THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW

JAMES C. HATHAWAY

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States are increasingly challenging the logic of simply assimilating refugees to their own citizens. Questions are now raised about whether refugees should be allowed to enjoy freedom of movement, to work, to access public welfare programs, or to be reunited with family members. Doubts have been expressed about the propriety of exempting refugees from visa and other immigration rules, and even about whether there is really a duty to admit refugees at all. This book presents the first ever comprehensive analysis of the human rights of refugees set by the UN Refugee Convention, including analysis of its history and application by senior courts. Hathaway links these standards to key norms of international human rights law, and applies his analysis to the most difficult protection challenges faced around the world. This is a pioneering scholarly work, and a critical resource for advocates, judges, and policymakers.

JAMES C. HATHAWAY is James E. and Sarah A. Degan Professor of Law at the University of Michigan, and is a leading authority on, and is widely published in, international refugee law. He is the founding director of the University of Michigan's innovative Program in Refugee and Asylum Law, in which students have the opportunity to study refugee law from international, comparative, and interdisciplinary perspectives. He is also Senior Visiting Research Associate at Oxford University's Refugee Studies Programme. Hathaway was previously Professor of Law and Associate Dean of the Osgoode Hall Law School (Toronto), and has been a visiting professor at the American University in Cairo, and at the universities of Tokyo and California. He regularly provides training on refugee law to academic, non-governmental, and official audiences around the world.

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In memory of Lisa Gilad

"[D]ecisions had at times given the impression that it was a conference for the protection of helpless sovereign states against the wicked refugee. The draft Convention had at times been in danger of appearing to the refugee like the menu at an expensive restaurant, with every course crossed out except, perhaps, the soup, and a footnote to the effect that even the soup might not be served in certain circumstances."

Mr. Rees, International Council of Voluntary Agencies (Nov. 26, 1951)

"[I]t was clearly in the best interests of refugees that [the Refugee Convention] should be cast in a form which would be acceptable to governments, thus inducing them to accept at least certain commitments ... Otherwise, they would be obliged to enter reservations which would probably exclude even those minimum commitments. Liberalism which was blind to the facts of reality could only beat the air."

Mr. Rochefort, Representative of France (Nov. 30, 1951)

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ACKNOWLEDGMENTS

This book has evolved over the course of more than a decade. It was inspired by a call from the refugee law pioneer Atle Grahl-Madsen, shortly before his death. Professor Grahl-Madsen asked me to consider preparing a comprehensive analysis of the rights of refugees, drawing freely upon notes which he had authored during the 1960s (which were subsequently published in full by UNHCR in 1997). Grahl-Madsen's prescient vision was to link an updated study of the rights derived from the Refugee Convention with analysis of relevant norms of international human rights – thus yielding a truly comprehensive understanding of the refugee rights regime. As always, Grahl-Madsen was ahead of the curve: he foresaw that the days in which recognition of refugee status would lead with relatively little debate to respect for relevant legal entitlements would not last forever, and that there was therefore an urgent need for the academy to consolidate a clear understanding of the international legal rules that define the baseline entitlements that follow from refugee status. This book is my effort to do justice to his vision.

My own sense was that the study of legal norms would be most fruitful if tested against the hard facts of refugee life on the ground. The design for a mixed legal–empirical study emerged with the generous support of colleagues at York University's interdisciplinary Centre for Refugee Studies, in particular David Dewitt, Winona Giles, Diana Lary, and Penny Van Esterik. The university supported the launch of this research by awarding me the Walter L. Gordon Research Professorship for the academic year 1994–1995; the research effort itself was generously funded by Canada's Social Sciences and Humanities Research Council. At the same time, the International Academy of Comparative Law kindly appointed me General Rapporteur for a transnational study of the implementation of refugee rights around the world: with the extraordinary support of a team of twenty-eight National Rapporteurs, the analytical framework which grounds this book emerged. As the footnotes throughout this volume make clear, I remain enormously indebted to this group of eminent scholars who shared my commitment to developing an understanding of refugee rights capable of meeting real challenges in often difficult circumstances.

Much of the book was written while I was on the faculty of Osgoode Hall Law School of York University, in Toronto. Deans Jim MacPherson and Marilyn Pilkington were unfailingly supportive of my ambitions. My talented law colleagues Bill Angus and John Evans provided regular and much-needed advice, and were consistently encouraging of my efforts. My ever-supportive best friend Jamie Cameron kept my spirits high, even when I felt impossibly weighed down by the enormity of this undertaking – a role which I am thankful she still plays for me.

During the early years of this research, I had the honor to work with an outstanding team in the Law Unit of the Centre for Refugee Studies. Leanne MacMillan and Alex Neve coordinated the legal research work, and tolerated my wholly unreasonable requests with grace and true professionalism. Enthusiastic and top-quality research assistance was provided by an able team of graduate students, in particular by Michael Barutciski and Jeanne Donald. Unique recognition is owed to John Dent, who became my true partner in this research effort. John began work on this study while a graduate student in political science, and pursued the project full time after completing his degree. Not only did he conceive and execute a truly extraordinary empirical research effort, but he worked side by side with me on development of the book's legal analysis as well. Simply put, this book would never have emerged without John's invaluable insights and contributions.

When I moved to the University of Michigan Law School in 1998, it was in large part because then-Dean Jeffrey Lehman shared my vision to develop an unparalleled curriculum in international and comparative refugee and asylum law. Jeff found the resources to support my work, and allowed me to focus my energies entirely on thinking about refugee protection concerns. His successor Evan Caminker has been similarly generous to me, and has found the time to help me shape my research agenda. Wonderful colleagues at the Law School have given freely of their knowledge and perspectives – in particular, Christine Chinkin, Rob Howse, Chris McCrudden, Catharine MacKinnon, Roberta Morris, Bruno Simma, and Eric Stein. I am grateful also for the fine research assistance of Anne Cusick and Dipen Sabharwal. Louise Moor and Larissa Wakim not only helped me fine-tune my research, but agreed to coordinate much of the Program in Refugee and Asylum Law in order to give me the time to complete my writing. And from beginning to end of this endeavor, the outstanding resources of the University of Michigan Law Library have been made available to me. Law Librarian Margaret Leary met with me on my first day at the faculty to assess my research needs; her colleague Barb Garavaglia created a system that allowed me nearly painlessly to monitor key legal and social developments; and Aimee Mangan ensured that every research request I made was answered not only promptly, but with an attention to detail that most academics can only dream of.

A special acknowledgment is owed to an amazing group of visiting faculty and senior graduate students – Michelle Foster, Rodger Haines, Seong Soo Kim, Luis Peral, Dipen Sabharwal, and Seyoum Tesfay – each of whom generously read draft chapters of the book, and met regularly over the course of the winter 2003 term to discuss them. This process significantly sharpened my thinking, and was critical in identifying for me where additional work was required. Rodger and Luis have proved the best of friends and colleagues to me, continuing to provide wise counsel from afar at a moment's notice.

