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.

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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 Refugees⁸ and Global Compact for Safe, Orderly and

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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).
Regular Migration (‘Global Compact on Migration’) — 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).

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. 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.

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’).


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. These scholars acknowledge that differences do exist among Third World countries. 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’.

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. 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. 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. 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

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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.


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.


their analysis of the international economic order,\textsuperscript{19} the human rights framework\textsuperscript{20} and the environment.\textsuperscript{21} The concept of the ‘civilising mission’ is often used as a broad analytical framework to further those inquiries.\textsuperscript{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.

\textbf{II} \hspace{0.5cm} \textbf{FORCED DISPLACEMENT TODAY}

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

\textsuperscript{19} See, eg, Mohammed Bedjaoui, \textit{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), \textit{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), \textit{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, \textit{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’).

\textsuperscript{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) \textit{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, \textit{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’).


\textsuperscript{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, \textit{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) \textit{New York University Journal of International Law and Politics} 513; Mutua, ‘Savages’ (n 20).
their obligations with respect to protection and assistance.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{27} The 10 most affected countries are all in the Third World.\textsuperscript{28} Similarly, there were 3.3 million new internal displacements associated with disaster events, which also mostly affected Third World countries.\textsuperscript{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.\textsuperscript{30}


\textsuperscript{25} Ibid.

\textsuperscript{26} Ibid 2–3.


\textsuperscript{28} Ibid.

\textsuperscript{29} Ibid.

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. 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’. 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. 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. MEDMIG noted that the number of displaced persons who reach Europe makes up a ‘tiny fraction’ of global movement. 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’. The report also stated that overall, ‘[m]ore than three

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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.


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, Lesvos) and 60 in Turkey (Izmir, Istanbul) (Eastern Mediterranean route)’: at 18.
38 Ibid 9.
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

\[\text{\textquoteleft}the 1951 Convention does not deal with the question of admission, and neither does it oblige a state of refuge to accord asylum as such, or provide for the sharing of responsibilities \ldots \text{\textquoteleft}the Convention does not address the question of ‘causes’ of flight, or make provisions for prevention; its scope does not include internally displaced persons, and it is not concerned with the better management of international migration.\right\] \(^{47}\)

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

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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).
Occupying Power or to that of any other country, occupied or not ... regardless of their motive while Additional Protocol II prohibits parties to a conflict from ordering the displacement of civilians or compelling civilians to leave their territory. 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. Hence, imperative military reasons override such prohibition, as does the safety of civilians.

Under the Rome Statute of the International Criminal Court, ‘deportation 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’. Similarly, ‘unlawful 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.

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’. 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. 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. Refugee scholars have highlighted this rule as providing one of the strongest legal bases for complementary protection to displaced persons. Human rights law also guarantees the freedom of movement within the territory of a state in which a person is lawfully present. This right includes

49 Geneva Convention IV (n 48) art 49.
50 Additional Protocol II (n 48) art 17.
52 This is explicitly provided in Additional Protocol II (n 44) art 17.
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’).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{62}

\section*{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’\textsuperscript{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.

\begin{itemize}
  \item \textsuperscript{60} See, eg, ibid art 12(2); Human Rights Committee, \textit{General Comment No 27: Article 12 (Freedom of Movement)}, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [2].
  \item \textsuperscript{61} See Guy S Goodwin-Gill and Jane McAdam, \textit{The Refugee in International Law} (Oxford University Press, 3\textsuperscript{rd} ed, 2007) 296–325.
  \item \textsuperscript{63} Anne Orford, ‘A Jurisprudence of the Limit’ in Anne Orford (ed), \textit{International Law and Its Others} (Cambridge University Press, 2006) 1, 2.
\end{itemize}
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

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\(^{65}\) 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.


> [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.


Forced Human Displacement, the Third World, and International Law

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

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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.
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 Torture77 — 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).
among refugee scholars on this point. The definition of ‘refugee’ under the Refugee Convention is narrow and the Refugee Convention has not established an entity with authority to ‘resolve interpretive questions in a definitive fashion’. The regime also fails to address the crucial concern of responsibility sharing among states.

