

A CENTENARY OF MULTILATERAL RESPONSE TO FORCED HUMAN DISPLACEMENT: LEGACIES, LIMITATIONS AND THE FUTURE

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The international community's formal engagement with forced human displacement, which began in 1921 under the auspices of the League of Nations, has now surpassed the mark of a century. Initiated as an ad hoc arrangement to respond to the Russian refugee crisis of the 1920s, the engagement gradually expanded in scope to accommodate additional groups of displaced persons and developed into a full-fledged mechanism to respond to forced displacement at the international level. Although states were hesitant to provide their full support at the start, the growing realisation of the utility of appointing an international actor to handle a phenomenon that would otherwise need to be handled by the states themselves provided the incentive for gradual state support. This resulted in progressively normative and institutionalised development culminating in the adoption of the Convention Relating to the Status of Refugees as the governing international law treaty on refugees and the establishment of the United Nations High Commissioner for Refugees as the accepted institutional framework. However, despite a century of engagement at the international level, the scale of contemporary forced displacement remains alarming in terms of the number of forcibly displaced persons, the lack of global responsibility-sharing and the absence of strategies to address the root causes of forced displacement. The scope of and access to protection have also narrowed despite the universalisation of the refugee regime. This article situates this contradiction in a historical analysis of the relationship between the international regime governing forced displacement and the people and nations of the Third World. The article reviews the history of international responses to forced displacement, identifies the legacies and limitations of the now century-old regime and proposes a policy priority for the future.

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[1 September 1921]

Sir,

I have the honour to acknowledge [sic] your telegram of August 24th, 1921, conveying to me the invitation of the Council that I should act as High Commissioner on behalf of the League in connection with the problems concerning Russian Refugees in Europe.

I have much pleasure in accepting this invitation.

I have the honour to be, Sir, your obedient Servant,

(*signed*) Fridtjof Nansen.

The Right Hon Sir Eric Drummond, KCMG

League of Nations, Geneva.¹

I 100-PLUS YEARS OF REFUGEE WORK: INTRODUCTION

Formal international engagement with the phenomenon of forced human displacement began in 1921 under the auspices of the Council of the League of Nations ('the League'). This formal international response has now passed the mark of a century. What began as ad hoc work, with minimal financial or institutional support, is now a large-scale global operation with entrenched frameworks enabling sustained engagement. The work began with the efforts of Fridtjof Nansen who, on 1 September 1921, accepted the invitation of the League to serve as the first High Commissioner for Russian Refugees. Nansen's remarkable work brought relief to thousands of displaced persons and his activities laid the foundations for successive institutional and policy responses around the protection of displaced persons.² This paved the way for what became an enduring international commitment of states.

However, despite a century of action to address forced human displacement, the general trend has been an increase to the dilemma, with surges following major international incidents.³ Yet the scope of the protection regime has gradually

¹ Eric Drummond, Secretary-General, 'The Question of the Russian Refugees' (1921) 2(9) *League of Nations Official Journal* 1006, 1027 ('The Question of the Russian Refugees (November 1921)') (emphasis in original).

² Vincent Chetail, 'Fridtjof Nansen and the International Protection of Refugees: An Introduction' (2003) 22(1) *Refugee Survey Quarterly* 1, 4–5 ('Fridtjof Nansen').

³ Successive reports of the United Nations High Commissioner for Refugees and the Internal Displacement Monitoring Centre show that the general trend of forced displacement is an increasing one. See *United Nations High Commissioner for Refugees* (Web Page) <<https://www.unhcr.org/search?comid=56b079c44&&cid=49aea93aba&tags=globaltrends>> ; 'Displacement Data', *Internal Displacement Monitoring Centre* (Web Page) <<https://www.internal-displacement.org/database/displacement-data>>, archived at <<https://perma.cc/DJ5E-CZS7>>.

narrowed.⁴ This contradiction partly lies in the fact that different objectives defined the international regime governing forced human displacement during the initial 30 years (1921–1951) and the latter 70-plus years (1951–present). During the initial 30 years, the international regime of protection operated as a European, large-scale, group-based protection scheme.⁵ European states quickly recognised the issuance of identity certificates and facilitated the movements, repatriation or resettlement of refugees as cases demanded. Towards the end of this period though, and particularly after the creation of the International Refugee Organisation (‘IRO’) in 1949, the protection regime began to transition from group-based protection to protection based on individualised persecution.⁶ This paved the way for a narrower and more restrictive protection regime which characterises the last 70 years and counting.

In this article we seek to illuminate the disjuncture between the trend of displacement and the scope of the protection regime, both historically and presently, using a historical analysis that situates the development of the refugee regime in the context of the relation between the West and the Third World. The article will highlight and draw on themes of critiques from a broad range of scholarship, including Third World Approaches to International Law (‘TWAAIL’).⁷ A key driver of the shift in the objective of the international regime governing forced displacement at the end of the interwar period was the increasing interaction

⁴ We use the term ‘regime’ in the sense it is used in international relations theory to refer to ‘principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area’: Stephen D Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’ (1982) 36(2) *International Organization* 185, 185. ‘[P]rocedures, rules, or institutions for certain kinds of activity’ or ‘sets of governing arrangements that affect relationships of interdependence’: Robert O Keohane and Joseph S Nye, *Power and Interdependence* (Longman, 4th ed, 2011) 5, 16. The governance of the phenomenon of forced displacement is an area that has developed into a strong framework of rules, processes and institutions aimed at garnering multilateral cooperation. Alexander Betts has expanded the notion of a regime with respect to refugees to a ‘refugee regime complex’, noting the increasing interaction of refugee protection with different regimes such as ‘human rights, humanitarianism, security, development, and peace-building’: Alexander Betts, ‘The Refugee Regime Complex’ (2010) 29(1) *Refugee Survey Quarterly* 12, 13.

⁵ See Gilad Ben-Nun, ‘From Ad Hoc to Universal: The International Refugee Regime from Fragmentation to Unity 1922–1954’ (2015) 34(2) *Refugee Survey Quarterly* 23, 26–7. Walter Adams provides a good summary of the group-based mass movements of refugees: Walter Adams, ‘Extent and Nature of the World Refugee Problem’ (1939) 203 *Annals of the American Academy of Political and Social Science* 26.

⁶ James C Hathaway, ‘The Evolution of Refugee Status in International Law: 1920–1950’ (1984) 33(2) *International and Comparative Law Quarterly* 348, 376–8 (‘The Evolution of Refugee Status’); David Kennedy, ‘International Refugee Protection’ (1986) 8(1) *Human Rights Quarterly* 1, 3.

⁷ TWAAIL is a theoretical approach that centres the experiences of Third World states and populations to understand and illuminate how the development and operation of international law affected and continues to affect their interests. The Eurocentricity of the international legal system, the persistent exclusion of the Third World in its development and the built-in structures and discourses that continue to undermine Third World states and populations in the various areas of international law are some of the major themes that TWAAIL scholars engage with. For a brief introduction to TWAAIL, see Makau Mutua, ‘What Is TWAAIL?’ (2000) 94 (April) *Proceedings of the Annual Meeting (American Society of International Law)* 31; James Thuo Gathii, ‘TWAAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography’ (2011) 3(1) *Trade, Law and Development* 26. For an in-depth introduction, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007); 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* (Koninklijke Brill, 2003) 47.

of the phenomenon of forced displacement with European states' interests and borders. European states' interests were at stake amidst the rising anti-colonial struggles in the post-World War Two ('WWII') period, and this led to the increasing interaction of refugees and asylum seekers from the Third World with European borders. In a previous piece, we have argued that the international regime governing forced displacement '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'.⁸ There, we outlined how colonialism both induced displacement in Third World states and simultaneously led to the exclusion of these states from the developing protection regime. We also interrogated how self-serving shifts in the refugee policy stance of European states impacted Third World states.⁹

In this piece, we continue to build a narrative around the significance of the Third World¹⁰ in the 100-year-old international regime governing forced displacement. We review the history of the regime to reveal dual failures that inhibit the regime from fully serving its underlying purpose of protecting and assisting displaced persons. The first failure, which is an in-built one, pertains to the reluctance of states to assume principled obligations towards displaced persons.¹¹ The second failure lies in the exclusivity of the international regime governing forced displacement that emerged to defend the interests of continental Europe. During the interwar period, this exclusivity was openly displayed in the geographic focus of actions and efforts to protect displaced persons. In the aftermath of WWII, the exclusivity became subtle in that while the regime's geographic reach extended, its responsiveness dwindled. Like the development of the international legal order, non-European states and societies have been largely ignored, at some stage, in developing the refugee regime. At another stage, the development centres these states in an exclusionary sense to evaluate how the regime should interact with them. In Part II, this article offers a brief history of international responses to forced displacement over the regime's first full century. Parts III and IV critically review the regime's legacies and limitations, while Part V proposes a preventive strategy for future engagement with the global challenge of forced human displacement.

⁸ Samuel Berhanu Woldemariam, Amy Maguire and Jason von Meding, 'Forced Human Displacement, the Third World and International Law: A TWAIL Perspective' (2019) 20(1) *Melbourne Journal of International Law* 248, 250 (emphasis omitted).

⁹ *Ibid* 265–7.

¹⁰ We make a conscious choice to continue the TWAIL tradition of using the category 'Third World' as a political term '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': *ibid* 251. In this sense, the term is less geographic or economic but rather an affirmation of the unique position of states and populations who share histories and experiences of colonial domination and exclusion in the development and operation of international law. For a further TWAIL analysis on the continued relevance of the term 'Third World' as an analytical category, see Chimni (n 7) 48–51; Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34(1) *European Journal of International Law* 7, 62–82 ('Rethinking International Law').

¹¹ Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford University Press, 1996) 41 ('*Beyond Charity*'); Louise W Holborn, 'The Legal Status of Political Refugees, 1920–1938' (1938) 32(4) *American Journal of International Law* 680, 682 ('The Legal Status of Political Refugees').

II A HISTORICAL REVIEW OF REFUGEE RESPONSE

A Early Foundations

Forced displacement has been an enduring feature of human history. However, society's conceptualisation and response to it through time has been dependent on the existing structures of social and political organisation.¹² Prior to the embrace of the Westphalian state model, forced displacement was essentially considered an issue left to be addressed by the individuals or groups facing displacement. This changed when a succession of early scholars of international law characterised forced displacement as an issue of concern for international law and international relations.¹³ As early as the 16th and 17th centuries, the early scholars of international law debated the fate of forcibly displaced persons and the obligation of states towards them. Their writings dealt predominantly with displacement in the context of war. Their analysis was also informed by the dominant legal theory of their time.¹⁴ In this regard, marked differences existed between the opinions of those who subscribed to the natural law theory and those who affirmed the positivist theory in their application of international law. While the former emphasised the individual's right to protection,¹⁵ the latter emphasised the sovereign power of the state to grant admission into its territory.¹⁶

They identified a foundational dilemma in this area of the law between the individual's right to seek protection and the sovereign authority of the state to make final determinations in this regard. They also identified fundamental

¹² The emergence of the Westphalian system, for example, placed forced displacement in the context of state relations and territoriality: Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14(2–3) *International Journal of Refugee Law* 238, 238–40.

¹³ The early scholars of international law, such as Francisco de Vitoria, Alberico Gentili, Hugo Grotius, Christian von Wolff and Samuel von Pufendorf dealt with the protection of refugees and displaced persons mainly in the context of war and persecution. They outlined some basic obligations that sovereigns have towards displaced persons, such as admitting them to their territory and protecting them from their persecutors, while maintaining that the state has the sovereign right to make decisions. For a review of their views, see Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel' (2016) 27(4) *European Journal of International Law* 901 ('Sovereignty and Migration'); 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 ('An Intellectual History').

¹⁴ Chetail provides an excellent analysis that highlights the theoretical roots of the positions of early scholars on migration: Chetail, 'Sovereignty and Migration' (n 13). See also McAdam, 'An Intellectual History' (n 13).

¹⁵ De Vitoria and Grotius are prominent scholars who espoused the natural law theory to argue for the freedom of movement: Franciscus de Vitoria, *On the Indians Lately Discovered*, tr John Pawley Bate (The Carnegie Institution of Washington, 1917) 151 [trans of: *De Indis et De Iure Belli*]; Hugo Grotius, *On the Law of War and Peace: Three Books*, tr Francis W Kelsey (Clarendon Press, 1925) 201–2 [trans of: *De Jure Belli Ac Pacis: Libri Tres* (1646)].

¹⁶ Von Pufendorf and von Wolff leaned towards a positivist understanding of the state's obligation towards migrants and displaced persons: Samuel von Pufendorf, *Of the Law of Nature and Nations: Eight Books*, tr Basil Kennett (3rd ed, 1717) 32–4; Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, tr Joseph H Drake (Oxford University Press, 1934) 144–50.

principles that still resonate in the law.¹⁷ The analysis of these scholars focused on identifying state obligations as regards forcibly displaced persons, mostly in the context of war. However, their brief engagement with the topic did not lead to a systematic approach to assist and protect displaced persons or to a call for multilateral cooperation in this respect.¹⁸ The phenomenon did not receive as much attention as other prominent issues of the time such as piracy, war or trade and diplomatic disputes. Ad hoc state practice was the norm during this period and even that was typically guided by political motives or religious affiliations with the displaced populations.¹⁹

B *Inauguration of Multilateral Response under the League of Nations*

The multilateral cooperation that began on the topic of forced displacement in the immediate aftermath of World War One ('WWI') served to further lay the foundations for a more focused approach to protect and assist displaced persons. It also filled some of the gaps observed in the past in respect of the absence of an organised international regime for the regulation of forced displacement.²⁰ The formative interwar years of international cooperation to address forced displacement were crucial for several reasons.²¹ First, experimental efforts were undertaken to address forced displacement that carefully navigated the identification of actors and negotiated responsibilities. This experiment sought the introduction of the ad hoc mechanisms discussed below and adopted an incremental approach that began with a single group of displaced persons, the Russian refugees, before gradually expanding. In this respect, there was a tendency to pursue a minimalist approach where states assumed little to no formal obligations with respect to displaced persons and left the ad hoc mechanisms to

¹⁷ A prominent example here is Grotius' advocacy for the recognition of the granting of asylum as a peaceful and friendly act: Grotius (n 15) 819–20. This principle now forms a foundation of refugee and asylum law and has received recognition in legal instruments. The *OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa* and the *Declaration on Territorial Asylum* both state that 'the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State': *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) art 2(2) ('*OAU Refugee Convention*'); *Declaration on Territorial Asylum*, GA Res 2312 (XXII), UN GAOR, 22nd sess, 1631th plen mtg, UN Doc A/RES/2312 (XXII) (14 December 1967) Preamble ('*Declaration on Territorial Asylum*').