Nor have I benefited only from the assistance of colleagues close to home. Christian Wolff, a graduate student at Oxford's Refugee Studies Centre, undertook a massive empirical updating project for me in 2003–2004 – spanning literally every concern, in every part of the world. His efforts were heroic, and the research unearthed of enormous value to ensuring the continuing relevance of the case studies presented here. Chris Nash of the European Council on Refugees and Exiles, as well as academics Lee Anne de la Hunt, David Turton, and Marjoleine Zieck, was key among a group of persons I prevailed upon to advise me. I also acknowledge with gratitude the comments on my research from students to whom it has been presented at the Oxford University Refugee Studies Centre, as well as from researchers at Amnesty International in London where I have had the privilege to teach refugee law for many years.

Some of the most direct assistance I have received has been from a wonderful group of support persons – Wendy Rambo and Rose della Rocca at Osgoode Hall, and Baiba Hicks, Janice Proctor, and Karen Rushlow at Michigan. They have all taken a serious interest in this project, and found creative ways to advance the flow of this research, for which I am most grateful.

I have also received extraordinary support from Cambridge University Press to bring this book into being. Finola O'Sullivan believed in this project from the start, and ensured that standard publishing procedures were tailored to meet the particular challenges of producing this book. Diane Ilott was the model of a perfectionist editor: her proposals for revision were routinely thoughtful, and of real assistance to me. And Maureen MacGlashan has created a wonderful set of tables and indices, which I am confident will enable even the most demanding reader to navigate this book with ease.

And finally, there is a cast of wonderful people who have kept me sane during the long period of research and writing. John Moreau suffered more than anyone from my dedication to this work; I owe him more than I can say. My canine pal Otis patiently watched nearly every keystroke from the beginning to end of this writing project, silently communicating his unfailing confidence that I could see the project through. And last but definitely not least, I have been blessed with the very best of friends and family who supported me during interminable bouts of anxiety and stress. To my parents, Bernice and Charles Hathaway; and to Virginia Gordan in Ann Arbor,

Paul Gravett and Mark Hand on Salt Spring Island, and Howard and Pat Frederick in Tucson: thank you for never letting me down.

This book is dedicated to my dear friend Lisa Gilad – social anthropologist, advocate for social justice, and refugee law decision-maker – who died tragically before she could see her inspired agenda to better the lot of refugees through to completion. Lisa was committed to the view that law could make a critical difference to the welfare of refugees, and worked tirelessly to inspire a humane understanding of protection principles among her colleagues, as well as in the broader community of persons working with refugees in government, academia, and on the front lines. My hope is that this study will contribute to the work of others who, like Lisa, believe that refugee protection can best be assured by a steadfast commitment to clear rules, interpreted in context, and applied with compassion.

James C. Hathaway
Ann Arbor, Michigan
December 2004

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[2] As discussion of the Refugee Convention in general permeates the whole of the text (i.e. *passim*) only discussion of particular articles is included in this Table.

ABBREVIATIONS FOR COURTS AND TRIBUNALS CITED

Au. HC	Austria, High Court
Aus. FC	Australia, Federal Court
Aus. FFC	Australia, Full Federal Court
Aus. HC	Australia, High Court
Can. FC	Canada, Federal Court
Can. FCA	Canada, Federal Court of Appeal
Can. IRB	Canada, Immigration and Refugee Board
Can. SC	Canada, Supreme Court
ECHR	European Court of Human Rights
ECJ	European Court of Justice
Eng. CA	England, Court of Appeal
Eng. HC	England, High Court
Eng. QBD	England, Queen's Bench Division
Eur Comm	European Commission on Human Rights
Fr. CE	France, Conseil d'Etat
Ger. AC	Germany, Administrative Court
Ger. FCC	Germany, Federal Constitutional Court
Ger. FASC	Germany, Federal Administrative Supreme Court
HK PC	Hong Kong, Privy Council
ICJ	International Court of Justice
India SC	India, Supreme Court
Inter-Am Comm HR	Inter-American Commission on Human Rights
Jap. SC	Japan, Supreme Court
NZ CA	New Zealand, Court of Appeal
NZ HC	New Zealand, High Court
NZ RSAA	New Zealand, Refugee Status Appeals Authority
NZ SC	New Zealand, Supreme Court
PCIJ	Permanent Court of International Justice
SA CC	South Africa, Constitutional Court
SA HC	South Africa, High Court
SA SCA	South Africa, Supreme Court of Appeal
Sw. FC	Switzerland, Federal Court
Tokyo DC	Japan, Tokyo District Court

Tokyo HC	Japan, Tokyo High Court
UK HL	United Kingdom, House of Lords
UK SIAC	United Kingdom, Special Immigration Appeals Commission
UNCAT	United Nations Committee Against Torture
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
US AG	United States, Attorney General
US BIA	United States, Board of Immigration Appeals
US CA2	United States, 2nd Circuit Court of Appeals
US CA4	United States, 4th Circuit Court of Appeals
US CA7	United States, 7th Circuit Court of Appeals
US CA8	United States, 8th Circuit Court of Appeals
US CA9	United States, 9th Circuit Court of Appeals
US CA11	United States, 11th Circuit Court of Appeals
US DCCa	United States, District Court, California
US DCEDNY	United States, District Court, Eastern District of New York
US DCNDCa	United States, District Court, Northern District of California
US DCSDNY	United States, District Court, Southern District of New York
US IC	United States, Immigration Court
US SC	United States, Supreme Court
US SJCMass	United States, Supreme Judicial Court of Massachusetts
WTO AB	World Trade Organization Appellate Body

INTRODUCTION

The greatest challenge facing refugees arriving in the developed world has traditionally been to convince authorities that they are, in fact, entitled to recognition of their refugee status.[1] What level of risk is required by the "well-founded fear" standard? What sorts of harm are encompassed by the notion of "being persecuted"? Is there a duty to seek an internal remedy within one's own country before seeking refugee protection abroad? What is the meaning of the five grounds for protection, and what causal connection is required between those grounds and the risk of being persecuted? Most recently, significant attention has also been paid to the nature of the circumstances under which a person may be excluded from, or deemed no longer to require, protection as a refugee.

While debate continues on these and other requirements for qualification as a Convention refugee,[2] there is no denying that the decade of the 1990s gave rise to a marked increase in both the extent and depth of judicial efforts to resolve the most vexing definitional controversies. Senior appellate courts now routinely engage in an ongoing and quite extraordinary transnational judicial conversation[3] about the scope of the refugee

[1] The core of the international legal definition of a refugee requires that "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [the applicant] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country": Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954 (Refugee Convention), supplemented by the Protocol relating to the Status of Refugees, 606 UNTS 8791, done Jan. 31, 1967, entered into force Oct. 4, 1967 (Refugee Protocol).

