedings* 546; Elena Fiddian-Qasimiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) pt 4 (‘Root Causes of Displacement’).

¹⁶⁵ Rakhyun E Kim, ‘The Nexus between International Law and the Sustainable Development Goals’ (2016) 25(1) *Review of European Community and International Environmental Law* 15, 15.

¹⁶⁶ See above Part III(B)(2).

¹⁶⁷ See Adrienne Millbank, ‘The Problem with the 1951 Refugee Convention’ (Research Paper No 5 2000–01, Social Policy Group, Parliament of Australia, 5 September 2000) iii: ‘The UNHCR and other asylum seeker supporters, while acknowledging that there are problems with the operation of the *Convention*, are concerned that opening it up to review could lead to restriction, rather than expansion, of refugee rights.’

¹⁶⁸ *OAU Refugee Convention* (n 6).

¹⁶⁹ Marina Sharpe, ‘The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions’ (2012) 58(1) *McGill Law Journal* 95, 111.

¹⁷⁰ See Internal Displacement Monitoring Centre, *GRID 2018* (n 85) v, 16–22.

and asylum. Accordingly, the task of expanding the pool of forcibly displaced persons who should be entitled to international protection as refugees is better undertaken through mechanisms that supplement the *Refugee Convention*.¹⁷¹ Such efforts should also complement global responsibility sharing and the pursuit of preventive strategies.

V CONCLUSION

This article has analysed the relationship between the Third World and international law using a TWAIL lens. The international legal framework regulating forced human displacement is predominantly a product of European experiences and solutions and this is a source of weakness for the framework. Forced displacement as it existed in the Third World — caused and perpetuated by colonialism — was not considered during the development of the existing rules. The international legal framework currently has gaps that constrain its fitness for purpose while the Third World continues to be most impacted by forced displacement. The task of reforming the existing legal rules to accommodate the problem in its current scope and to introduce a burden sharing scheme remain the primary challenges facing the international community. We argue that there is a need to turn away from the ‘unilateralism’ that defines the current governance of forced displacement in favour of what Chimni calls ‘a dialogic model’, a model in which sound argument, and not power, prevails in future engagements to reform approaches to forced displacement.¹⁷²

One lesson the international community should learn from a century of engagement with the problem of forced displacement is that reactive responses have not brought lasting solutions. Unprecedented ad hoc international cooperation is required to introduce and implement comprehensive packages that proactively address the root causes of displacement while responding to current crises. For this to have a long-term effect, a reformed system must challenge Western hegemony and dismantle the privilege gained through an exploitative colonial past.

¹⁷¹ See Millbank (n 167) iii; Jane McAdam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23(1) *International Journal of Refugee Law* 2, 5, 26.

¹⁷² BS Chimni, ‘Reforming the International Refugee Regime: A Dialogic Model’ (2001) 14(2) *Journal of Refugee Studies* 151, 152.