¹⁸ Our reference to 'multilateral cooperation' here subscribes to John Gerard Ruggie's conception of multilateralism as 'a generic institutional form of modern international life ... [which] has been present from the start. The generic institutional form of multilateralism must not be confused with formal multilateral organizations, a relatively recent arrival and still of only relatively modest importance': John Gerard Ruggie, 'Multilateralism: The Anatomy of an Institution' (1992) 46(3) *International Organization* 561, 567.

¹⁹ The Huguenot refugee episode is a typical refugee movement that received wide attention in the history of refugee movements. The religious and interstate aspects of the movement played a significant role in this regard. For a recent take on this history, see Owen Stanwood, *The Global Refuge: Huguenots in an Age of Empire* (Oxford University Press, 2020).

²⁰ Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing, 2016) 104.

²¹ While the "interwar period" generally refers to the years between the end of WWI and the start of WWII (1918–1939), we use the phrase the "formative interwar years" liberally to refer to the initial 30 years of the development of the international refugee protection regime from 1921–1951. The bulk of this period aligns with the "interwar period" and the international refugee regime's prior concern during the "formative interwar years" was managing the forced displacement resulting from the two world wars.

carry the lion's share of responsibilities.²² Yet, state cooperation with ad hoc mechanisms was relatively positive and migration policies were liberal.

Second, during the formative years, key normative and institutional principles evolved that informed later developments.²³ For example, the so-called durable solutions to displacement — repatriation, local integration and resettlement — were first identified and implemented during the interwar period.²⁴ Nansen's embrace of neutrality as a guiding principle of his humanitarian work has also remained a cornerstone principle in the work of the successive refugee institutions established under the League and in the United Nations High Commissioner for Refugees ('UNHCR'). Third, the experience of the formative years affirmed to states the necessity of dealing with forced displacement through international institutions. These institutions provided a measure of detachment for states from direct obligations to displaced persons while ensuring that they maintained control over the institutions that undertook the task of protection and assistance.²⁵ Dealing with forced displacement through international institutions simultaneously enabled states to retain their sovereign prerogative to make determinations as to who was authorised to enter their territory.

When the League commenced refugee work in 1921, the focus was on the 1.5–2 million Russian refugees who were displaced across Europe.²⁶ The International Committee of the Red Cross ('ICRC') brought the matter to the League's attention and urged it to take action as the assistance required by these refugees had exceeded the capacity of non-governmental organisations and charities.²⁷ The ICRC particularly requested the League to appoint a Commissioner whose mandate would be the definition of the legal status of the Russian refugees, their repatriation to Russia and the coordination of efforts for their assistance.²⁸ The

²² Gil Loescher, 'The International Refugee Regime: Stretched to the Limit?' (1994) 47(2) *Journal of International Affairs* 351, 351–2 ('The International Refugee Regime').

²³ Chetail, 'Sovereignty and Migration' (n 13); Claudena M Skran, 'Historical Development of International Refugee Law' in Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1, 6 ('Historical Development of International Refugee Law'); Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford University Press, 1995) 296 ('*Refugees in Inter-War Europe*').

²⁴ Claudena M Skran, 'Profiles of the First Two High Commissioners' (1988) 1(3–4) *Journal of Refugee Studies* 277, 282 ('Profiles of the First Two High Commissioners'); Megan Bradley et al, 'Whither the Refugees? International Organisations and "Solutions" to Displacement, 1921–1960' (2022) 41(2) *Refugee Survey Quarterly* 159, 168.

²⁵ Loescher noted that the creation of the international refugee regime was not prompted by 'purely altruistic motives' but rather by the self-serving interests of states who also sought to control the international institutions they charged with responsibility through financial and budgetary constraints: Loescher, 'The International Refugee Regime' (n 22) 351–2.

²⁶ The initial letter of the International Committee of the Red Cross referred to 'eight hundred thousand Russian refugees scattered throughout Europe': Eric Drummond, Secretary-General, 'The Question of the Russian Refugees' (1921) 2(2) *League of Nations Official Journal* 225, 227 ('The Question of the Russian Refugees (March 1921)'). 'The estimates of the numbers that fled from Russia have varied from slightly under a million to over two million': Elina Multanen, 'British Policy towards Russian Refugees in the Aftermath of the Bolshevik Revolution' (1999) 12(1) *Revolutionary Russia* 44, 44.

²⁷ Drummond, 'The Question of the Russian Refugees (March 1921)' (n 26) 227; Gilbert Jaeger, 'On the History of the International Protection of Refugees' (2001) 83(843) *International Review of the Red Cross* 727, 727–8.

²⁸ Drummond, 'The Question of the Russian Refugees (March 1921)' (n 26) 225.

ICRC hoped to replicate the success story of the repatriation of prisoners of war that was undertaken under the League's supervision post-WWI.

However, the League avoided taking on direct obligations to Russian refugees. It relegated the determination of the legal status of refugees to the governments of the countries where the refugees were living. The League also stated that it could not 'concern itself with the problem of repatriation' as it was not able to negotiate with the Soviet authorities or arrange the required logistics.²⁹ With respect to the coordination of efforts, the League was of the opinion that 'the relief of distress among the refugees can best be undertaken by the combined efforts of the powerful international voluntary organisations'.³⁰ The League took a passive stance and deferred the matter to member states who were expected to provide suggestions on solutions to displacement and the desirability of international cooperation in this area.³¹ In this regard, it is to be noted that the terms of the *Covenant of the League of Nations* did not specifically provide for a mandate of this sort.³² Despite the lack of Covenant authority, what is noteworthy is the support the League received from member states to move forward with the initial proposal from the ICRC for action in respect of Russian refugees.³³

Accordingly, the League primarily concerned itself with the financial implications of establishing a permanent institution dedicated to the refugee work.³⁴ As a nascent international institution, it was not in a position to advocate for displaced persons and allowed state interests to drive decision-making.³⁵ Indeed, the League presented itself as a defender of states' interests. Therefore, with the appointment of Fridtjof Nansen as High Commissioner,³⁶ work on an international regime began with minimal engagement from the League. The High Commissioner and voluntary organisations shouldered the bulk of responsibilities. States reserved their engagements to small financial contributions such that the High Commissioner had to repeatedly plead for the League and states to finance the project.³⁷

Figure 1: Timeline of international refugee institutions.

²⁹ Ibid 226.

³⁰ Ibid.

³¹ '[During the interwar period] the nature of the problems identified, and the associated solutions, tilted towards state interests': Bradley et al (n 24) 168.

³² Louise W Holborn, 'The League of Nations and the Refugee Problem' (1939) 203 (May) *The Annals of the American Academy of Political and Social Science* 124, 124 ('The League of Nations and the Refugee Problem'); Greg Burgess, *The League of Nations and the Refugees from Nazi Germany: James G McDonald and Hitler's Victims* (Bloomsbury Publishing, 2016) 47.

³³ Hanotaux, 'The Question of the Russian Refugees' (1921) 2(7) *League of Nations Official Journal* 755, 755–6.

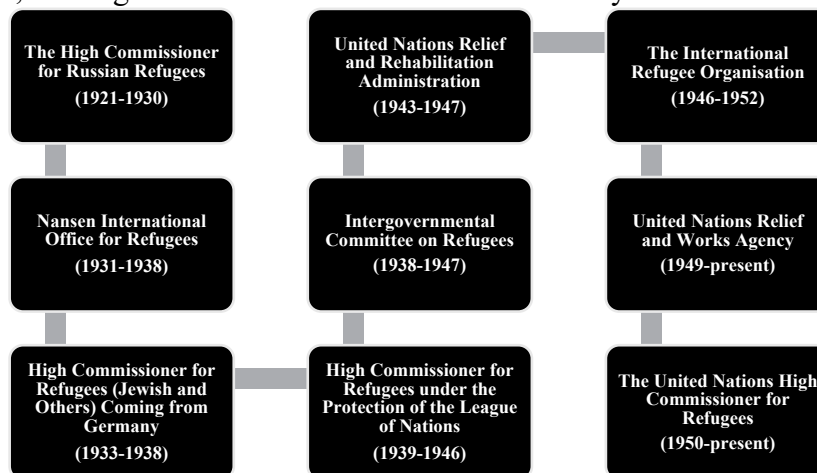
³⁴ Ibid 757.

³⁵ This perhaps marks a significant difference with the current role of the UN and its agencies, particularly the UNHCR, which appear to be vocal, openly advocating for displaced persons and calling on states to assume more responsibilities.

³⁶ The League attached strong significance to the identity of the High Commissioner to be appointed, believing that the personal characteristics of the individual were key to obtaining the cooperation of governments and Russian groups. Having worked in the repatriation of prisoners of war in Russia, Nansen was found to be an ideal candidate for the position: Hanotaux (n 33) 756. Nansen accepted his appointment on 1 September 1921: Drummond, 'The Question of the Russian Refugees (November 1921)' (n 1) 1027.

³⁷ Holborn, 'The League of Nations and the Refugee Problem' (n 32) 125, 128.

One of the early successes of the High Commissioner was convincing states to approve and recognise the issuance of identity certificates for Russian refugees.³⁸ On 5 July 1922, the League adopted the *Arrangement with Respect to the Issue of Certificates of Identity to Russian Refugees* ('1922 Arrangement').³⁹ Dubbed 'Nansen Passports', the certificates served as identification cards and enabled the refugees to travel and return to the issuing state subject to applicable laws.⁴⁰ Another major success of the High Commissioner was soliciting contributions from states for much-needed relief assistance. The assistance of Russian refugees in Constantinople, who were living in dire circumstances, was a case in point.⁴¹ However, the High Commissioner's efforts were merely the start of what was to



become an ever-expanding engagement.

Various episodes of forced displacement arose during the interwar period that required a continuous engagement with the phenomenon. The disintegration of the Ottoman Empire, the persecution of the Armenians, the Greco-Turkish war and the ensuing state-building process led to the forced displacement of mainly minority groups.⁴² The League gradually extended the 1922 *Arrangement* to various groups of displaced persons including Armenian, Turkish, Assyrian, Assyro-Chaldaean and assimilated refugees.⁴³ This marked phase one of the history of refugee assistance under the League. Nansen died in 1930 and the League created the Nansen International Office for Refugees which operated from 1931–1938.

³⁸ Skran, 'Historical Development of International Refugee Law' (n 23) 7.

³⁹ *Arrangement with Respect to the Issue of Certificates of Identity to Russian Refugees*, 13 LNTS 238 (signed and entered into force 5 July 1922) ('*Arrangement with Respect to the Issue of Certificates of Identity to Russian Refugees*').

⁴⁰ John C Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press, 2nd ed, 2018) 157–8.

⁴¹ Fridtjof Nansen, High Commissioner for the Russian Refugees, 'Rationing of Russian Refugees at Constantinople' (1921) 2(10–12) *League of Nations Official Journal* 1247–8.

⁴² Woldemariam, Maguire and von Meding (n 8) 250.

⁴³ *Arrangement of 12 May 1926 Relating to the Issue of Identity Certificates to Russian and Armenian Refugees*, signed 12 May 1926, 89 LNTS 2004 ('*Arrangement of 12 May 1926 Relating to the Issue of Identity Certificates to Russian and Armenian Refugees*'); *Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees*, 89 LNTS 2006 ('*Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees*').

In 1933, the League created an additional High Commissioner for Refugees (Jewish and Others) Coming from Germany. The High Commissioner was set up outside the League to avoid a perception of the League interfering in the domestic affairs of Germany.⁴⁴ With the coming to power of the Third Reich and its implementation of racially repressive laws and policies, a growing number of Jewish and non-Aryan people fled Germany under desperate conditions.⁴⁵ The League appointed James G McDonald to head the new High Commissioner's office. McDonald firmly believed that the displacement phenomenon could only be stopped by addressing the roots of the problem.⁴⁶ Accordingly, he sought to engage with the German authorities but to no avail. He was also frustrated by the League's leading powers who failed to confront the Nazi leadership or to provide meaningful support for his plans.⁴⁷ He finally resigned from his position and used the occasion to publish an extensive outline of the policy, legislative, judicial and administrative measures the Nazi leadership were implementing in pursuit of racial repression.⁴⁸

The last refugee organisation the League created was the High Commissioner for Refugees under the Protection of the League of Nations by combining the Nansen International Office for Refugees and the High Commissioner for Refugees (Jewish and Others) Coming from Germany.⁴⁹ The Intergovernmental Committee on Refugees ('IGCR') and the United Nations Relief and Rehabilitation Administration ('UNRRA') were created outside of the League under the leadership of the United States.⁵⁰ While both provided relief to displaced persons, the former was created mainly in response to the Jewish outflow from Germany⁵¹ and the latter as a WWII relief and recovery effort.⁵²

⁴⁴ Burgess (n 32) 53.

⁴⁵ Norman Bentwich, 'The League of Nations and Refugees' (1935) 16 *British Year Book of International Law* 114, 125.

⁴⁶ Claudena M Skran, 'The International Refugee Regime: The Historical and Contemporary Context of International Responses to Asylum Problems' in Gil Loescher (ed), *Refugees and the Asylum Dilemma in the West* (Pennsylvania State University Press, 1992) 8, 28.

⁴⁷ Paul R Bartrop, *The Evian Conference of 1938 and the Jewish Refugee Crisis* (Springer, 2017) 6.

⁴⁸ McDonald's letter of resignation outlines the details of the repression and persecution that Jewish people and non-Aryans faced in the 1930s: Letter of Resignation from James G McDonald to the Secretary-General of the League of Nations, 27 December 1935 <<https://dl.wdl.org/11604/service/11604.pdf>>, archived at <<https://perma.cc/GMG9-GJZT>>.