[2] In its recent Global Consultations on International Protection, the United Nations High Commissioner for Refugees (UNHCR) identified as issues of particular salience the scope of the "membership of a particular social group" category; gender-related persecution; the nature of the duty to seek internal protection or relocation; and the cessation and exclusion clauses. See E. Feller et al. eds., *Refugee Protection in International Law* (2003) (Feller et al., *Refugee Protection*), at 263–552.

[3] See A.-M. Slaughter, "A Typology of Transjudicial Communication," (1994) 29 *University of Richmond Law Review* 99.

definition,[4] and have increasingly committed themselves to find common ground.[5] Indeed, the House of Lords has suggested that courts have a legal responsibility to interpret the Refugee Convention in a way that ensures a common understanding across states of the standard of entitlement to protection:

> [A]s in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning . . . without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty . . .
>
> In practice it is left to national courts, faced with the material disagreement on an issue of interpretation, to resolve it. But in doing so, [they] must search, untrammelled by notions of [their] national legal culture, for the true autonomous and international meaning of the treaty.[6]

In contrast to the progress achieved by courts in conceiving a shared understanding of the Convention refugee definition, there has been only minimal judicial engagement with the meaning of the various rights which follow from recognition of Convention refugee status. Although most of the Refugee Convention is in fact devoted to elaborating these entitlements, there is only a smattering of judicial guidance on a small minority of the rights set by the treaty. Even in the academic literature, only the core duty of *non-refoulement* and, to a lesser extent, the duties of non-expulsion and non-penalization, have received any serious attention.[7] This analytical gap is

[4] The contemporary jurisprudence of leading asylum states on the scope of Convention refugee status is collected at the University of Michigan's Refugee Caselaw Site, www.refugeecaselaw.org.

[5] The establishment in 1995 of the International Association of Refugee Law Judges (IARLJ), now comprising members from some forty asylum states, is a particularly noteworthy means of advancing this sense of refugee law as a common enterprise. In 2002, the IARLJ convened its first Advanced Workshop on Refugee Law, in which appellate judges from around the world met to seek consensus on refugee definition issues identified by them as particularly challenging. See J. Hathaway, "A Forum for the Transnational Development of Refugee Law," (2003) 15(3) *International Journal of Refugee Law* 418.

[6] *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [2001] 2 WLR 143 (UK HL, Dec. 19, 2000).

[7] The only refugee rights which have received relatively extensive academic attention are Arts. 31–33. See e.g. G. Stenberg, *Non-Expulsion and Non-Refoulement* (1989); W. Kälin, *Das Prinzip des Non-Refoulement* (1982). Even in the context of its recent Global Consultations on International Protection, UNHCR drew particular attention to only three refugee rights: the rights of *non-refoulement* (Art. 33), freedom from penalization or detention for illegal entry (Art. 31), and protection of family unity: Feller et al., *Refugee Protection*, at 87–179, 185–258, and 555–608. Those academic works that do address the full range of refugee rights are all quite dated, including N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953); A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963, pub'd., 1997); and P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (posthumously pub'd., 1995).

no doubt largely the result of the tradition of most developed states simply to admit refugees, formally or in practice, as long-term or permanent residents. While not required by the Refugee Convention,[8] this approach has led de facto to respect for most Convention rights (and usually more). Because refugee rights were not at risk, there was little perceived need to elaborate their meaning.

In recent years, however, governments throughout the industrialized world have begun to question the logic of routinely assimilating refugees, and have therefore sought to limit their access to a variety of rights.[9] Most commonly, questions are now raised about whether refugees should be allowed to enjoy freedom of movement, to work, to access public welfare programs, or to be reunited with family members. In a minority of states, doubts have been expressed about the propriety of exempting refugees from compliance with visa and other immigration rules, and even about whether there is really a duty to admit refugees at all. There is also a marked interest in the authority of states to repatriate refugees to their countries of origin, or otherwise to divest themselves of even such duties of protection as are initially recognized.

This movement towards a less robust form of refugee protection mirrors the traditional approach in much of the less developed world. For reasons born of both pragmatism and principle, poorer countries – which host the overwhelming majority of the world's refugees[10] – have rarely contested the eligibility for refugee status of those arriving at their borders.[11] Yet this conceptual generosity has not always been matched by efforts to treat the refugees admitted in line with duties set by the Refugee Convention. In far too many cases, refugees in less developed states have been detained, socially marginalized, left physically at risk, or effectively denied the ability to meet even their most basic needs. The imperative clearly to define the rights which follow from refugee status, while of comparatively recent origin in most

[8] See chapters 4.1 and 7.4 below.

[9] See e.g. J. Hathaway, "The Emerging Politics of *Non-Entrée*," (1992) 91 *Refugees* 40, also published as "L'émergence d'une politique de non-entrée," in F. Julien-Laferrière ed., *Frontières du droit, Frontières des droits* (1993), at 65; and, in particular, G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (2000).

[10] As of Dec. 31, 2003, for example, just under 80 percent of the world's refugees were protected in Africa, the Middle East, or South and Central Asia: US Committee for Refugees, *World Refugee Survey 2004* (2004), at 4–5.

[11] In some instances, particularly in Africa, the commitment to a more expansive understanding of refugee status has been formalized in regional treaty or other standards. See J. Hathaway, *The Law of Refugee Status* (1991) (Hathaway, *Refugee Status*), at 16–21; and G. Goodwin-Gill, *The Refugee in International Law* (1996) (Goodwin-Gill, *Refugee in International Law*), at 20–21.

industrialized states, is of long-standing duration in much of the less developed world.

The goal of this book is therefore to give renewed life to a too-long neglected source of vital, internationally agreed human rights for refugees. More specifically, the analysis here seeks to elaborate an understanding of refugee law which is firmly anchored in legal obligation, and which is accordingly detached from momentary considerations of policy and preference. The essential premise is that refugees are entitled to claim the benefit of a deliberate and coherent system of rights.

It will be clear from this formulation that the Refugee Convention and its Protocol are conceived here not as accords about immigration, or even migration, but as part and parcel of international human rights law. This view is fully in line with the positions adopted by senior courts which have analyzed the object and purpose of the Refugee Convention. In perhaps the earliest formulation, the Supreme Court of Canada embraced the view that the essential purpose of the Refugee Convention is to identify persons who no longer enjoy the most basic forms of protection which a state is obliged to provide. In such circumstances, refugee law provides surrogate or substitute protection of basic human rights:

> International refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only when that protection is unavailable, and then only in certain situations.[12]

Complementing this analysis, the House of Lords more recently affirmed that the fundamental goal of refugee law is to restore refugees to affirmative protection:

> The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a convention reason in his own country to turn for protection to the international community.[13]

Justice Kirby of the High Court of Australia has moreover linked the goals of refugee law directly to the more general human rights project:

> [The Refugee Convention's] meaning should be ascertained having regard to its object, bearing in mind that the Convention is one of several

[12] *Canada v. Ward*, (1993) 103 DLR 4th 1 (Can. SC, June 30, 1993). More recently, Justice Bastarache of the same court affirmed that "[t]he overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place": *Pushpanathan v. Minister of Citizenship and Immigration*, 1998 Can. Sup. Ct. Lexis 29 (Can. SC, June 4, 1998), at para. 59.