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. Of these, 76% of the global conflict IDPs are found in just 10 Third World countries. 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’). 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.

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
respect to the admission of displaced persons into the territory of a state. 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. When forced displacement was a huge problem within Europe, European states provided solutions through the League of Nations (‘LoN’).

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. 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.

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. 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
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. 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. 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. 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 War 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.

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’. 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

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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 (‘Throughout 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 (‘Migration has been part of the human experience throughout history’).

96 See generally Dawson and Farber (n 95).


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.

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

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. 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’. 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

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\text{creation 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.}\]

Thirdly, anti-colonial struggles also resulted in massive displacements. 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. 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 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

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\(^{109}\) 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, 58\(^{th}\) sess, 77\(^{th}\) 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.’


\(^{113}\) See Marrus (n 109). Michael Marrus discusses the refugee movements within Europe in the 20\(^{th}\) 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

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\(^{115}\) 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 105) 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’).


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

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. 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. 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. 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. However, the two differed on whether this should form part of their mandate.

The consequent failure to seriously consider and devise mechanisms to address

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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-Q9NS>. See also Harrell-Bond (n 68) 4.
root causes has contributed to the ever-rising number of displaced persons since the 1920s.\textsuperscript{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’\textsuperscript{127} The \textit{UN Charter} and discrete areas of international law also enshrine the principle of prevention.\textsuperscript{128} States likewise commit to work on the prevention of underlying causes of forced human displacement.\textsuperscript{129} Two examples of the importance of preventive strategies that aim to address root causes are the recently adopted \textit{Global Compact on Refugees} and the \textit{Global Compact on Migration}.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{126} Loescher, ‘The International Refugee Regime’ (n 90) 352, 354–5, 365.
\item \textsuperscript{127} Arthur C Helton, ‘A Note on the Legal Dimensions of Preventing Forced Migration’ (2000) 94 \textit{American Society of International Law Proceedings} 137, 137.
\item \textsuperscript{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: \textit{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, \textit{The Prevention of Gross Human Rights Violations under International Human Rights Law} (Springer, 2018). See, eg, Human Rights Council, \textit{The Role of Prevention in the Promotion and Protection of Human Rights}, HRC Res 24/16, 35\textsuperscript{th} mtg, 24\textsuperscript{th} 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 I to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations’ (2014) 96(895–6) \textit{International Review of the Red Cross} 707 (obligation to prevent violations of international humanitarian law); Philippe Sands and Jacqueline Peel, \textit{Principles of International Environmental Law} (Cambridge University Press, 3\textsuperscript{rd} ed, 2012).
\item \textsuperscript{129} See, eg, \textit{New York Declaration for Refugees and Migrants}, GA Res 71/1, UN GAOR, 71\textsuperscript{th} 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.
\item \textsuperscript{130} See \textit{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.
\item See also \textit{Global Compact on Migration}, UN Doc A/RES/73/195 (n 9) para 12: This \textit{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.
\end{itemize}
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’), the Global Compact on Refugees and the Global Compact on Migration 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’. 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.

The Global Compact on Refugees is another important initiative. Adopted by the UN General Assembly on 17 December 2018, 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.

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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.
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.


\(^{142}\) 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. 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. 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’. In this regard, he discussed the ‘new agenda for democratic theory’ 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.

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. Orford noted that state or local actors were typically characterised as the principal threats to human rights, democracy and security, while international actors were characterised as the custodians of these values and as saviours whose intervention was necessary to remedy a crisis.

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

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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.


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. 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’.

The Syrian displacement crisis is a case in point. 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. 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. However, most literature on this topic is focused on the crisis the displacement caused in Europe. They abstain from addressing the

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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.’


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.

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 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.


\(^{162}\) See ‘Dangerous Complacencies’ (n 161) 14–15.

prohibition and the inadequate response to climate change. 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’. 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. 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. 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, which is praised for its wider definition of a refugee, should have resolved that continent’s challenges in this regard. Instead, Africa continues to have a high portion of internally displaced persons.

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

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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).
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. 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.

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.