⁴⁹ Susan F Martin, 'War, Natural Disasters and Forced Migration' in Marc R Rosenblum and Daniel J Tichenor (eds), *The Oxford Handbook of the Politics of International Migration* (Oxford University Press, 2012) 53, 56.

⁵⁰ Hasan-Askari Rizvi, 'United Nations and the Refugee Problem' (1985) 38(1) *Pakistan Horizon* 46, 47; Bastiaan Bouwman, 'Postwar Displacement, Liberalism and the Genesis of the International Refugee Regime' (Working Paper No 25, SCRIPTS Cluster of Excellence, 2023) 6, 7.

⁵¹ Franklin D Roosevelt convened the Évian Conference which deliberated on assistance to Jewish refugees and resulted in the creation of the IGCR. The debate continues as to the motivation for such action. Supporters point to Roosevelt as the hero who saved Jewish lives, while critics see Roosevelt's action as an attempt to divert from and limit the arrival to the US of Jewish refugees. See Richard Breitman and Allan J Lichtman, *FDR and the Jews* (Harvard University Press, 2013) 1–2.

⁵² Hathaway, 'The Evolution of Refugee Status' (n 6) 372.

C Succession under the United Nations

By the time the United Nations was established in 1945, the displacement phenomenon had risen to a new level.⁵³ Many interwar displaced persons were not yet resettled, and WWII had driven further mass forced displacement. The immediate attention of the UN-era refugee organisations was therefore on addressing the post-war displacement crisis. When the UN later proceeded to create refugee institutions, it had the opportunity to learn from the formative interwar years and the experience of engagement with the refugee phenomenon. In this regard, there were major departures from interwar approaches to dealing with forced displacement.

In the 70 years since the adoption of the *Convention Relating to the Status of Refugees* ('1951 Refugee Convention'), we have observed a marked shift in the approach and objectives of the international regime governing forced displacement. The refugee institutions under the UN adopted narrower definitions of the persons who qualified for protection.⁵⁴ Refugee status or protection was no longer conferred on a prima facie basis (ie based on belonging to a group of displaced persons). Rather it began to be conferred based on a 'well-founded fear of being persecuted' as an individual, except in those instances where there were calculated political gains to be attained from offering group-based protection. The Cold War and the Hungarian refugee episodes are cases in point.⁵⁵ Though this period witnessed increased state participation, states also implemented various

⁵³ The estimate of the number of post-WWII displaced persons ranged between 10–60 million in the span of a few years. Louise W Holborn notes that there were about 10–12 million refugees in Europe upon the establishment of the International Refugee Organization: Louise W Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations* (Oxford University Press, 1956) 171. Arthur Rucker, writing in 1949, estimates the number of refugees in Europe to be between 10–12 million: Arthur Rucker, 'The Work of the International Refugee Organization' (1949) 25(1) *International Affairs* 66, 66. Michael R Marrus cites Eugene Kulischer's estimate that 'the total number of displaced Europeans during the entire course of Hitler's war was [30] million or more': Michael R Marrus, *The Unwanted: European Refugees in the Twentieth Century* (Oxford University Press, 1985) 297 (citation omitted). Jane McAdam notes '[t]he Second World War had displaced over 50 million people in Europe, and there were 100 million internally displaced persons in China': Jane McAdam, 'The Enduring Relevance of the 1951 Refugee Convention' (2017) 29(1) *International Journal of Refugee Law* 1, 2. 'The number of refugees in Germany alone was 14 million': at 2. Andrew I Schoenholtz estimates over 40 million people were displaced in Europe alone in 1945 due to war and persecution: Andrew I Schoenholtz, 'The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century' (2015) 16(1) *Chicago Journal of International Law* 81, 83. Matthew Frank and Jessica Reinisch refer to an estimate of 60 million Europeans displaced after WWII: Matthew Frank and Jessica Reinisch, 'Refugees and the Nation-State in Europe, 1919–59' (2014) 49(3) *Journal of Contemporary History* 477, 478.

⁵⁴ Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, 'Refugees Defined and Described' in Guy S Goodwin-Gill and Jane McAdam (eds), *The Refugee in International Law* (Oxford University Press, 4th ed, 2021) 15, 18.

⁵⁵ Dennis Gallagher, 'The Evolution of the International Refugee System' (1989) 23(3) *International Migration Review* 579, 582. BS Chimni critiques the attempt to draw and justify differences in response to Cold War and Hungarian refugees on the one hand and Third World refugees on the other as 'self-serving': BS Chimni, 'The Geopolitics of Refugee Studies: A View From the South' (1998) 11(4) *Journal of Refugee Studies* 350, 360 ('The Geopolitics of Refugee Studies').

policies and rules that were restrictive and narrowed access to territory and protection.⁵⁶

Two factors could be pointed to as the underlying motivations for this post-WWII shift towards a restrictionist approach. First was the assumption that, once the war had ended and the massive wave of post-war displacements had been addressed, a narrower protection regime would be sufficient to attend to future displacements. At the heart of this assumption was the distinction that was made between European refugees and non-European refugees⁵⁷ and associated thinking that, with the end of WWII, the worst chapter for Europe had passed.⁵⁸ The *1951 Refugee Convention* served this purpose by restricting the refugee definition and the Convention's application effectively to Europe. BS Chimni has noted that the tendency to distinguish between European refugees and those in the Third World, which he referred to as the 'myth of difference', was a foundation laid in preparation for a paradigm shift in refugee policy and law that took place in the 1980s and 90s.⁵⁹ The 'myth of difference' was a policy basis that also informed the geographic and temporal limitations in the *1951 Refugee Convention*.

An objection may be raised here that the *1951 Refugee Convention* did provide for a geographical option under art 1B enabling states to declare whether they wished to extend the Convention to events occurring elsewhere. However, this geographical option was practically meaningless even though most parties to the Convention chose to extend its application beyond Europe. First, though the geographic limitation expanded in such a way, the temporal limitation which made the Convention applicable only to events before 1 January 1951 meant that the major focus of the Convention was still on episodes of displacements that took place in continental Europe. This is because the normative and institutional frameworks in place at the time were already preoccupied with European refugees and displaced persons. Second, considering the historical reluctance of states to commit to principled obligations in respect of displaced persons even across continental Europe, the assumption that the geographical option would indicate a change in direction is untenable. Third, colonial powers possessed the authority to decide whether the Convention applied to their colonial possessions.⁶⁰ This limited the decision-making of countries under colonial domination. Fourth, the

⁵⁶ Andrew I Schoenholtz, 'The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century' (2015) 16(1) *Chicago Journal of International Law* 81, 86–7.

⁵⁷ James C Hathaway for example noted that, in deciding to limit the application of the *1951 Convention Relating to the Status of Refugees* to European refugees, Western states argued 'that the need of European refugees for legal protection, rather than material assistance, distinguished this group from all other refugees in the world' and that 'international protection for this group could be secured without the provision of any direct financial assistance': James C Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31(1) *Harvard International Law Journal* 129, 153.

⁵⁸ While examining the post-WWII resettlement of refugees as evidence of a successful responsibility-sharing scheme, Astri Suhrke noted that one of the reasons for its success was 'a sense that emptying the camps of Europe was a one-time affair that would help to close a horrendous chapter in Western history': Astri Suhrke, 'Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action' (1998) 11(4) *Journal of Refugee Studies* 396, 405.

⁵⁹ Chimni, 'The Geopolitics of Refugee Studies' (n 55) 351.

⁶⁰ The territorial application clause enabled that: *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 40 ('*1951 Refugee Convention*').

Convention entered into force in April 1954 and most of the declarations extending the Convention to areas beyond Europe were made long after the 1967 *Protocol Relating to the Status of Refugees* ('1967 Refugee Protocol') was adopted. This again rendered the Convention's geographical option meaningless as the 1967 *Refugee Protocol* abolished the geographical and temporal restrictions. Lastly, the very need to introduce the geographical option as an auxiliary to the default geographic focus on Europe is itself indicative of the Eurocentricity of the refugee regime.

The second factor had to do with the increasing interaction between European states and forcibly displaced persons from outside Europe. Growing anti-colonial and decolonisation struggles and the responses of colonial European states were generating large displacements that increasingly interacted with European borders.⁶¹ The 1980s also witnessed an increase in the 'arrival in the West of refugees from the Third World'.⁶² European states began to implement restrictive asylum policies that did not support group-based displacements driven by conflicts. By universalising a narrower protection regime, states acted to protect European interests. The 1967 *Refugee Protocol* served this purpose. This universalisation was self-serving for its designers as it reflected the disjuncture between the causes and types of displacements unfolding in the Third World and the universal legal regime governing refugee protection. The trend in the scope of protection in the later 70 years of the refugee regime has therefore narrowed.

The move towards a restrictive protection regime began with the IRO, which was the first refugee organisation created under the auspices of the UN. The *Constitution of the International Refugee Organization* ('IRO Constitution') was a turning point in setting the future normative direction of the international regime. In sharp contrast to the scope of interwar approaches, the IRO began to narrow the regime of protection. Its mandate was limited to a tightly defined group of refugees and displaced persons⁶³ and the *IRO Constitution* excluded certain individuals from seeking protection (mainly 'traitors, quislings and war criminals').⁶⁴ The *IRO Constitution* repeatedly used words such as 'genuine' and 'bona fide' refugees and displaced persons suggesting the need for a rigorous vetting procedure. In this regard, the *IRO Constitution* explicitly called on the IRO

to ensure that its assistance [was] not exploited by persons in the case of whom it [was] clear that they [were] unwilling to return to their countries of origin because they prefer[red] idleness to facing the hardships of helping in the reconstruction of their countries, or by persons who intend[ed] to settle in other countries for purely economic reasons, thus qualifying as emigrants.⁶⁵

When the IRO was dissolved in 1949 and replaced by the UNHCR in 1950, the normative groundwork had already been laid. The *Statute of the Office of the*

⁶¹ Gallagher (n 55) 583; Astri Suhrke, 'A Crisis Diminished: Refugees in the Developing World' (1993) 48(2) *International Journal* 215, 217.

⁶² Chimni, 'The Geopolitics of Refugee Studies' (n 55) 351.

⁶³ Annex I to the *Constitution of the International Refugee Organization* provided a separate definition for 'refugees' and 'displaced persons' who fall under the IRO's mandate: *Constitution of the International Refugee Organization*, opened for signature 15 December 1946, 18 UNTS 3 (entered into force 20 August 1948) annex I pt I.

⁶⁴ *Ibid* annex I para 1(c).

⁶⁵ *Ibid* annex I para 1(e).

United Nations High Commissioner for Refugees ('Statute of the UNHCR') broadly replicated the narrower regime adopted under the *IRO Constitution* and added further restrictions by limiting refugee protection to individuals whose protection needs arose from 'events occurring before 1 January 1951'.⁶⁶ These restrictions were strengthened through the adoption of the *1951 Refugee Convention*, which engaged a temporal and geographic limitation to continental Europe. This rendered the *1951 Refugee Convention* 'little more than [a] "regional" treaty'.⁶⁷

The adoption of the *1951 Refugee Convention* offered a point of closure to the development of refugee law. While its narrow definition of refugees meant that European states would no longer deal with group-based protection, the temporal and geographic limitations ensured these states would have no obligation to provide protection and assistance to displaced persons from elsewhere. The latter point was of concern for colonial European states who were facing anti-colonial struggles and the increasing movement of displaced persons from colonised countries to the Global North.⁶⁸

Reflecting on the century of legal development in this context, the longevity of the *1951 Refugee Convention* is unparalleled. No binding refugee law of universal application has been adopted since the Convention's adoption in 1951. The attempt to craft an international treaty on the right of asylum, which began with the International Law Commission's inclusion in 1949 of the topic of the 'Right to Asylum' in the provisional list for codification, also failed.⁶⁹ It resulted in the *Declaration on Territorial Asylum*, the last global soft-law instrument dealing with asylum.⁷⁰ Significantly, the *1951 Refugee Convention*'s temporal and geographic limitations were removed by the *1967 Refugee Protocol*. However, this amendment effectively universalised a treaty that developed in consideration of European interests and was fine-tuned to a European context.⁷¹ The nature of

⁶⁶ *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428 (V), UN Doc A/RES/428(V) (14 December 1950) annex para 6(A)(ii) ('*Statute of the Office of the United Nations High Commissioner for Refugees*').

⁶⁷ Itty Abraham, 'Making the Convention "Universal": Other Views of the Additional Protocol', *Völkerrechtsblog: International Law and International Legal Thought* (Blog Post, 26 May 2021) <<https://voelkerrechtsblog.org/making-the-convention-universal-other-views-of-the-additional-protocol/>>, archived at <<https://perma.cc/34VU-ARBW>>.

⁶⁸ See generally Lucy Mayblin, 'Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees' (2014) 27(3) *Journal of Historical Sociology* 423. Mayblin provides a case study on Britain and uncovers how colonial subjugation impacted the rights of non-European refugees and the substance of the *1951 Refugee Convention*.

⁶⁹ 'Summary Records and Documents of the First Session Including the Report of the Commission to the General Assembly' [1949] *Yearbook of the International Law Commission* 281.

⁷⁰ *Declaration on Territorial Asylum* (n 17). For a detailed analysis of the history of and negotiations surrounding the *Declaration on Territorial Asylum*, see Guy S Goodwin-Gill, 'The 1967 Declaration on Territorial Asylum' (2012) *United Nations Audiovisual Library of International Law* 1, 1–12.