[13] *Horvath v. Secretary of State for the Home Department*, [2000] 3 All ER 577 (UK HL, July 6, 2000), per Lord Hope of Craighead.

> important international treaties designed to redress "violation[s] of basic human rights, demonstrative of a failure of state protection" ... It is the recognition of the failure of state protection, so often repeated in the history of the past hundred years, that led to the exceptional involvement of international law in matters concerning individual human rights.[14]

As these formulations make clear, refugee law is a remedial or palliative branch of human rights law. Its specific purpose is to ensure that those whose basic rights are not protected (for a Convention reason) in their own country are, if able to reach an asylum state, entitled to invoke rights of substitute protection in any state party to the Refugee Convention. As such, the right of entry which is undoubtedly the most visible consequence of refugee law is, in fact, fundamentally consequential in nature, and of a duration limited by the persistence of risk in the refugee's state of origin.[15] It is no more than a necessary means to a human rights end, that being the preservation of the human dignity of an involuntary migrant when his or her country of origin cannot or will not meet that responsibility. In pith and substance, refugee law is not immigration law at all, but is rather a system for the surrogate or substitute protection of human rights.

Despite its obvious relevance and widespread ratification,[16] the Refugee Convention has only rarely been understood to be the primary point of reference when the well-being of refugees is threatened. In particular, there has too often been a tendency simply to invoke non-binding UNHCR or other institutional policy positions. When legal standards are brought to bear, there appears to have been a tacit assumption that whatever concerns refugees face can (and should) be addressed by reliance on the more recently evolved general system for the international protection of human rights.[17]

[14] *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per Kirby J. See also *Applicant "A" and Ano'r v. Minister for Immigration and Multicultural Affairs*, (1997) 190 CLR 225 (Aus. HC, Feb. 24, 1997), per Kirby J. at 296–297, holding that the term "refugee" is "to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights (esp. Arts. 3, 5, and 16) and the International Covenant on Civil and Political Rights (esp. Arts. 7, 23)."

[15] See chapter 4.1 below.

[16] As of October 1, 2004, 145 states were a party to either the Refugee Convention or Refugee Protocol. Madagascar, Monaco, Namibia, and St. Kitts and Nevis were a party only to the Convention; Cape Verde, the United States of America, and Venezuela were a party only to the Protocol: UNHCR, www.unhcr.ch (accessed Nov. 19, 2004).

[17] "In traditional international law, the 'responsibility of States for damage done in their territory to the person or property of foreigners' frequently appears closely bound up with two great doctrines or principles: the so-called 'international standard of justice', and the principle of the equality of nationals and aliens ... What was formerly the object of these two principles – the protection of the person and his property – is now intended to be

It is, of course, true that all persons are today understood to possess legally defined human rights worthy of official validation across time and societies. States acknowledge in principle that they may not invoke raw power, sovereign political authority, or cultural diversity to rationalize failure to ensure the basic rights of persons subject to their jurisdiction – including refugees.[18] The range of international human rights instruments is moreover indisputably vast, and growing. Yet, more than half a century after inauguration of the United Nations system of international human rights law, we must concede that there are only minimal legal tools for the imposition of genuine and truly universal state accountability. The adjustment to an understanding of human rights law conceived outside the political processes of individual nation-states has required a painstaking process of reconciling divergent values and political priorities, which is far from complete. Instead of a universal and comprehensive system of human rights law, the present reality is instead a patchwork of standards of varying reach, implemented through mechanisms that range from the purely facilitative to the modestly coercive.[19] Despite all of its successes, the human rights undertaking is very much a work in progress, with real achievements in some areas, and comparatively little in others.

This fragmentary quality of international human rights law has too often been ignored by scholars and advocates. In a perhaps unconscious drive to will the universal human rights project to early completion, there has been a propensity to overstate the authentic reach of legal norms by downplaying, or even recasting, the often demanding standards which govern the recognition of principles as matters of international law. In the result, there is now a troubling disjuncture between law as declared and law recognized as a meaningful constraint on the exercise of state authority.

The view advanced here, in contrast, is that the protection of refugees is better pursued by the invocation of standards of indisputable legal authority,

accomplished by the international recognition of the essential rights of man. Under this new legal doctrine, the distinction between nationals and aliens no longer has any *raison d'être*, so that both in theory and in practice these two traditional principles are henceforth inapplicable. In effect, both of these principles appear to have been outgrown by contemporary international law": F. V. Garcia Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), at 1.

[18] Belgium at one point proposed incorporation in the Refugee Convention of at least Arts. 18 and 19 of the Universal Declaration of Human Rights. The proposal was defeated because of agreement with the views of the British representative "that a convention relating to refugees could not include an outline of all the articles of the Universal Declaration of Human Rights; furthermore, by its universal character, the Declaration applied to all human groups without exception, and it was pointless to specify that its provisions applied also to refugees": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 8.

[19] See generally P. Alston and J. Crawford eds., *The Future of UN Human Rights Treaty Monitoring* (2000).

and in particular by reliance on widely ratified treaty law. This study therefore seeks clearly to adumbrate, in both theoretical and applied terms, the authentic scope of the international legal rights which refugees can bring to bear in states of asylum. This approach is based on a firm belief that the creative synthesis of imperfect norms and mechanisms is the best means of pursuing meaningful state accountability in the present legal context, and that the international refugee rights regime provides an important, and thus far insufficiently exploited, opportunity to advance this goal.

In light of this purpose, this book does not address other than incidentally a variety of related issues. Most obviously, it is not a study of the refugee definition.[20] Neither does it seek to explain the work of the institutions charged with the protection of refugees at the domestic or international levels,[21] or the ways in which the refugee protection regime as a whole could be more effectively configured.[22]

Nor does this book present a detailed analysis of the full range of highly specialized human rights treaties established by the United Nations and regional bodies. This decision to avoid canvassing all potentially pertinent international human rights was not taken lightly, since it is clearly correct that particular refugees also benefit incidentally from the protection of specialized branches of international human rights law. Refugees who are members of other internationally protected groups, such as racial minorities, women, and children, may avail themselves of specialized treaty rights in most states.[23] Other refugees will be entitled to claim rights and remedies in consequence of their reasons for flight, a matter of particular importance to those who have escaped from war.[24] Still other refugees will be received in parts of the world

[20] The scope of the Convention refugee definition is discussed in detail in Hathaway, *Refugee Status*; in relevant portions of Goodwin-Gill, *Refugee in International Law*, at 32–79; and in A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. I, 1966), at 142–304. Particularly influential analyses of the domestic interpretation of the Convention refugee definition include D. Anker, *The Law of Asylum in the United States* (1999); W. Kälin, *Grundriss des Asylverfahrens* (1990); and F. Tiberghien, *La protection des réfugiés en France* (1999).