⁷¹ Lucy Mayblin, 'Historically European, Morally Universal? The 1951 Geneva Convention on the Status of Refugees', *E-International Relations* (Article, 28 March 2010) <https://www.e-ir.info/2010/03/28/historically-european-morally-universal-the-1951-geneva-convention-on-the-status-of-refugees/#google_vignette>, archived at <<https://perma.cc/YC8G-RSZK>>; Anghie, 'Rethinking International Law' (n 10) 77.

forced displacement outside of Europe has resembled that of interwar Europe,⁷² yet the restrictive norms of the *1951 Refugee Convention*, especially its definition of a refugee, have meant that its geographic and temporal expansion has been artificial.⁷³ The rare occasions where Western states supported broader protection for displaced persons coincided with the furtherance of their political interests, such as during the Cold War. For example, the ‘industrial countries of the first world’ had a politically oriented refugee regime targeted at refugees from communist countries and forming part of their strategy to combat communism.⁷⁴ The end of the Cold War then marked a shift in refugee policy that aimed to divert from and limit the arrival of refugees and displaced persons in Europe. These measures included the implementation of restrictive asylum policies and border closures which envisaged policies of containment,⁷⁵ interdiction and the offshore processing of asylum applications,⁷⁶ carrier sanctions⁷⁷ and the increased securitisation of discourse on asylum and forced displacement.⁷⁸

Another objection may be raised here against the contention that the definition of a refugee under the *1951 Refugee Convention* represented a narrowing of the scope of protection. An alternative argument may be that the universalisation of the criteria embedded in the refugee definition, especially after the adoption of the *1967 Refugee Protocol*, represented an expansion from the previous ad hoc approach of identifying specific groups of refugees. Subject to the arguments outlined above in response to the geographic option clause under art 1B of the *1951 Refugee Convention*, it is true that the refugee definition under the Convention moved away from the previous ad hoc approach of designating groups as refugees to a permanent definition applicable across episodes of displacement. However, whether this universalisation of the refugee definition has resulted in a broader scope of protection needs to be closely scrutinised.

Protection as an international law obligation was consolidated after the adoption of the *1951 Refugee Convention* and later the *1967 Refugee Protocol*. While the interwar period also resulted in international agreements in respect of

⁷² Andrew Shacknove, ‘From Asylum to Containment’ (1993) 5(4) *International Journal of Refugee Law* 516, 529; Woldemariam, Maguire and von Meding (n 8) 267.

⁷³ Mayblin (n 71).

⁷⁴ Charles B Keely, ‘The International Refugee Regime(s): The End of the Cold War Matters’ (2001) 35(1) *International Migration Review* 303, 306.

⁷⁵ Noting the post-Cold War shift to containment of refugees in countries of origin, T Alexander Aleinikoff argued ‘[a]s resettlement possibilities become more remote and “temporary” arrangements become depressingly long-term, primary attention is now being directed to the countries of origin of refugee flows. In short, in the past decade the *exilic bias* has been superseded by a *source-control bias*’: T Alexander Aleinikoff, ‘State-Centered Refugee Law: From Resettlement to Containment’ (1992) 14(1) *Michigan Journal of International Law* 120, 130 (emphasis in original).

⁷⁶ See generally Jessica Howard, ‘To Deter and Deny: Australia and the Interdiction of Asylum Seekers’ (2003) 21(4) *Refugee* 35.

⁷⁷ See generally Erika Feller, ‘Carrier Sanctions and International Law’ (1989) 1(1) *International Journal of Refugee Law* 48.

⁷⁸ ‘[P]ost-Cold War reactions to migration hold novel characteristics from those responses that existed during and before the Cold War. This diversity of features is, according to us, the consequence of the securitisation of migration’: Valeria Bello, ‘The Spiralling of the Securitisation of Migration in the EU: From the Management of a “Crisis” to a Governance of Human Mobility?’ (2022) *Journal of Ethnic and Migration Studies* 1, 2.

displaced persons,⁷⁹ the protection obligation was mainly driven by domestic policy as opposed to international law obligations. This is partly the reason why ad hoc protection measures were widely available during the interwar period and were more flexible in accommodating different groups.⁸⁰ As argued above, the episodes of displacements in interwar Europe were also largely group-based displacements. However, obligations that European states were prepared to undertake as a matter of their domestic policy, which is subject to their discretion and national interests, were not ones they were prepared to undertake as a matter of international law obligation. Hence, the individuation of the refugee definition and its embrace as the legal standard for protection under the *1951 Refugee Convention* was a bold normative statement that signalled a shift towards a narrower regime of protection.

The contention that the *1951 Refugee Convention* and the *1967 Refugee Protocol* represented a normative shift towards a narrower scope of protection becomes clearer when considering the discord between the refugee definition and the types of displacements in the Third World since the decolonisation movements, which were largely group-based.⁸¹ Group displacement is also a recurring contemporary feature in Third World states.⁸² A broader definition of a refugee and the practice of granting protection on a prima facie basis have been a major contribution of Third World states that also host a large number of

⁷⁹ Some of the prominent international agreements include the *Convention Relating to the International Status of Refugees*, opened for signature 28 October 1933, 159 LNTS 3663 and the *Convention Concerning the Status of Refugees Coming From Germany*, opened for signature 10 February 1938, 192 LNTS 4461.

⁸⁰ Skran, *Refugees in Inter-War Europe* (n 23) 85; Ben-Nun (n 5) 26–7; Karin Åberg, ‘Examining the Vulnerability Procedure: Group-Based Determinations at the EU Border’ (2022) 41(1) *Refugee Survey Quarterly* 52, 66.

⁸¹ Jeremy Hein notes ‘[f]rom World War Two to the end of the Cold War, decolonization and superpower conflict produced the largest number of refugees’: Jeremy Hein, ‘Refugees, Immigrants and the State’ (1993) 19 *Annual Review of Sociology* 43, 47. James L Carlin notes that ‘[o]n the African continent, the rapid pace of decolonization and the subsequent struggle for power, as well as racial and religious persecution, have precipitated the displacement of countless human beings, currently estimated to be in the millions’: James L Carlin, ‘Significant Refugee Crises since World War II and the Response of the International Community’ (1982) 3(1) *Michigan Journal of International Law* 3, 4. See generally Albert Kraler et al, ‘Learning from the Past: Protracted Displacement in the Post-World War II Period’ (Working Paper No 2, Transnational Figurations of Displacement, 2020) 3.

⁸² For example, according to UNHCR reports, the recent conflicts that broke out in Sudan, Gaza and Myanmar in 2023 have forcibly displaced more than 6 million, 1.6 million and 1.3 million people respectively. These are all group-based displacements that arise from circumstances that subject a large number of people to conditions that are threatening to life and safety. See United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2023* (Report, 2023) 8.

refugees.⁸³ However, while a prima facie recognition of refugee status has made it possible to provide protection on a group basis, this has further entrenched the disproportionate sharing of responsibility. The approach led to massive refugee camps in Africa and the Middle East, while European states selectively applied group-based protection in situations that aligned with their political and national interests. The approach also served as an instrumental strategy of containment.⁸⁴ The shift towards restrictionist immigration policies, discussed below, is another confirmation of the desire to limit protection obligations arising even out of a normative framework designed to minimise such obligations. Access to territory has further become a major obstacle which renders protection more unreachable in countries that are fortifying their borders. Accordingly, the contention that the refugee regime founded upon the *1951 Refugee Convention* represented a narrowing of the scope of protection is supported by the historical record, evidence from state practice and a critical look at trends in protection.

Despite the recent adoption of the *Global Compact on Refugees*⁸⁵ and the *Global Compact for Safe, Orderly and Regular Migration*⁸⁶ as soft-law instruments aiming to renew the commitment of the international community to migrants and refugees, the restrictionist trend continues to date. Anti-immigrant and anti-refugee sentiments are growing across the Western world.⁸⁷ These xenophobic sentiments are also increasingly featuring in the Third World, driven mainly by economic fear and uncertainty, arguably a by-product of globalised capitalism.⁸⁸ Australia continues the practices of offshore processing and

⁸³ There is significant debate among scholars regarding the legal basis for prima facie protection, its meaning and legal effects. 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, 89. Marina Sharpe argues that neither the *OAU Refugee Convention* nor the *1951 Refugee Convention* provide for prima facie or group-based determination of refugee status: Marina Sharpe, *The Regional Law of Refugee Protection in Africa* (Oxford University Press, 2018) 66–70. The UNHCR adopted a formal guideline on the topic in 2015 and notes the *OAU Refugee Convention*, the *1951 Refugee Convention* and resolutions of the UN General Assembly as providing the legal basis for prima facie determination of refugee status: United Nations High Commissioner for Refugees, *Guidelines on International Protection No 11: Prima Facie Recognition of Refugee Status*, UN Doc HCR/GIP/15/11 (24 June 2015) 2. Matthew Albert argues that prima facie determination of refugee status is a form of individual determination as opposed to group-determination: Matthew Albert, 'Prima Facie Determination of Refugee Status: An Overview and its Legal Foundation' (Working Paper Series No 55, January 2010) 10.

⁸⁴ See generally Are John Knudsen and Kjersti G Berg (eds), *Continental Encampment: Genealogies of Humanitarian Containment in the Middle East and Europe* (Berghahn Books, 2023).

⁸⁵ *Report of the United Nations High Commissioner for Refugees: Part II*, UN GAOR, 73rd sess, Supp No 12, UN Doc A/73/12 (2 August 2018) ('*Global Compact on Refugees*').

⁸⁶ *Global Compact for Safe, Orderly and Regular Migration*, GA Res 73/195, 73rd sess, 60th plen mtg, Agenda Items 14 and 119, UN Doc A/RES/73/195 (11 January 2019).

⁸⁷ See generally Mattias Ekman, 'Anti-Immigration and Racist Discourse in Social Media' (2019) 34(6) *European Journal of Communication* 606. In his empirical study, Kenneth R Vaughan argues that '[n]egative attitudes toward immigrants are associated with lowered evaluations of democracy and increased illiberal-democratic preferences': Kenneth R Vaughan, 'Anti-Immigrant Sentiment and Opposition to Democracy in Europe' (2021) 19(4) *Journal of Immigrant and Refugee Studies* 540, 544.

⁸⁸ See generally Adam S Harris et al, 'The Economic Roots of Anti-Immigrant Prejudice in the Global South: Evidence from South Africa' (2018) 71(1) *Political Research Quarterly* 228. This empirical study identifies how economic factors, mainly the rate of unemployment, drive xenophobic sentiments in South Africa.

indefinite detention of some categories of asylum seekers,⁸⁹ while some European states are turning to Australian-style practices.

These externalisation practices are not limited to offshore processing but have involved offshore protection in third countries. This latter approach is currently becoming a strategy of choice among countries in Europe. In June 2021, the Danish Parliament passed a law authorising the use of offshore processing of asylum.⁹⁰ In November 2023, Italy and Albania signed a protocol on migration management under which Italy would finance the construction of two detention centres in Albania where rescued migrants would be taken for processing of their asylum claims.⁹¹ The United Kingdom followed suit by striking a deal⁹² with Rwanda for the removal of asylum seekers and other individuals to Rwanda for settlement and protection. The *Nationality and Borders Bill 2021* (UK)⁹³ introduced to give effect to the agreement passed through several legal challenges before international and domestic judicial bodies. There has also been an interim measure from the European Court of Human Rights ordering the UK government not to remove an Iraqi asylum seeker to Rwanda ‘until the expiry of a period of three weeks following the delivery of the final domestic decision in the ongoing judicial review proceedings’.⁹⁴

This interim measure comes at the back of a High Court of Justice challenge that found ‘[t]he inadmissibility and removal decisions were not unlawful by reason of any of the generic grounds of challenge or by the general claims of procedural unfairness’.⁹⁵ The Court, however, found that the way ‘the Home

⁸⁹ On the occasion of Australia’s submission of its third Universal Periodic Review report in January 2021, member states of the UN expressed concern on the practice of offshore processing of asylum claims and the indefinite detention of migrants and asylum seekers, and called on Australia to stop the practice or review its policies. See *Report of the Working Group on the Universal Periodic Review: Australia*, 47th sess, Agenda Item 6, UN Doc A/HRC/47/8 (24 March 2021).

⁹⁰ Nikolas Feith Tan, ‘Denmark’s Extraterritorial Asylum Vision’, *Refugee Law Initiative* (Blog Post, 19 April 2021) <<https://rli.blogs.sas.ac.uk/2021/04/19/denmarks-extraterritorial-asylum-vision/>>, archived at <<https://perma.cc/R535-2UCS>>. The UNHCR provided its observation on the draft law which dubbed the Danish Bill an attempt at ‘externalization’ and warned of its potential to ‘lead to an erosion of the international protection system’: United Nations High Commissioner for Refugees, ‘UNHCR Observations on the Proposal for Amendments to the Danish Alien Act (Introduction of the Possibility to Transfer Asylum-Seekers for Adjudication of Asylum Claims and Accommodation in Third Countries)’ (Report, 4 March 2021) 4.

⁹¹ Gabija Leclerc, Maria Margarita Mentzelopoulou and Anita Orav, *Extraterritorial Processing of Asylum Claims* (Briefing, January 2024) 7. For a detailed take on the protocol, see Sergio Carrera, Giuseppe Campesi and Davide Colombi, *The 2023 Italy-Albania Protocol on Extraterritorial Migration Management: A Worst Practice in Migration and Asylum Policies* (Report, 2023).

⁹² *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement*, United Kingdom–Rwanda, signed 13 April 2022 (Memorandum of Understanding).

⁹³ *Nationality and Borders Bill 2021* (UK). See the UNHCR’s observations on the Bill for further detail on how the Bill would impact the international protection of asylum seekers: United Nations High Commissioner for Refugees, ‘UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021–22’ (Report, October 2021).

⁹⁴ European Court of Human Rights, ‘The European Court Grants Urgent Interim Measure in Case Concerning Asylum Seeker’s Imminent Removal from the UK to Rwanda’ (Press Release, ECHR 197, 14 June 2022).

⁹⁵ *AAA v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin), [437].

Secretary went about the implementation of her policy in a number of the individual cases ... was flawed'.⁹⁶ A group of asylum seekers have secured permission to appeal the High Court decision on the grounds that the Home Office has failed to consider the safety of Rwanda as a place to send the asylum seekers. On 15 November 2023, the UK Supreme Court held that 'there are substantial grounds for believing that the removal of the claimants to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement'.⁹⁷ To circumvent the Supreme Court's ruling, the Rishi Sunak government introduced the Safety of Rwanda (Asylum and Immigration) Bill 2024 (UK) which was passed into law by the UK Parliament on 23 April 2024.⁹⁸ As of the writing of this article, no flights have yet departed to relocate asylum seekers to Rwanda under the forced deportation program envisaged in the Rwanda deal.⁹⁹ Such trading of protection responsibility weakens the shared moral foundations of the international refugee regime and renders it a transactional regime in which some countries will offer to host more refugees in exchange for deals on development, trade or economic cooperation.¹⁰⁰ These externalisation measures restrict 'access to territorial asylum' and 'raise questions about the applicable international law standards, the legality of resulting externalisation measures and the accountability of states and other actors for any breaches of international law'.¹⁰¹

Looking back at the two phases (the initial 30 years and the later 70 years) of the development of the international regime governing forced displacement, it is evident that the interaction of Third World refugees with European borders has been a major consideration in the self-serving twists and turns in international and domestic refugee policies of Western states. In the following Parts, we highlight the legacies of the regime governing forced displacement, focusing on both its achievements and the systemic flaws that threaten to undermine gains made.