[21] On this issue, see in particular G. Loescher, *The UNHCR and World Politics: A Perilous Path* (2001); and A. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (2002).

[22] See J. Hathaway ed., *Reconceiving International Refugee Law* (1997).

[23] Of particular importance are the International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2106A(XX), adopted Dec. 21, 1965, entered into force Jan. 4, 1969; the Convention on the Elimination of All Forms of Discrimination against Women, UNGA Res. 34/180, adopted Dec. 18, 1979, entered into force Sept. 3, 1981; and the Convention on the Rights of the Child, UNGA Res. 44/25, adopted Nov. 20, 1989, entered into force Sept. 2, 1990.

[24] See e.g. T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 3–78.

that have adopted regional human rights conventions now clearly understood to embrace non-nationals, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms,[25] or in which there is a transnational human rights regime specifically designed to assist refugees, as in the case of the regional refugee convention adopted in 1969 by the Organization of African Unity.[26]

The decision not to engage in depth with the full range of regional and specialized human rights norms in no way reflects a view that these standards are not of real importance to refugees. They are not, however, standards that apply universally to all refugees: only a subset of refugees are women, or children, or members of racial minorities. An even smaller percentage of refugees can claim the protection of any one of the regional human rights or refugee treaties. Because of the specialized nature of these accords, they cannot reasonably be invoked in aid of the goal of this study, that being to define the common core of human rights entitlements that inhere in *all* refugees, in all parts of the world, simply by virtue of being refugees. This more foundational, and hence more limited, enterprise is designed to elaborate the common *corpus* of refugee rights which can be asserted by refugees in any state party to the Refugee Convention or Protocol, whatever the refugee's specific identity or circumstances. The hope is that others will build upon this basic analysis to define the entitlements of sub-groups of the refugee population entitled to claim additional protections.

One critical deviation from the commitment to this fairly strictly defined analytical focus has, however, been made. The rights regime presented here is the result of an effort to synthesize the entitlements derived from conventional refugee law with those rights codified in the two foundational treaties of the international human rights system, the International Covenant on Civil and Political Rights and its companion International Covenant on Economic, Social and Cultural Rights.[27] The specificity of analysis has been compromised in this way partly because it is clear that a treatment of refugee law which takes no account whatever of more general human rights norms would clearly present an artificially narrow view of the human rights of refugees. More specifically, though, this analytical synthesis was necessary in order to present an interpretation of the Refugee Convention which complies with the view, set out below, that the alignment of refugee law

[25] 213 UNTS 221, done Nov. 4, 1950, entered into force Sept. 3, 1953.

[26] Convention governing the Specific Aspects of Refugee Problems in Africa, 10011 UNTS 14691, done Sept. 10, 1969, entered into force June 20, 1974, at Arts. II–VI.

[27] International Covenant on Civil and Political Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 (Civil and Political Covenant); International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Jan. 3, 1976 (Economic, Social and Cultural Covenant).

with international human rights law is required by the duty to interpret the Refugee Convention in context, and taking real account of its object and purpose.[28]

The specific decision to present a merged analysis of refugees' rights and of rights grounded in the two Human Rights Covenants is moreover defensible in view of the unique interrelationships between these particular treaties and refugee law.[29] At a formal level, more than 95 percent of the state parties to the Refugee Convention or Protocol have also signed or ratified both of the Human Rights Covenants.[30] Even more important, about 86 percent of the world's refugees reside in states which have signed or ratified the two Covenants on Human Rights, more even than the 68 percent who reside in a state party to the Refugee Convention or Protocol.[31] As such, both in principle and in practice, refugee rights will in the overwhelming majority of cases consist of an amalgam of principles drawn from both refugee law and the Covenants. Second, and of particular importance, the Covenants and the Refugee Convention aspire to comparable breadth of protection, and set consistently overlapping guarantees. As will be clear from the analysis

[28] See chapter 1.3.3 below.

[29] In principle, it would also have made sense to incorporate analysis of rights that are universally binding as authentic customary norms or general principles of law since, to the extent such standards inhere in all persons, refugees are clearly entitled to claim them. But because only protection from systemic racial discrimination is clearly so defined (see chapter 1.2 below) – and since that right is already included in the more general duty of non-discrimination set by the Civil and Political Covenant – the focus here is limited to the cognate rights stated in the two Human Rights Covenants.

[30] Of the 145 state parties to the Refugee Convention, only eight have not signed or ratified either of the Human Rights Covenants: Antigua and Barbuda, Bahamas, Fiji, Holy See, Mauritania, Papua New Guinea, St. Kitts and Nevis, and Tuvalu. Three have signed or ratified only the International Covenant on Civil and Political Rights: Botswana, Haiti, and Mozambique. One state party to the Refugee Convention has signed or ratified only the International Covenant on Economic, Social and Cultural Rights: Solomon Islands: United Nations High Commissioner for Human Rights (UNHCHR), www.unhchr.ch (accessed Nov. 19, 2004).

[31] Of the Dec. 31, 2003 world refugee population of 11,852,900, 86 percent (10,289,700) were residing in a state that has signed or ratified the International Covenant on Civil and Political Rights and 86 percent (10,269,200) were residing in a state that has signed or ratified the International Covenant on Economic, Social and Cultural Rights. In contrast, only 8,148,200 refugees – 68 percent of the total refugee population – resided in a state party to the Refugee Convention or Protocol. These figures are derived from statistics in US Committee for Refugees, *World Refugee Survey 2004* (2004), at 4–5; UNHCHR, www.unhchr.ch (accessed Nov. 19, 2004); and UNHCR, www.unhcr.ch (accessed Nov. 19, 2004). Most rights in the Covenants are granted to all persons physically present in the territory, including refugees, although less developed countries are afforded some latitude in deciding the extent to which economic rights will be extended to non-nationals: Civil and Political Covenant, at Art. 2(1), and Economic, Social and Cultural Covenant, at Art. 2(2)–(3).

below, even when refugee law is the source of a stronger or more contextualized form of protection on a given issue, it is usually the case that the Covenants contribute in some way to the clarification of the relevant responsibilities of states.

In conceiving this work, an effort has been made to be attentive to the central importance of facts. Because a work of scholarship on refugee law seems more likely to be of value if it does not restrict itself simply to the elucidation of legal norms in abstract terms, the treatment of each right in this book begins with an overview of relevant protection challenges in different parts of the world. Some cases present the current reality faced by refugees; others highlight important protection challenges in the recent past. An effort has also been made to include examples from all parts of the world, and impacting diverse refugee populations. The analysis that follows seeks to engage with these practical dilemmas, and to suggest how refugee law should guide their resolution. This approach reflects a strong commitment to the importance of testing the theoretical analysis of human rights standards against the hard facts of protection dilemmas on the ground. The hope is that by taking this approach, the reliability of the analysis presented here is strengthened, and the normative implications of the study are made more clear.

The opening chapter of the book presents an analysis of the fundamental background question of the sources of international law, with a focus on how principles about the sources of law should be applied to identify human rights of genuinely universal authority. This analysis is based upon a theory of modern positivism, which accepts that international law is most sensibly understood as a system of rules agreed to by states, intended to govern the conduct of states, and ultimately enforced in line with the will of states. The theory of international law embraced here is thus in a very real sense a conservative one, predicated on a rigorous construction of the sources of law. Drawing on this theoretical approach, the study identifies those universal rights of particular value to refugees, even as it explains why the rights of refugees are for the most part best defended not by reference to universal custom or general principles of law, but rather by reliance on clear duties codified in treaty law.

Because of this study's primary commitment to reliance on treaty law, chapter 1 concludes with an overview of the approach taken throughout the study to the interpretation of treaties, with specific reference to the construction of the treaties at the heart of this study, the Refugee Convention and Protocol, and the two Human Rights Covenants. It is suggested that there are powerful reasons to defer neither to literalism nor to state practice in discerning the true meaning of these accords. To the contrary, it is both legally correct and more substantively productive to construe the text of refugee and other human rights treaties in the light of their context, objects and purposes as discerned, in particular, from careful study of their drafting history. Equally important, the interpretations of cognate rights rendered by United

Nations treaty supervisory bodies should be understood to be a vital source of contemporary guidance on the content of refugee rights. This is so not only because the advancement of human rights is at the core of refugee law's object and purpose, but more generally because the resultant normative synthesis furthers the commitment to interpret treaties in good faith, and as living instruments.

Chapter 2 moves from analysis of general legal principles to address the specific content of the international refugee rights regime. It begins by tracing the origins of refugee rights in the international law on aliens, through to its codification in the present Convention and Protocol relating to the Status of Refugees. This chapter also introduces the essential approach of the foundational refugee treaties, and shows how they have been complemented both by "soft law" standards and by the evolution of contemporary treaties on human rights and the rights of aliens. Particular attention is paid to the development of general norms of non-discrimination law, and to their relevance as a protective mechanism for refugees. The chapter concludes by explaining why, despite progress in related fields of law, the specific entitlements set by refugee law remain fundamental to ensuring the human dignity of refugees.

Chapter 3 introduces the rather unique principles governing entitlement to claim the rights set by the Refugee Convention. As a fundamental principle, the acquisition of refugee rights under international law is not based on formal status recognition by a state or agency, but rather follows simply and automatically from the fact of substantive satisfaction of the refugee definition. As UNHCR has affirmed:

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee, but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.[32]

Despite this critical understanding of refugee status determination as a purely declaratory process, the Refugee Convention does not grant all rights immediately and absolutely to all refugees. To the contrary, it strikes a reasonable balance between meeting the needs of refugees and respecting the legitimate concerns of state parties. In this sense, the Convention reflects the commitment of the drafters to the establishment of a treaty that is both politically realistic, and of positive benefit to refugees.[33]

[32] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, re-edited 1992), at para. 28.

[33] See generally J. Hathaway and A. Cusick, "Refugee Rights Are Not Negotiable," (2000) 14(2) *Georgetown Immigration Law Journal* 481.

While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state. Some rights inhere as soon as the refugee comes under a state's authority; a second set when he or she enters its territory; others once the refugee is lawfully within the territory of a state party; a fourth group only when the refugee is lawfully staying or durably residing there; and a few rights govern the pursuit of a durable solution to refugeehood. The nature of the duty to extend rights to refugees is moreover defined through a combination of absolute and contingent criteria. A small number of rights are guaranteed absolutely to refugees, and must be respected even if the host government does not extend these rights to anyone else, including to its own citizens. More commonly, though, the standard for compliance varies in line with the relevant treatment afforded another group under the laws and practices of the receiving country. Under these contingent rights standards, the scope of entitlement is conceived as a function of the rights of aliens generally, of the nationals of most-favored states, or as equivalent to those afforded citizens of the host country itself. The Refugee Convention moreover incorporates an overarching duty of non-discrimination between and among refugees, and strictly limits the ability of states to suspend refugee rights, even for national security reasons.

Chapters 4–7 are the heart of the book. They offer a detailed analysis of the substance of refugee rights, drawing on both the norms of the Refugee Convention itself and on cognate standards set by the Covenants on Human Rights. Rather than grouping rights on the basis of traditional categories (e.g. civil, political, economic, social, or cultural), these chapters are structured around the refugee experience itself. This organizational structure reflects the Refugee Convention's commitment, described in chapter 3, to define eligibility for protection on the basis of degrees of attachment to the host state.[34]

Chapter 4 therefore addresses those rights agreed to be immediately (if provisionally) acquired upon coming under the jurisdiction of a state party, as well as those which inhere upon reaching its territory, even before any steps have been taken to verify refugee status. These initial rights speak to the extraordinary personal vulnerability of asylum-seekers, and to the importance of safeguarding their most basic interests until and unless a decision is taken formally to verify their refugee status. A second set of modestly more extensive human rights, described in chapter 5, is deemed suited to the condition of refugees who have met the host state's legal requirements for

[34] It is also hoped that adoption of a chapter structure which draws attention to the delays set by refugee law for the acquisition of rights will facilitate critical assessment of the Convention's implicit assumptions regarding the timing and duration of the legal commitment to protection.

lawful presence, including by having satisfied national requirements for the assessment of their refugee status. As in the case of the first set of rights, these enhanced protections inhere until and unless a decision is reached to deny recognition of refugee status.

Once a refugee is authorized to remain in the asylum country, he or she benefits from additional rights, discussed in chapter 6, understood to be necessary to ensuring that the refugee can establish a durable and fully dignified life until and unless the reasons for departure from the home state come to an end. A final group of human rights, set out in chapter 7, is associated with the movement toward the solution of refugee status, whether this is by way of return home, by resettlement in a third country, or by the residual solution of permanent integration in the host state.