III LEGACIES OF A 100-YEAR-OLD REGIME

Forging a robust multilateral collaboration on a subject is often challenging. Institutionalising it, even more so. This has certainly been the case with regard to the protection and assistance of displaced persons. Efforts in this regard required gauging the respective interests of states on the topic, championing the cause for the protection of displaced persons and the tireless work of humanitarians. Despite the many failures of the 100-year-old engagement (some of which are explored in the next Part), there are positive aspects that merit recognition, particularly the zeal and dedication of individuals who have been called to serve as high

⁹⁶ Ibid [438].

⁹⁷ *R v Secretary of State for the Home Department* [2023] UKSC 42, 56 [149].

⁹⁸ Safety of Rwanda (Asylum and Immigration) Act 2024.

⁹⁹ The UK has, however, sent its first asylum seeker to Rwanda at the end of April 2024. This was done under a voluntary scheme: Harry Cole, 'LIFT OFF: First Ever Migrant Sent to Rwanda in Historic Move that Will Help Stop the Boats & Remove Thousands More', *The Sun* (online, 30 Apr 2024) <<https://www.thesun.co.uk/news/politics/27641889/first-migrant-sent-to-rwanda-sunak/>>, archived at <<https://perma.cc/X22Z-SVNJ>>.

¹⁰⁰ Hanne Beirens and Samuel Davidoff-Gore, 'The UK-Rwanda Agreement Represents Another Blow to Territorial Asylum', *Migration Policy Institute* (Commentary, April 2022) <<https://www.migrationpolicy.org/news/uk-rwanda-asylum-agreement>>, archived at <<https://perma.cc/LED8-KJSN>>.

¹⁰¹ Refugee Law Initiative, 'Refugee Law Initiative Declaration on Externalisation and Asylum' (2022) 34(1) *International Journal of Refugee Law* 114, 114.

commissioners, the gradual development of a baseline international legal and institutional framework for the protection and assistance of forcibly displaced persons and the rise in advocacy for refugee rights.

A *The Role of Humanitarian Leaders*

Individuals, including high commissioners of refugee organisations, state officials who supported their efforts and staff of non-governmental organisations have made zealous and meaningful contributions to the development of the century-old refugee regime. Some prominent contributors included Gustave Ador (President of the ICRC), Fridtjof Nansen¹⁰² (the first High Commissioner for Russian Refugees) and James G McDonald¹⁰³ (the High Commissioner for Refugees (Jews and Others) Coming from Germany). These prominent figures played crucial roles during the initial years of the establishment of the international regime governing forced displacement, assisting large numbers of displaced persons at a time when resources allocated for this purpose were minimal.

These humanitarians articulated refugee and asylum issues and demonstrated how multilateral engagement could also advance the interests of states. Ador was the first to plead the case of refugees before the League. While the ICRC provided relief and support to Russian refugees, the scope of the challenge quickly grew beyond the capacity of relief agencies. Accordingly, Ador proposed and promoted intergovernmental cooperation which led to the League's appointment of a High Commissioner.¹⁰⁴ The League subsequently appointed Fridtjof Nansen, a devout humanitarian, to this post. In his effort to assist Russian refugees, and later an expanded group of displaced persons, Nansen laid the groundwork for what would later become a regime tending to displaced persons across the globe. From the introduction of personal identity documents to developing a funding model to provide relief and assistance for refugees, Nansen introduced innovative policies as High Commissioner.¹⁰⁵ He was also known for his firm stance on maintaining the humanitarian nature of the High Commissioner's functions and this enabled him to earn the trust of states who were otherwise sceptical of the work of the League in relation to displaced persons.¹⁰⁶ Nansen was operating in the heat of the political division that marked Europe in the aftermath of WWI. He was conscious that introducing political advocacy into his work may discourage state cooperation.¹⁰⁷

¹⁰² See generally Chetail, 'Fridtjof Nansen' (n 2); Skran, 'Profiles of the First Two High Commissioners' (n 24).

¹⁰³ See generally Richard Breitman, Barbara McDonald Stewart and Severin Hochberg (eds), *Advocate for the Doomed: The Diaries and Papers of James G McDonald, 1932–1935* (Indiana University Press, 2007); Burgess (n 32); Skran, 'Profiles of the First Two High Commissioners' (n 24).

¹⁰⁴ Claudena M Skran, 'Gustave Ador, the ICRC, and Leadership on Refugee and Migration Policy', *Humanitarian Law and Policy* (Blog Post, 30 January 2018) <<https://blogs.icrc.org/law-and-policy/2018/01/30/gustave-ador-the-icrc-and-leadership-on-refugee-and-migration-policy/>>, archived at <<https://perma.cc/8JDD-7WRN>> ('Gustave Ador').

¹⁰⁵ Loescher, 'The International Refugee Regime' (n 22) 354; Holborn (n 32) 124–6.

¹⁰⁶ Marit Fosse and John Fox, *Nansen: Explorer and Humanitarian* (Hamilton Books, 2015) 49, 86.

¹⁰⁷ Skran, 'Profiles of the First Two High Commissioners' (n 24) 283, 286; Skran, *Refugees in Inter-War Europe* (n 23) 229.

In contrast, McDonald extended the High Commissioner's remit beyond humanitarian advocacy to political advocacy that confronted states on policies and practices he identified as driving displacement.¹⁰⁸ He tried to put this into practice by confronting members of the League for their reluctance to condemn the actions of the Third Reich in Germany leading to the persecution and flight of Jewish people and non-Aryans.¹⁰⁹ Claudena Skran noted

McDonald has the distinction of being the only refugee administrator in the Inter-war Period to publicly criticize the German government for its inhumane treatment of Jews and other 'non-Aryans', and to call for international intervention to deal with the root causes of the refugee exodus. In making his appeal, McDonald did not receive a great deal of encouragement from the governments composing the League of Nations. In fact, the reverse is true. They took great pains to avoid confronting the German government on the refugee issue.¹¹⁰

Despite the differences in their approaches and policies, the interwar figures behind the effort to assist refugees were committed humanitarians. The foundations they laid significantly shaped the efforts, policies and experiences of successive refugee institutions and normative frameworks. From outlining the concept of durable solutions to devising the funding arrangements for refugee work, crafting principles governing humanitarian work and calling for preventive approaches to forced displacement, the legacies of these individuals continue to inform policies, research and decision-making today.

B *The Strengthening of Normative and Institutional Structures*

The recognition of the need to protect refugees and displaced persons has a long history in international law. However, despite such long recognition, the notion of protection of refugees as an attendant obligation of the state took a long time to crystallise. Accompanied by evolving normative and institutional frameworks for the protection and assistance of displaced persons, the formal response the League initiated in 1921 sped up the process. As will be noted in Part IV, this crystallisation took a narrower Eurocentric framing. Nevertheless, an effort that began as an ad hoc arrangement to respond to the Russian refugee crisis of the 1920s gradually expanded in scope to accommodate additional groups of displaced persons and developed into a full-fledged mechanism to respond to forced displacement at the international level.¹¹¹ States undertook various efforts to

¹⁰⁸ Skran, *Refugees in Inter-War Europe* (n 23) 230–1; Loescher, 'Beyond Charity' (n 11) 44.

¹⁰⁹ Skran, *Refugees in Inter-War Europe* (n 23) 231–3.

¹¹⁰ *Ibid* 231.

¹¹¹ *Ibid* 85.

improve the situation of refugees in the interwar years through the adoption of treaties.¹¹²

Accordingly, with all its deficiencies and insufficiencies, we now have norms and institutions that provide the bare minimum of legal protections for displaced persons in international law.¹¹³ International law now imposes core obligations on states with respect to forcibly displaced persons such as the freedom of movement,¹¹⁴ the right to seek asylum¹¹⁵ and the obligation not to return (*refouler*) refugees to places where their lives and freedoms would be threatened.¹¹⁶ The substantive and due process rights stipulated in international human rights law and in the domestic legal systems of states further complement the legal framework of protection for displaced persons as these norms are equally applicable to displaced persons.¹¹⁷ These bodies of norms provide the basis for a rights-based approach to forced displacement.¹¹⁸ Arguing for the expanded application of human rights principles to refugees, Louis Henkin said:

In sum, and in a few words: Not only compassion but responsibility; not only individual state responsibility but collective responsibility; *not only the Refugee Convention but the International Covenants and the UN Charter; not only UNHCR but the Human Rights Committee* and, if necessary, the UN Security Council.¹¹⁹

The evolution of institutional capacity in this area of international law is also impressive. Analysing institutional development along a spectrum that ranges from the High Commissioner for Russian Refugees, which began its work in 1921,

¹¹² Some of the arrangements and treaties adopted in the interwar period include: *Arrangement with Respect to the Issue of Certificates of Identity to Russian Refugees* (n 39); *Arrangement of 12 May 1926 Relating to the Issue of Identity Certificates to Russian and Armenian Refugees* (n 43); *Arrangement of 30 June 1928 Relating to the Legal Status of Russian and Armenian Refugees*, signed 30 June 1928, 89 LNTS 2005 ('*Arrangement of 30 June 1928 Relating to the Legal Status of Russian and Armenian Refugees*'); *Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees* (n 43); *Convention Relating to the International Status of Refugees*, signed 28 October 1933, 159 LNTS 3663 ('*Convention Relating to the International Status of Refugees*'); *Convention Concerning the Status of Refugees Coming from Germany*, opened for signature 10 February 1938, 192 LNTS No 4461 ('*Convention Concerning the Status of Refugees Coming from Germany*').

¹¹³ Thomas Gammeltoft-Hansen and Nikolas F Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5(1) *Journal on Migration and Human Security* 28, 30.

¹¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12.

¹¹⁵ *Universal Declaration of Human Rights*, GA Res 217 A, UN GAOR, UN Doc A/810 (10 December 1948) art 14.

¹¹⁶ *1951 Refugee Convention* (n 60) art 33.

¹¹⁷ For a detailed discussion of how human rights law could be used to enhance the protection of the rights of refugees, see generally Brian Gorlick, 'Human Rights and Refugees: Enhancing Protection through International Human Rights Law' (2000) 69(2) *Nordic Journal of International Law* 117.

¹¹⁸ The promotion of a human rights-based approach to the various aspects and types of forced displacement now holds a dominant place in research and advocacy: see, eg, Bridget Lewis and Rowena Maguire, 'A Human Rights-Based Approach to Disaster Displacement in the Asia-Pacific' (2016) 6(2) *Asian Journal of International Law* 326; Sébastien Jodoin, Kathryn Hansen and Caylee Hong, 'Displacement Due to Responses to Climate Change: The Role of a Rights-Based Approach' in Benoit Mayer and François Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar, 2017) 205.

¹¹⁹ Louis Henkin, 'Refugees and their Human Rights' (1995) 18(4) *Fordham International Law Journal* 1079, 1081 (emphasis added).

to the UNHCR, which began its work in 1951, reveals a gradual strengthening of institutional capacity in many respects. The capacity to handle mass movements, generate finances, secure the cooperation of states and organise large-scale logistics has grown substantially. Most importantly, the UNHCR holds an authoritative position of influence in refugee policy-making and unparalleled expertise in the area.¹²⁰ Such transformation relied on the growing recognition by states of the utility of global institutions in this context in line with their realisation that forced displacement would not be a temporary phenomenon.

C *Humanitarian Impact and the Proliferation of Advocacy and Engagement*

With all its faults and defaults,¹²¹ the international mechanism put in place to address forced displacement has rendered much-needed protection and assistance to millions of people in desperate situations. The humanitarian impact of the regime governing forced displacement has been immense. When the League inaugurated the international refugee regime in 1921, the High Commissioner for Russian Refugees had to operate under severe resource shortages.¹²² The budget allocated to the office was minimal and the funding model adopted for the refugee work forced the High Commissioner to raise funds from states and private sources,¹²³ further burdening its already complex remit. Despite these resource shortages, the High Commissioner for Russian Refugees laid the foundations for what was to become a fundraising model for subsequent years. This model consisted of appraising the financial need for the work and then engaging and pleading with states and private actors to make contributions. This remains the model even today under the UNHCR.¹²⁴ The successive international refugee

¹²⁰ Gil Loescher, 'UNHCR and Forced Migration' in Elena Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 215, 217.

¹²¹ Some of the key criticisms of the interwar refugee regime are summarised in Skran, 'Historical Development of International Refugee Law' (n 23) 35–6.

¹²² At times, these resource shortages meant that important and innovative projects for the settlement of refugees could not proceed: see Holborn, 'The Legal Status of Political Refugees' (n 11) 688, where she notes the failure of Nansen and Albert Smith's plan for mass settlement of displaced persons in the form of agricultural communities due to an inability to secure the required funds.

¹²³ The involvement of private actors in the interwar refugee work was high. Notable examples include the participation of Jewish philanthropic organisations in response to the flight of Jewish refugees from Germany following the ascent to power of the Third Reich: see *ibid* 699.

¹²⁴ Chetail outlines the significant impact Nansen has had on the foundations of the current international system of protection of refugees, noting:

In the nine-year life of [the High commissioner for Russian Refugees], Nansen ministered to hundreds of thousands of refugees, utilizing the methods that were to become the basis of the past and present international regime for the protection of refugees: resettlement, voluntary repatriation or local integration. To this end, he set up a whole organization, buying food, chartering transport and raising the necessary funds. Nansen established what would eventually become the basic structure of UNHCR, an office of the High Commissioner in Geneva with local representatives in host countries: Chetail, 'Fridtjof Nansen' (n 2) 4.

Ninette Kelley and Jean-Francois Durieux note that the funding model the UNHCR has used for a while has been 'the traditional system of having to rely solely on voluntary contributions': Ninette Kelley and Jean-Francois Durieux, 'UNHCR and Current Challenges in International Refugee Protection' (2004) 22(1) *Refuge* 6, 13.

institutions managed to assist millions of forcibly displaced persons while under severe resource shortages.¹²⁵

The success of this work was also remarkable. Particularly with respect to the League, it has been noted that the League was more successful in its technical and incidental affairs, such as its work on refugees and displaced persons, than in its primary mandate of peace and security.¹²⁶ This praise of course belongs to the successive high commissioners established under the League. In the UN era, the humanitarian impact of the UNHCR's work has also been well regarded. The UNHCR was awarded the Nobel Peace Prize in 1954 'for its efforts to heal the wounds of war by providing help and protection to refugees all over the world'¹²⁷ and in 1981 'for promoting the fundamental rights of refugees'.¹²⁸

Non-governmental organisations have also been indispensable actors behind the humanitarian impact of the now century-old regime.¹²⁹ Forced displacement places people in legal, social and economic limbo.¹³⁰ The protection of a host state is often not automatically gained when the loss of the protection of a state of origin occurs. This often leads to, at least in the Global South, years of encampment where refugees have to wait for the determination of their refugee status and a durable solution.¹³¹ This brings about social detachment and the inability to economically fend for oneself until the recognition of the right to work is granted,¹³² thereby placing forcibly displaced persons in a vulnerable position. In this regard, non-state actors, such as non-governmental organisations, community-based relief and aid associations and individual philanthropists have always played

¹²⁵ See generally Skran, *Refugees in Inter-War Europe* (n 23) 146–84: In chapter five, Skran outlines several episodes of displacements that the interwar refugee institutions managed, the number of people that received assistance and the constant struggle to fund the initiatives to provide durable solutions to displaced populations.

¹²⁶ David R Stone, 'Imperialism and Sovereignty: The League of Nations' Drive to Control the Global Arms Trade' (2000) 35(2) *Journal of Contemporary History* 213, 213–4; FS Northedge, *The League of Nations: Its Life and Times 1920–1946* (Leicester University Press, 1986) 165–6; Frank and Reinisch (n 53) 481; Kimberly Lowe, 'Reassessing the League of Nations' Humanitarian Assistance Regimes, 1918–1939' in Ute Planert and James Retallack (eds), *Decades of Reconstruction: Postwar Societies, State-Building, and International Relations from the Seven Years' War to the Cold War* (Cambridge University Press, 2017) 293, 293.

¹²⁷ 'The Nobel Peace Prize 1954', *The Nobel Prize* (Web Page) <<https://www.nobelprize.org/prizes/peace/1954/summary/>>, archived at <<https://perma.cc/XQA2-BGQ2>>.

¹²⁸ 'The Nobel Peace Prize 1981', *The Nobel Prize* (Web Page) <<https://www.nobelprize.org/prizes/peace/1981/summary/>>, archived at <<https://perma.cc/U6QU-Z54V>>.

¹²⁹ The support given by non-state actors to refugees and displaced persons continues as a significant feature of the regime to date. For a great resource documenting the role of grassroots community movements supporting refugees and asylum seekers in the context of the 2015 'refugee crisis' in Europe, see Sue Clayton, *The New Internationalists: Activist Volunteers in the European Refugee Crisis* (Goldsmiths Press, 2020).

¹³⁰ T Alexander Aleinikoff and David Owen, 'Refugee Protection: "Here" or "There"?' (2022) 10(3) *Migration Studies* 464, 466–72.

¹³¹ For a brief history of encampment and analysis of encampment as a refugee distancing measure, see generally Geoffrey Heeren, 'Distancing Refugees' (2020) 97(4) *Denver Law Review* 761.

¹³² Matthew J Gibney, 'Refugees and Justice between States' (2015) 14(4) *European Journal of Political Theory* 448, 460.

a crucial role in the refugee work of the past 100 years.¹³³ It is to be noted that even when the League's assumption of responsibility in this area was spearheaded by the plea of the ICRC regarding the plight of Russian refugees,¹³⁴ non-state actors stood in the gap to provide assistance and advocate for the protection of refugees.¹³⁵

Another mark of success in the 100-year-old regime is the persistent advocacy for the recognition and protection of refugee rights. This has resulted in the proliferation of refugee literature,¹³⁶ refugee rights advocacy groups and academic institutions focusing on displaced persons.¹³⁷ There have, however, been occasions when refugee literature was complicit in aiding policymakers to justify the adoption of narrower and more restrictive laws and policies.¹³⁸ Chimni noted that this was particularly evident in the proliferation of refugee literature in the 1980s.¹³⁹

Overall, the positive yields of the international engagement with the phenomenon of forced displacement over the past 100 years have resulted mainly from the participation of non-state actors. State engagement has always been reserved and politically calculated. In the next section, we delve deeper into the flaws of the regime governing forced displacement and will highlight how state policy choices and decisions expose the inability of the regime to protect displaced persons.

IV LIMITATIONS OF THE REGIME

'[C]harity consoles but does not question'.¹⁴⁰ The regime has been hobbled by various limitations from the very beginning, some emerging from early design and implementation decisions and others from foundational philosophies. In this Part, we explore how ad hoc interventions became the norm with regard to forced

¹³³ For analysis on the role of private and voluntary organisations during the interwar period, see Skran, *Refugees in Inter-War Europe* (n 23) 79–83.

¹³⁴ Skran, 'Gustave Ador' (n 104); Jaeger (n 27) 728.

¹³⁵ A list of some of the interwar period non-state actors can be found at Skran, *Refugees in Inter-War Europe* (n 23) 79–81. The UNHCR also provides a list of its non-state partners at: 'Our Partners', *United Nations High Commissioner for Refugees* (Web Page) <<https://www.unhcr.org/en-au/governments-and-partners.html>>, archived at <<https://perma.cc/PUY2-NN76>>.

¹³⁶ Refugee literature has been robust since the interwar period, where we find contemporaneous commentaries on the works of the series of refugee institutions under the League: see generally Richard Black, 'Fifty Years of Refugee Studies: From Theory to Policy' (2001) 35(1) *International Migration Review* 57. The post-WWII period also witnessed a burgeoning refugee literature including works by Jacques Vernant, Paul Weis, Atle Grahl-Madsen, Guy S Goodwin-Gill, Claudena Skran, James C Hathaway, Gil Loescher, BS Chimni and so many more. Currently, there are many journals serving the purpose of advocacy and engagement with refugee issues, such as the *International Journal of Refugee Law*, the *Journal of Refugee Studies*, the *Refugee Survey Quarterly* and *Refuge: Canada's Journal of Refugees*.

¹³⁷ Academic and policy institutions have also expanded and we now have well-established centres of enquiry such as the Refugee Studies Centre at Oxford (founded in 1982) and the Andrew and Renata Kaldor Centre for International Refugee Law at the University of New South Wales (founded in 2013).

¹³⁸ For a critical evaluation of the geopolitics of knowledge production in this area, see Chimni, 'The Geopolitics of Refugee Studies' (n 55).

¹³⁹ See generally *ibid*.

¹⁴⁰ Eduardo Galeano, *Upside Down: A Primer for the Looking-Glass World* (Metropolitan Books, 1998) 311.

displacement and how European people and states started as, and have remained, the priority in decision-making. This Eurocentrism, and its attendant lack of self-reflection, underpins later failures to reflect on the root causes of displacement in the second half of the 20th century through today, which failures are so often an end-product of colonisation and Global North violence (via wars, proxy wars and economic exploitation) towards and in the Global South. We explore why people are forced to move and why the regime is so inept at preventing these phenomena. Unfortunately, political neutrality often leads to its proponents being complicit in maintaining the status quo, and it has been inherently difficult for the regime to seriously target root causes of displacement while attempting to avoid advocacy for political and social action.

A *Ad Hoc Interventions, from Miscalculations to a Deliberate Policy Choice*

The regime governing forced displacement has suffered, to a greater or lesser extent throughout its first century, from a persistent assumption that the displacement phenomenon is temporary. During the first 30 years of the regime, states consistently operated under the assumption that the various episodes of forced displacement could be settled through ad hoc interventions.¹⁴¹ These interventions were gradually expanded to accommodate additional groups of displaced persons;¹⁴² however, the ad hoc nature of the regime meant that states assumed minimal formal obligations to displaced persons per se. The protection function was played by different entities at different times¹⁴³ while the provision of humanitarian relief remained in the hands of relief and humanitarian organisations and sometimes in the hands of the International Labour Organisation.¹⁴⁴

By the end of the initial 30 years of the regime, the international community had enough experience to appreciate the need for an established and permanent mechanism to handle the phenomenon, particularly as displacement was proliferating outside Europe. However, the ad hoc nature of the refugee work continued until 2003 with numerous mandate renewals for the UNHCR to continue its operation.¹⁴⁵ Such an approach strongly suggests that beyond a mere assumption of the temporary nature of international engagement with forced displacement, the ad hoc engagement evolved into a deliberate policy of choice in the post-WWII period. By continuing the UNHCR's operation through mandate renewals and restricting the refugee regime to continental Europe until 1967, states reinforced their deliberate retreat from assuming obligations towards displaced persons, particularly those from the Third World.

Self-serving motivations were perhaps the exception here, as elaborated further in the next section. Contrary to the above proposition regarding the absence of a

¹⁴¹ Bentwich (n 45) 115; Bradley et al (n 24) 166–7, 174.

¹⁴² Skran, *Refugees in Inter-War Europe* (n 23) 86.

¹⁴³ For example, after the Nansen International Office for Refugees was created in 1930, 'the political and legal protection of the refugees was ... entrusted to the organs of the League; and a special Refugee Office would take over the humanitarian duties hitherto discharged by the High Commissioner': Bentwich (n 45) 117.

¹⁴⁴ Bradley et al (n 24) 168.

¹⁴⁵ *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, UN GAOR, 58th sess, 77th mtg, Agenda Item 112, UN Doc A/RES/58/153 (24 February 2004).

pre-1967 engagement with refugees outside of Europe, it is important to note that the UNHCR had already begun a limited engagement with refugee work outside of Europe before 1967. An oft-cited case here is the UNHCR's involvement during the Algerian War of Independence.¹⁴⁶ However, this was made possible primarily by virtue of a French declaration under art 40 of the *1951 Refugee Convention* which extended the Convention to territories for whose international relations France was responsible. France had already made this declaration on 23 June 1954¹⁴⁷ and this appears to have been a strategic move to outsource the responsibility for refugees to the UNHCR or to enlist its help in the event of a deterioration of the political circumstances in Algeria, which, at the time, was already on the horizon. The Cold War interest of the US is another example of a self-serving motivation behind the UNHCR's pre-1967 involvement with refugee assistance in Africa.¹⁴⁸

B *The Eurocentric Focus of the Regime*

With its origins in European society and displacements within Europe, the regime governing forced displacement has shown persistent Eurocentrism in the scope of protection and assistance rendered, in the exclusions from protection and in the design of policy approaches to displacement.¹⁴⁹ A statist framing of forced displacement issues that centre the state, rather than the displaced persons, as the object of protection has been a foundational narrative of the refugee regime since its inauguration.¹⁵⁰ This statist framing never considered all states the same but persistently excluded Third World states and societies from the regime.¹⁵¹

The statist approach to displacement was evident in how European states approached the fate of interwar refugees with a focus on the impact of their presence on European economies, societies and culture.¹⁵² It was notably maintained in the post-WWII period through the discontinuation of group-based

¹⁴⁶ See generally Cecilia Ruthström-Ruin, *Beyond Europe: The Globalization of Refugee Aid* (Lund University Press, 1993).

¹⁴⁷ *1951 Refugee Convention* (n 60) art 40.

¹⁴⁸ Gil Loescher, 'UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy' (2017) 33(1) *Refugee* 77, 81–2.

¹⁴⁹ For a detailed discussion of the exclusion of non-European refugees from the international refugee regime, see generally Glen Peterson, 'Sovereignty, International Law, and the Uneven Development of the International Refugee Regime' (2015) 49(2) *Modern Asian Studies* 439.

¹⁵⁰ This is not a denial of the humanitarian motives that have played a role in the establishment of the refugee regime. Scholars have identified this as one of the plausible explanations for the emergence of the refugee regime: Skran, *Refugees in Inter-War Europe* (n 23) 69. However, humanitarianism does not provide the full picture of why the regime was installed particularly when the issue is considered in the light of the measured and constrained commitment of states. Loescher, for example, argued that the 'self-serving interest' of states was one of the reasons behind the creation of the international refugee regime: Loescher, 'The International Refugee Regime' (n 22) 351–2. Holborn also noted that '[p]olitical considerations of responsibility and of expediency, the desire to build up the League as an instrument of international conciliation, and humanitarian sympathies have played a part in deciding the character and extent of responsibility the League's organs were to accept': Holborn, 'The League of Nations and the Refugee Problem' (n 32) 124. See also Natasha Saunders, 'Paradigm Shift or Business as Usual? An Historical Reappraisal of the "Shift" to Securitisation of Refugee Protection' (2014) 33(3) *Refugee Survey Quarterly* 69, 81–91.

¹⁵¹ Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (n 57) 153; Maja Janmyr, 'The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda' (2021) 33(2) *International Journal of Refugee Law* 188, 192–3.