An epilogue to the book seeks to open debate on the larger and more political issues of just how the rights set by refugee law should be enforced. Returning to themes introduced in chapter 2, attention is given to the failure of the international community to establish an overarching supervisory mechanism for the Refugee Convention of the kind now in place for virtually every other major United Nations human rights treaty, as well as to the viability of the alternative, national and agency-based enforcement systems upon which refugees are largely compelled to rely. This chapter also introduces the much larger question of the continuing practicality of a rights-based system for the protection of refugees, particularly given the often radical difference between the political, social, and economic circumstances known to the drafters of the Refugee Convention, and those which exist in the states where refugees are most commonly received today.

The thesis which underlies this study is that the specificity of refugee entitlements is too often ignored – not only by those governments which often treat refugees as little more than the beneficiaries of humanitarian discretion, but also by scholars and advocates who too readily assume that generic human rights law is a sufficient answer to the needs of refugees. The objective here is to correct these common misperceptions, and to affirm the importance of refugee-specific rights. While the structures by which refugee law is implemented are no doubt in need of creative reinvigoration and perhaps even of fundamental retooling, it is nonetheless vital to endorse the recognition by states of "the enduring importance of the 1951 Convention, as the primary refugee protection instrument which . . . sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope."[35] In an era in which there is no more than selective

[35] "Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees," UN Doc. HCR/MMSP/2001/09, Dec. 13, 2001, incorporated in Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part II, Preamble, para. 2.

ability and inclination to put down human rights abuse abroad, and in which traditional human rights afford few immediate and self-actuating sources of relief, refugee law stands out as the single most effective, truly autonomous remedy for those who simply cannot safely remain in their own countries. The surrogate protection of human rights required by refugee law is too valuable a tool not to be widely understood, and conscientiously implemented.

1

International law as a source of refugee rights

A study of the rights of refugees under international law must first stake out a position on the critical question of what counts as international law. There is, of course, a simple answer to this question: refugee rights are matters of international law to the extent they derive from one of the accepted trio of international law sources: treaties, custom, or general principles of law.[1] But while technically correct, this facile response fails to do justice to real disagreements about how rules derived from custom or general principles are to be identified and, more specifically, about whether general rules of recognition can fairly be applied to the identification of human rights norms. While this book in no sense aspires to analyze these concerns in depth, it begins with a brief explanation of the reasoning which led to the adoption here of a relatively conservative understanding of the sources of both custom and general principles premised on a consent-based, modern positivist view of international law.

In the second part of this chapter, the rules of recognition are applied to determine whether there are human rights derived from custom, general principles of law or treaties of universal reach which, by virtue of the generality of those sources of law, inhere in all persons. Any protections guaranteed by all states to all persons will, of course, accrue to the benefit of refugees. Yet while in principle universal human rights law[2] should provide the common denominator of protections owed to refugees throughout the world, the analysis here suggests that in practice it delivers little by way of legal entitlement. Because the tests for recognition of a universal norm are appropriately demanding, the protective ambit of universal human rights law is, at best, exceedingly modest.

[1] Statute of the International Court of Justice, 59 Stat. 1055 (1945), adopted June 26, 1945, entered into force Oct. 24, 1945 (ICJ Statute), at Art. 38(1).

[2] The term "universal international law" is distinguished from the concept of "general international law," which embraces rules of law which deal with issues of general interest and which are binding on the large majority of (but not all) members of the international community. See generally G. Danilenko, *Law-Making in the International Community* (1993) (Danilenko, *Law-Making*), at 9–10.

The third part of this chapter therefore focuses squarely on treaty law, the most important contemporary source of refugee rights. It presents an understanding of the rules of treaty interpretation which requires significant deference to be afforded the context, object, and purpose of refugee and other human rights treaties. This approach draws on recognition that purely literal interpretation of text is to be avoided under international law. It further acknowledges that evidence of state practice is no more than conditionally relevant in general terms, and of considerably less value in the interpretation of human rights conventions than other treaties. The text of a refugee or other human rights treaty should instead be construed in a way that ensures its effectiveness, as conceived by reference to both the intentions of the drafters and the contemporary social and legal environment within which the treaty must function. To this end, the analysis of refugee rights presented here draws significantly on both the *travaux préparatoires* of the Refugee Convention and on the authoritative interpretations of cognate rights rendered by the United Nations treaty bodies.

1.1 A modern positivist understanding of the sources of universal rights

The simplicity of the assertion that the Charter of the United Nations has ushered in a new era of universally accepted human rights norms is attractive, but untenable as an honest description of the legal landscape. To date, and despite rhetoric to the contrary,[3] states simply have not been willing comprehensively to limit their sovereignty in favor of the essential dignity of the human person. While some see continued patterns of human rights abuse as little more than evidence of a failure to *respect* universal human rights law, this approach begs the question of the origins of those universal rights. Most obviously, because relatively consistent state practice is an essential element for the development of custom, it surely follows that significant inconsistent state practice undermines reliance on customary international law as a source of universal human rights. Yet countervailing practice seems, as discussed below, too often to be either dismissed or even ignored altogether by large parts of the scholarly community.

[3] See e.g. I. Cotler, "Human Rights as the Modern Tool of Revolution," in K. Mahoney and P. Mahoney eds., *Human Rights in the Twenty-First Century: A Global Challenge* 7 (1993), at 10: "[T]he post World War II explosion in international human rights law – the internationalization of human rights, and the humanization of international law – turned [the] traditional international law theory on its head. Accordingly, international human rights law would now be premised on the notion that every state has an obligation to protect not only any aliens within its midst, but its own citizens. Individuals, then, are not objects, but subjects of international law with rights and remedies that are justiciable in both domestic and international fora."

Clarity about the defining characteristics of the formal sources of universal international law has been fundamentally compromised by a blurring of the boundary between the law and the politics of human rights. This entanglement of admittedly worthy moral claims with matters of strict legal duty is not only intellectually and legally dubious, but risks stigmatizing all human rights law as no more than a matter of aspiration.[4] This study therefore begins by confronting the proclivity to exaggerate the ambit of universal human rights law. It then defines and applies more defensible criteria for the validation of universal human rights.

Because treaties normally create duties only for states that choose to adhere to them,[5] genuinely universal human rights norms are most likely to be generated through either custom or general principles of law. Both of these sources formalize as generally applicable international law those standards which states treat as binding on themselves, without the necessity of codification. Specifically, custom validates consistent and uniform interstate practices that have come to be regarded by governments as matters of obligation.[6] General principles of international law, in turn, are normally derived from domestic standards present in the legal cultures of a significant majority of states.[7] To the extent that a

[4] As cogently observed by Laws LJ, "[n]othing, surely, is more elementary than the certainty required for the identification of what is and is not law . . . ; and we must not be seduced by humanitarian claims to a spurious acceptance of a false source of law": *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003, rev'd. on another ground at [2004] UKHL 55 (UK HL, Dec. 9, 2004)), at para. 100.