¹⁵² Bradley et al (n 24) 172; Saunders (n 150).

protections. As noted above, this shift to individuated, persecution-based protection was out of sync with the kind of displacement occurring in that period in the Third World. During the Cold War, the statist approach manifested itself in the use of refugees as ‘pawns’ to further geopolitical interests.¹⁵³ The Western states reconsidered their refugee admission policies in such a way that these policies formed part of their Cold War strategy to contain the spread of communism and to discredit communist states.¹⁵⁴ This led to the liberal reception of displaced persons from communist states and, at times, the provision of group-based protection that detracted from the post-WWII individuated, persecution-based approach.¹⁵⁵ However, this gesture was not extended to displaced persons from Africa as they carried little geopolitical significance in the context of the Cold War.¹⁵⁶

The consistent omission of non-European states and societies from the refugee regime in terms of the protection their citizens received under it is another mark of Eurocentricity. Unsurprisingly, the Western response to forced displacement in the Third World was marked by exclusions, containment, *non-entrée* regimes and securitisation.¹⁵⁷ The interwar period exclusions of non-European states and societies in Africa, Asia and Latin America need to be seen through the lens of colonial domination.¹⁵⁸ Interwar policymaking did not grapple with the fact that colonial domination itself drove displacements across these continents. One of the strongest demonstrations of the statist stronghold in the refugee regime is the fact that while European states actively caused displacement in the rest of the world, first through colonisation and then through responses to anti-colonial movements, they formed regimes to assist European refugees to whom they bore little to no formal obligations.¹⁵⁹

With the adoption of the *1951 Refugee Convention*, the exclusion of Third World states and societies was formalised by limiting the Convention’s application to continental Europe. The geographic and temporal limitations of the *1951*

¹⁵³ Chimni, ‘The Geopolitics of Refugee Studies’ (n 55) 350.

¹⁵⁴ Keely (n 74) 306–8.

¹⁵⁵ Barbara Harrell-Bond, *Refugees and the International System: The Evolution of Solutions* (Report, June 1995) 5. A prominent example of the en masse recognition of refugees during the Cold War occurred with the admission of Hungarian refugees fleeing the revolution of 1956: Joel Boutroue et al, *The State of the World’s Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford University Press, 2000) 29–31; Greg Burgess, *Refugees and the Promise of Asylum in Postwar France, 1945–1995* (Palgrave Macmillan, 2019) 168. Greg Burgess noted that the legal flexibility shown to accommodate Hungarian refugees within the definition of a refugee under the *1951 Refugee Convention* was a demonstration of ‘just how significant the Hungarian refugees had become to Cold War politics’: at 169.

¹⁵⁶ Julie Mertus, ‘The State and the Post-Cold War Refugee Regime: New Models, New Questions’ (1998) 20(1) *Michigan Journal of International Law* 59, 64–74.

¹⁵⁷ Tendayi Achiume, ‘Race, Refugees, and International Law’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 43, 56–9.

¹⁵⁸ We have elsewhere outlined the impacts of colonial domination in respect of migration and forced displacement: Woldemariam, Maguire and von Meding (n 8) 250, 263–8.

¹⁵⁹ Jonathan Crush and Abel Chikanda, ‘Forced Migration in Southern Africa’ in Elena Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 554, 556–60. Recent contributions engaging with the impact of colonialism on forced displacement can be found in Martin Lemberg-Pedersen et al (eds), *Postcoloniality and Forced Migration: Mobility, Control, Agency* (Bristol University Press, 2022).

Refugee Convention to events that unfolded in Europe are the clearest statement of the Eurocentric nature of the regime. This came at a time when the anti-colonial struggles in Africa were generating mass displacement and a growing number of displaced persons were finding their way to Europe.¹⁶⁰ This legal vacuum inspired the adoption of a regional refugee instrument in Africa,¹⁶¹ effectively rendering the *1951 Refugee Convention* to appear as a European instrument of no relevance to African states. Though the *OAU Refugee Convention* in Africa was adopted in 1969, its preparation seems to have stimulated ‘the rapid adoption of the [1967] Protocol’ that removed the temporal and geographic limitations from the *1951 Refugee Convention*.¹⁶² The effect of this was the universalisation of a Eurocentric regime.¹⁶³ Though the temporal and geographic limitations were removed, the normative limitations remained intact.

C Failure to Reflect on the Root Causes of Forced Displacement

Another mark of Eurocentricity and a major limitation in the regime governing forced displacement pertains to attitudes reflected in the narrative and discourse of causes of displacement. During the interwar period when forced displacement was prevalent in Europe, the focus of narratives and discourse was on the need to assist and protect displaced persons. There were minimal efforts to alleviate the core causes of these displacements¹⁶⁴ and many turned a blind eye at times, such as in the case of the repressive actions of the Third Reich in Germany.¹⁶⁵ Attempts to shift the focus to addressing root causes were actively suppressed during the interwar period.¹⁶⁶ This suppression of a policy focused on root causes had political goals. This is particularly highlighted in the effort of James G McDonald who confronted European states on their failure to address the causes of refugee

¹⁶⁰ Astri Suhrke, ‘A Crisis Diminished: Refugees in the Developing World’ (n 61) 218; Jay Ramasubramanyam, ‘Subcontinental Defiance to the Global Refugee Regime: Global Leadership or Regional Exceptionalism?’ (2018) 24 *Asian Yearbook of International Law* 60, 71; Claire Eldridge, Christoph Kalter and Becky Taylor, ‘Migrations of Decolonization, Welfare, and the Unevenness of Citizenship in the UK, France and Portugal’ (2023) 259(1) *Past and Present* 155, 155–6.

¹⁶¹ *OAU Refugee Convention* (n 17).

¹⁶² Sharpe (n 83) 25.

¹⁶³ Janmyr (n 140) 194.

¹⁶⁴ Skran, for example, highlights that ‘[t]he major actors in the international refugee regime did not directly try to eliminate war, one of the most obvious causes of refugee movements. Instead, they left this task to the League of Nations as a whole’: Skran, *Refugees in Inter-War Europe* (n 23) 228. Skran further highlights the absence of provisions to protect human rights abuses perpetrated by governments and the sentiment among governments that ‘a government’s treatment of its own people was essentially a domestic concern and not an issue for the international community’: at 228.

¹⁶⁵ Reminiscing on the little impact that the Évian Conference, convened to assist Jewish refugees from Germany, has had in bringing relief to Jewish refugees, Pertti Ahonen quotes Israel’s Yad Vashem memorial: ‘At the conference, the world’s democracies made it clear that they were willing to do next to nothing for the Jew of Europe... The world’s doors, closed at Evian, remained shut throughout World War II’: Pertti Ahonen, ‘Europe and Refugees: 1938 and 2015–16’ (2018) 52(2–3) *Patterns of Prejudice* 135, 140.

¹⁶⁶ For example, the League of Nations ‘distance[d] itself from the [High Commissioner for Refugees (Jewish and Others) Coming from Germany]’: Skran, *Refugees in Inter-War Europe* (n 23) 231.

outflows from Germany in the lead-up to WWII.¹⁶⁷ The Allied Powers were also actively involved in orchestrating some of the conflicts that took place in the interwar period.¹⁶⁸ As concerns displacements in the Third World in the post-WWII period, which have mainly been caused by the impacts of colonisation, the minimal focus on these causes has proven the Eurocentric utility of the refugee regime, shielding colonisers from public scrutiny. A deeper reflection on root causes would have therefore exposed and confronted the powerful states on their policies and actions in interwar Europe and afterwards.

The argument here is not to advance a call for the conflation of the humanitarian nature of refugee protection with the politically charged discourse of root causes of displacement. The protection of forcibly displaced persons should always be approached with a humanitarian lens, especially by receiving states, and should be decoupled from the political discussions of causes. In other words, a discourse on the root causes of displacement should not lead to a situation where people are denied protection or where people are held hostage to demands pertaining to the resolution of root causes so identified by states. However, approaching the displacement phenomenon as a purely humanitarian crisis and persistently failing to look inward into actions and policies that create the crisis have been features of the international refugee regime since its inception.

For a hundred years, limited deeper reflection and strategic direction were set with the goal of addressing the root causes of forced displacement. There were two attempts in the late 1970s and 80s where two studies were commissioned, one by the UN Commission on Human Rights¹⁶⁹ and the other by the UN General Assembly, to inquire into the means to address the root causes of mass displacement.¹⁷⁰ The outcomes of these studies were recommendations that did not bring about shifts or major changes in how the international community approached forced displacement.¹⁷¹ However, a growing state-led focus on causes and prevention, albeit a vitiated one, had already begun to surface in the post-WWII period.¹⁷² This subtle shift in the focus of narratives and discourse was a

¹⁶⁷ Skran, *Refugees in Inter-War Europe* (n 23) 230; Alessandra Roversi, 'The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period' (2003) 22(1) *Refugee Survey Quarterly* 21, 35.

¹⁶⁸ The first author's PhD thesis provides a detailed analysis on the internalist bias of explanations of the causes of forced displacement in the interwar period and how that exonerated from scrutiny the broader regional forces that played a role in causing those displacements: Samuel Berhanu Woldemariam, 'Forced Human Displacement, the State and International Law: A Critical Look From the South' (PhD Thesis, University of Newcastle, 2021).

¹⁶⁹ The UN Commission on Human Rights commissioned the study entitled 'Human Rights and Mass Exoduses' under the leadership of Sadruddin Aga Khan: *Human Rights and Mass Exoduses: Report of the Secretary-General*, 58th sess, Agenda Item 119(b), UN Doc A/58/186 (25 July 2003).

¹⁷⁰ The UN General Assembly commissioned another study that established a 'Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees': *International Cooperation to Avert New Flows of Refugees*, GA Res 37/121, 37th sess, 108th plen mtg, UN Doc A/Res/37/121 (16 December 1982).

¹⁷¹ For a detailed take on the failures of the two initiatives, see David A Martin, 'Large-Scale Migrations of Asylum Seekers' (1982) 76 *American Journal of International Law* 598, 600–3.

¹⁷² The UN Commission on Human Rights study on *Human Rights and Mass Exoduses* and the UN General Assembly study on *International Cooperation to Avert New Flows of Refugees* are themselves examples of state-led initiatives on causes and prevention, the first being proposed by Canada and the latter by Germany: *ibid* 599, 601.

paradoxical double-edged sword. While it portrayed the Western states as the protectors of the persecuted by shifting the focus to the internal causes of displacement in the states of origin, it was also used to justify restrictionist refugee policies and policies of containment.¹⁷³ Chimni noted:

The myth of difference went hand in hand with an internalist interpretation of the root causes of refugee flows which squarely laid the blame at the door of post-colonial societies and states, underestimating the significance of external factors. ... And it comes as no surprise that in the discussion of the causes of refugee flows the focus has been on internalist explanations ... for externalist explanations apportion blame between the state from which refugees flee and states responsible for authoring policies or undertaking action leading to the outflow of refugees.¹⁷⁴

The discourse on the prevention of forced displacement has also focused on symptoms rather than on the political and structural impediments that exist in the international legal order. These impediments create and sustain structures of inequality and injustice. Until these root causes are acknowledged and addressed, the mere treatment of symptoms cannot resolve the forced displacement conundrum. TWAIL scholars make contributions in this area by exposing the structural problems embedded in the international legal order. The norms and institutions of international law are shaped by Western states in such a way that they further Western interests while undermining the interests of the non-Western majority. This domination is evident in the international economic order, in the use of force in international relations, in the fight against climate change and in the enforcement of international obligations, to mention a few areas.

As we will discuss in the last Part, a principled integration of the discourse of root causes and prevention should not shift blame to countries of origin or restrict access to asylum in the West. It should rather be comprehensive, both inward and outward-looking.

D *Neutrality versus the Politics of Refugee Response*

In the refugee regime, the principle of political neutrality has been and remains a peculiar feature that characterises the engagement of non-state humanitarian actors, particularly the multilateral refugee organisations. Ever since the first High Commissioner, Nansen, adopted the principle of neutrality as a core principle of his humanitarian work,¹⁷⁵ it has remained a cornerstone principle of subsequent institutions including the UNHCR.¹⁷⁶ The *Statute of the UNHCR* stipulates that ‘the work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees’.¹⁷⁷ This has essentially meant that in their engagement with

¹⁷³ See generally Shacknove (n 72); Cathryn Costello, ‘Overcoming Refugee Containment and Crisis’ (2020) 21(1) *German Law Journal* 17, 18.

¹⁷⁴ Chimni, ‘The Geopolitics of Refugee Studies’ (n 55) 351, 360.

¹⁷⁵ Skran, ‘Profiles of the First Two High Commissioners’ (n 24) 283. Skran highlights Nansen’s insistence on neutrality in undertaking his work in the midst of politically contested refugee movements involving Russian and Bulgarian refugees and the Greco-Turkish population exchange: at 286.

¹⁷⁶ For the various nuances of what neutrality entails, see David Forsythe, ‘UNHCR’s Mandate: The Politics of Being Non-Political’ (Working Paper No 33, UNHCR, March 2001).

¹⁷⁷ *Statute of the Office of the United Nations High Commissioner for Refugees* (n 66) art 2.

states, humanitarian institutions are to remain above politics and, among other things, refrain from confronting states on issues of the causes of forced displacement. Their activities are limited to the provision of protection and humanitarian support to displaced persons, managing their movement and seeking durable solutions.

While there are continuities in the substance of the neutrality principle from the Nansen era to the establishment of the UNHCR, there are also marked departures in the underlying objectives that the principle is supposed to serve. Nansen and the early humanitarians embraced the principle out of the conviction that their personal, as opposed to institutional, views of the political causes leading to forced displacement should not get in the way of negotiations with refugee-producing states regarding the protection of refugees and displaced persons.¹⁷⁸ Such convictions were strongly felt considering the infancy of the refugee regime and its dependence on the individual characters and efforts of the high commissioners.¹⁷⁹ The interwar period was also characterised by nationalism, animosity, high politics and suspicion in interstate relations.¹⁸⁰ Accordingly, the early high commissioners perceived that any approach short of neutrality was likely to be considered as taking sides and therefore detrimental to achieving the objective of protection and assistance to refugees and displaced persons.

Conversely, even though refugee organisations embrace this policy of political neutrality, states, who are the main actors in the refugee regime, often pursue refugee policies based on political calculations. States are the main actors whose actions lead to forced displacement. They are also the ultimate financiers of the refugee regime and hosts to refugees. Moreover, refugee policy forms an increasingly contentious part of the domestic political process of states. Both historic and current accounts of refugee policymaking reveal the dominance of politics, rather than principle, in decision-making.¹⁸¹

The juxtaposition of politically neutral refugee organisations with politically calculating states has effectively led to the former's assumption of more obligations towards forcibly displaced persons.¹⁸² With the rise in the number of displaced persons and the growing restrictions of receiving states on admission, refugee organisations have been left to tend to millions of displaced persons in refugee camps.¹⁸³ This has gradually eroded the UNHCR's protection mandate

¹⁷⁸ Skran, *Refugees in Inter-War Europe* (n 23) 229–30.

¹⁷⁹ Skran notes how Nansen 'used his status as a citizen from a neutral country to appeal for humanitarian causes' and how '[h]e addressed all his appeals on purely humanitarian grounds' directing the League to involve itself in the political dimensions of conflicts giving rise to displacement: Skran, 'Profiles of the First Two High Commissioners' (n 24) 280–1, 294.

¹⁸⁰ Harrell-Bond (n 155) 3.

¹⁸¹ For a brief review of the political calculations in the development of the refugee regime, see generally Guy S Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27(1) *Refugee Survey Quarterly* 8. Referring to the post-1990s restrictive European Union policies on asylum, Morten Kjærum writes that 'the state interest policy is dominant in comparison with human rights protection': Morten Kjærum, 'Refugee Protection between State Interests and Human Rights: Where Is Europe Heading?' (2002) 24(2) *Human Rights Quarterly* 513, 519.

¹⁸² Skran also noted the tension that existed between states and refugee organisations in the context of the interwar refugee work. 'On the one hand, governments created and financed the High Commission and expected it to serve their interests. On the other, the High Commission had the humanitarian responsibility to assist refugees and serve as their advocate in a world of states': Skran, 'Profiles of The First Two High Commissioners' (n 24) 278.

¹⁸³ Loescher (n 22) 363–5.

and transformed its functions more into those of the humanitarian sector.¹⁸⁴ More importantly, the conception of the “non-political character” of the UNHCR has transformed the benign principle of neutrality into a strategy that serves state-centric interests.

The suggestion here is not for refugee organisations to abandon their neutrality for that is neither the cause of nor the solution to the ever-increasing phenomenon of forced displacement. Rather, our argument here is that the benign principle of political neutrality of refugee organisations has been exploited by states and has paved the way for them to shirk responsibility and pass it onto these organisations. States have effectively substituted their substantive responsibility towards the protection of refugees with at-will financial commitments to refugee organisations. Chimni has argued that

*‘humanitarianism’ is the ideology of hegemonic states in the era of globalisation marked by the end of the Cold War and a growing North-South divide ... [T]he ideology of humanitarianism mobilises a range of meanings and practices to establish and sustain global relations of domination.*¹⁸⁵

Accordingly, the more passive these refugee organisations remain in accepting more obligations beyond their mandate, the more this renders them instruments for the advancement of the interests of the powerful Northern/Western states.¹⁸⁶ This is the discernible trend so far. In the process of time, the politically charged reception policy of states has allowed few refugees to be admitted in Western states, resulting in the use of camps as spaces of containment where refugees exist for years, even decades, in a state of survival¹⁸⁷ and languish under subpar conditions.¹⁸⁸ Under these conditions and contexts, “neutrality” in response to oppressive conditions happens to be an impossibility and a political response of its own accord that recreates the status quo. It also does not help the oppressed.

E *The Absence of a Robust Responsibility-Sharing Framework*

When the refugee regime was established in the aftermath of WWI, responsibility for the protection and assistance of displaced persons was essentially the core issue to be addressed. Under the shadow of the destruction of war in Europe, states were not prepared to assume what was considered an additional responsibility for displaced persons, particularly for those from enemy states. Humanitarian ideals were not always the dominant consideration for

¹⁸⁴ See generally BS Chimni, ‘Globalisation, Humanitarianism and the Erosion of Refugee Protection’ (Working Paper No 3, Refugee Studies Centre, February 2000).

¹⁸⁵ *Ibid* 3.

¹⁸⁶ Noting the post-Cold War shift in the UNHCR’s humanitarian engagement, Tor Krever argued ‘the use of a humanitarian discourse masks what is fundamentally a shift to policies of containment — and the pursuit of state, not refugee, interests — which have undermined UNHCR’s protection mandate’: Tor Krever, “‘Mopping-Up’: UNHCR, Neutrality and Non-Refoulement since the Cold War’ (2011) 10(3) *Chinese Journal of International Law* 587, 589.

¹⁸⁷ Nasia Anam, ‘Encampment as Colonization: Theorizing the Representation of Refugee Spaces’ (2020) 50(3) *Journal of Narrative Theory* 405, 406. Scholars have also argued that encampment of refugees results from the absence of a responsibility-sharing mechanism and leads to it ‘either [being] coercive for the hosting states or [undermining] the overall system of protection’: Aleinikoff and Owen (n 130) 468.

¹⁸⁸ Gibney (n 132) 449.

policies and actions with regard to displaced persons.¹⁸⁹ This posed a great challenge for the institutions and individuals charged with the task of protecting and assisting displaced persons. It required asserting the international character of the phenomenon and the humanitarian nature of the project of protection of and assistance to refugees and displaced persons.

The international character of the phenomenon received gradual recognition as the regime governing forced displacement expanded from dealing with Russian refugees in the 1920s to a universal regime through the adoption of the *1967 Refugee Protocol*. Similarly, the humanitarian nature of the refugee work received gradual state recognition initially through the advocacy of the humanitarian advocates we highlighted above.

However, despite the gradual recognition of the international scope and humanitarian nature of forced displacement, the sharing of responsibility did not complement such recognition. Accordingly, the sharing of responsibility has been asymmetric, with 76% of refugees currently hosted by low and middle-income countries and 70% of refugees currently hosted by neighbouring states.¹⁹⁰ Scholars have criticised the contemporary refugee regime for its lack of a binding framework for responsibility-sharing and have shared their thoughts on how this gap could be addressed.¹⁹¹

V THE WAY FORWARD: TOWARDS A PREVENTIVE APPROACH

Over the past century, states have approached forced displacement as a self-contained phenomenon, the solution for which predominantly lies in the protection and assistance of displaced persons. This approach has resulted in the gradual consolidation of a reactive engagement with the phenomenon as protection and assistance become crucial after people have been displaced.¹⁹² This has been the modus operandi of the international community over the past century. The reactive paradigm has resulted from and reproduces the failure to reflect on and address the root causes of forced displacement. We have elsewhere noted this very point as one of the major failures of the international regime governing forced displacement and argued that:

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.¹⁹³

¹⁸⁹ Loescher (n 22).

¹⁹⁰ United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2022* (Report, 14 June 2023) 2.

¹⁹¹ Exploring the suggested solutions to bridge the gap in responsibility-sharing is beyond the scope of this paper. For literature on this point see, eg, Aleinikoff and Owen (n 130); Gibney (n 132). Gibney calls for a responsibility-sharing arrangement that is based on the 'integrative capacity' of states and that shows due consideration for the interests of refugees: Gibney (n 132) 448.

¹⁹² Woldemariam, Maguire and von Meding (n 8) 261.

¹⁹³ *Ibid* 276.

While the reactive predisposition of the regime has been a characteristic since its establishment, the discourse over the need for a preventive approach that addresses the root causes of forced displacement also has its roots in the early history of the regime and various periods since. We have highlighted above McDonald's call to address the root causes of the displacement coming from Germany. Other notable examples relate to the 1980s, which saw two multilateral attempts to examine the root causes of displacement. The first initiative came from the UN Human Rights Committee in the form of a study on 'Human Rights and Mass Exoduses'.¹⁹⁴ In identifying the root causes of mass exoduses during the period of the study, Special Rapporteur Sadruddin Aga Khan emphasised the structural conditions in the world, such as the economic divide between the developing and developed countries, that precipitated forced displacement.¹⁹⁵ The final recommendations of the study also reflected on the need to address these structural conditions to address forced displacement.¹⁹⁶

The second initiative, an initiative to avert new flows of refugees, was proposed by the Federal Republic of Germany and endorsed by the UN General Assembly in a resolution.¹⁹⁷ The initiative identified the predominantly reactive nature of the existing response, the absence of serious consideration of preventive measures and 'an institutional basis for a system of preventive measures' and the need to establish such a mechanism.¹⁹⁸ States also submitted their views on the topic upon the invitation of the Secretary-General. The responses from states reflected a consensus on the deficiency of the existing system which prioritises humanitarian assistance to refugees¹⁹⁹ and on the need to address the root causes of the refugee problem.²⁰⁰ In this respect, there was a strong recognition of the need for a comprehensive undertaking to address the root causes of forced displacement. The Australian government's reply to the Secretary-General's call for views encapsulates the breadth of the call for comprehensive action:

A thorough and objective examination of the causes of mass flows of people may indicate what kind of measures are required to stabilize populations. For the long term these measures may have to relate to the whole basis of the international order and to extend widely to its political, social and economic aspects.²⁰¹

Though both attempts failed in prompting a meaningful change in direction that would curb the reactive predisposition of the refugee regime, they demonstrated the awareness of states of the deeply embedded structural issues. Despite this awareness, the lack of a strategic follow-up on these two initiatives also

¹⁹⁴ Sadruddin Aga Khan, Special Rapporteur, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Study on Human Rights and Mass Exoduses*, 38th sess, Agenda Item 12(b), UN Doc E/CN.4/1503 (31 December 1981).

¹⁹⁵ Ibid 12.

¹⁹⁶ Ibid 62–3.

¹⁹⁷ *International Co-operation to Avert New Flows of Refugees*, GA Res 35/124, 92nd mtg, UN Doc A/RES/35/124 (11 December 1980).

¹⁹⁸ *International Co-operation to Avert New Flows of Refugees: Report of the Secretary-General*, 36th sess, Agenda Item 66, UN Doc A/36/582 (23 October 1981) 18–27.

¹⁹⁹ Ibid 14.

²⁰⁰ Ibid 11.

²⁰¹ Ibid 6. The statement was part of the response of the Australian Government to the UN Secretary-General.

demonstrated the lack of political willingness to confront the structural issues head-on.

Unfortunately, in addition to a reactive approach, current trends are also indicative of an ever-narrowing protection regime as states continue to restrict asylum and increasingly seek to outsource their asylum obligations. The politicisation of protection and asylum is still a dominant feature in the distinctions made between those who *deserve* protection and those who do not. The opposing approaches employed by European Union countries in respect of the 2015 Syrian refugee crisis and the current Ukrainian refugee crisis are a case in point. While Syrian refugees were and still are subjected to various restrictions in their pursuit of asylum protection, European states effectively removed these barriers for refugees fleeing from Ukraine.²⁰² The response of the UK to refugees from Ukraine and those from elsewhere, mainly African states, further demonstrates this. Soon before the UK government announced a whole-of-government response to assist Ukrainian refugees in finding refuge in the country,²⁰³ it had signed a deal with the Rwandan government to transport asylum seekers, whom the UK government carefully calls ‘migrants’ in an effort to dissociate them from refugees, to Rwanda, where, according to the Home Office, ‘they will be able to rebuild their lives in safety’.²⁰⁴ This is a vivid reminder and a re-enactment of the Cold War period’s use of refugees as pawns.²⁰⁵

The argument here is not that Ukrainian refugees are not deserving of the protection that is being extended to them by the states. The argument is against the problematic association of refugee protection with political goals, which in this case relates to the bigger geopolitical tension with Russia. This renders refugee protection part of a political strategy to achieve a desired goal, thereby commodifying asylum and protection and making refugees political tools. This case again highlights the tendency to make distinctions between refugees from continental Europe and elsewhere.

A corollary challenge to the reactive predisposition of the refugee regime is the narrow conception of preventive action in the context of forced displacement. International efforts to pursue preventive actions, especially contemporary policies, often squarely focus on the socio-economic and political problems in the state of origin as the causes of displacement and seek to contain the movement of people within the state or region of origin. Such a narrow conceptualisation of prevention ignores the larger systemic and structural issues in the international

²⁰² Stephen McCloskey, ‘The War in Ukraine Has Revealed a Hierarchy of Victims’ [2022] (34) *Policy and Practice: A Development Education Review* 138, 141; Rachael Reilly and Michael Flynn, ‘The Ukraine Crisis Double Standards: Has Europe’s Response to Refugees Changed?’ *Global Detention Project* (Working Paper, 2 March 2022) 1–2 <<https://www.globaldetentionproject.org/the-ukraine-crisis-double-standards-has-europes-response-to-refugees-changed>>, archived at <<https://perma.cc/USS5-9ZXB>>; Jay Ramasubramanyam, ‘Some Refugees are Welcome, Others Not So Much: Revisiting the “Myth of Difference”’, *Völkerrechtsblog* (Blog Post, 28 April 2022).

²⁰³ United Kingdom, *Parliamentary Debates*, House of Commons, 10 March 2022, vol 710, col 467, 470 (Priti Patel, Home Secretary).

²⁰⁴ ‘First Migrants Set for Rwanda to Be Given Final Notice’, *UK Government* (Web Page, 1 June 2022) <<https://www.gov.uk/government/news/first-migrants-set-for-rwanda-to-be-given-final-notice>>, archived at <<https://perma.cc/KA3P-RPEU>>.

²⁰⁵ Chimni, ‘The Geopolitics of Refugee Studies’ (n 55) 350.

legal order that directly and indirectly impact the socio-economic and political wellbeing of people and nations, particularly in the Global South.²⁰⁶

We firmly believe that a reactive approach to forced displacement and the consideration of forced displacement as a problem squarely caused by circumstances in the country of origin and requiring minimal responses from the country of destination is a flawed approach. Countries of destination in the Global North are so often deeply involved with circumstances in countries of origin in the Global South. A TWAAIL approach is particularly helpful here as it enables a deeper exploration of the nature of this entangled past, present and future. If we are to ever witness positive progress in managing forced displacement, there will need to be a serious reflection on the systematic and structural issues in the international legal system, be it in the political or economic systems or be it internal or external to the country of origin. Such a reflection and a firm political commitment to address the structural inequalities and inequities that exist among nations will go a long way in creating an environment that enables people to live and thrive in a place they choose freely.

²⁰⁶ In his examination of the *Global Compact on Refugees*, Chimni has for example highlighted the failure to reflect on the 'responsibility of third States, in particular Western States, for recent outflows of refugees linked to their acts of intervention': BS Chimni, 'Global Compact on Refugees: One Step Forward, Two Steps Back' (2018) 30(4) *International Journal of Refugee Law* 630, 630.