[5] The Charter of the United Nations may sensibly be considered to be an exception to this rule, both because of its near-universal acceptance by states and because of its foundational status within the international legal system: see chapter 1.2.3 below. Other treaties may be explicitly or impliedly declaratory of universal custom or general principles of law, this implication arising most logically when a treaty is adopted without any significant opposition. Finally, a treaty may on occasion indirectly give rise to universal norms through interaction with customary lawmaking, for example where non-adhering states consistently act and are dealt with as though bound by a treaty's terms. But these exceptions apart, treaties ordinarily apply only to those states that have opted to be bound by them.

[6] Under the "natural law" view articulated by Lauterpacht, custom is merely the way through which preexisting law is revealed. "Custom is actual practice in pursuance of or in obedience to what is *already* law [emphasis added]": E. Lauterpacht ed., *International Law: The Collected Papers of Hersch Lauterpacht* (1970) (Lauterpacht, *Collected Papers*), at 238. But this perspective really cannot be maintained in a pluralistic world in which there is no universal agreement on the source or content of moral obligation.

[7] The alternative construction of general principles of law defines them to be "no more than a modern formulation of the law of nature which played a decisive part in the formative period of international law and which underlay much of its subsequent development. For there is no warrant for the view that the law of nature was mere speculation which gave a legal form to deductive thinking on theology and ethics. It was primarily a generalization of the legal experience of mankind": Lauterpacht, *Collected Papers*, at 74–75. To the contrary, it is suggested here that "natural law" is a culturally specific normative structure, the imposition of which on universal law is untenable.

pervasive sense of obligation can be located either in the agreed structure for the conduct of international relations or across systems of domestic governance, a universally binding legal standard may be declared to exist.

As described here, the existence of clear and consistent acceptance by states is a precondition to recognition of a standard as either customary law or a general principle of law. A universally binding human right cannot be brought into existence by simple declaration. Rather, a universal norm can be established only when states concretize their commitment to a particular principle either through their actions toward each other (custom) or by pervasively granting rights within their own political communities (general principles). It is the rigor of this standard that makes it possible for what are effectively supranational standards to emerge from a purely international legal system. Because a significant pattern of inconsistent state practice can always defeat the emergence of a new universal norm, there is no substantive departure from international law's commitment to reserving to states the authority to define the limits of acceptable state conduct. This is the *realpolitik* of international human rights law: there is simply no accepted mechanism by which states may presently be forced to accept universally binding standards.[8] Once such standards are established, however, non-conforming state practice is appropriately understood to be simply a violation of the universal norm, at least until and unless a new rule emerges through the same process of general recognition among states.

These descriptions of the ways in which universal human rights law may arise are firmly rooted in a positivist validation of the will of states.[9] The international human rights law system, even with its increasing openness to injections of individuated and collective concern, remains firmly anchored in a process of state auto-determination of the acceptability of state conduct. It is simply not honest to pretend that human rights norms may somehow descend and be binding upon states that have opted only for loose collaboration within a continuing system of nation-state sovereignty. Rules should instead be said to be part of international law only if they have been explicitly or impliedly agreed to by the states thereby said to be bound. Scholars and non-state actors may influence the course of interstate agreement; but states, and only states, make international law.[10]

[8] Dissenting states can dissociate themselves from an emerging customary norm by timely and persistent objection to the rule in question. The question of peremptory (*jus cogens*) norms is discussed at chapter 1.1.3 below.

[9] The understanding of the sources of law set out here was first advanced in J. Hathaway, "America, Defender of Democratic Legitimacy?," (2000) 11(1) *European Journal of International Law* 121.

[10] But see e.g. M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999) (Byers, *Custom*), which invokes non-legal approaches in aid of a less state-centered understanding of customary international law.

Many, perhaps most, scholars – particularly those who adhere to the now-dominant, policy-oriented school of thought developed at New Haven[11] – will see the affirmation here of legal positivism as unduly conservative, perhaps even simply as old-fashioned. Yet the alternative, policy-oriented, view is most certainly not immune from criticism. In particular, it depletes international law of the certainty required for meaningful accountability. Indeed, the extraordinarily vague and potentially far-reaching nature of the policy-oriented paradigm in practice dissuades governments from treating international law as a meaningful source of real obligations at all.[12] Whatever substantive breadth is sacrificed by positivism's insistence on evidence of consent is arguably more than compensated for by gains in meaningful enforceability that accrue from an understanding of international law as a system of state-generated, consent-based rules and operations. As Kingsbury has observed in an insightful analysis of Oppenheim's positivist understanding of international law,

> [I]t is difficult to argue that a robust theory of international law has as yet accompanied ... newer accounts of more and more inclusive and complex international society, with disaggregated states, an infinite diversity of non-state actors, private or hybrid rule-making, and an ever-expanding range of topics covered by competing systems or fragments of norms. The extensive cognitive and material reconstruction required to actualize emancipatory projects ... is indicative of the scale of the challenge. However unappealing Oppenheim's [positivist] approach has seemed, its coherence and manageability are normative attractions that make its continuing political influence intelligible.[13]

The policy-oriented understanding of international law also suffers from a basic problem of political legitimacy. Stripping the theory of any pretense of

[11] See e.g. M. McDougal and F. Feliciano, *Law and Minimum World Public Order* (1961).

[12] The very fluid, policy-oriented account of international law may have been devised precisely because it imposes so few clear obligations on states. As a response to the traditional isolationism of the United States, a non-threatening understanding of international law may have been thought strategically necessary to induce greater American participation in international legal regimes. And as Kingsbury has observed, this fluid approach may also serve contemporary American priorities. "If no balance [of power] exists, and one state becomes preponderant, that state will pursue 'anti-formalist' approaches where these suit it better. Thus, after the decline and collapse of the USSR, a US scholarly focus on 'governance,' 'regimes,' 'managerial compliance,' 'decision process' and the like, and a US tendency to negotiate detailed multilateral rule-making treaties which it does not then ratify, may reflect in some areas of international law a US preference for anti-formal malleability that is influenced by the aura of preponderant power": B. Kingsbury, "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law," (2002) 13(2) *European Journal of International Law* 401 (Kingsbury, "Legal Positivism"), at 421.

[13] Kingsbury, "Legal Positivism," at 416.

political neutrality, Anthony D'Amato argues that international law is comprised simply of those norms derived from state practice which facilitate systemic homeostasis or equilibrium.[14] Law is process, and is therefore essentially indistinguishable from international relations, or even from plain old international politics. As such, the inherent ambiguity of policy-oriented definitions provides extraordinary camouflage for the exercise of unilateral action in defiance of even broadly accepted norms.[15] The murky definitions of international law proposed by Myres McDougal and the generation of legal theorists who followed his lead are therefore not simply harmless efforts to take account of an increasingly complex international reality. This policy-oriented school of international law is, at its core, fundamentally anti-democratic.

Specifically, by rejecting legal positivism's concern to limit the scope of international law to those standards agreed by sovereign states to bind them, the policy-oriented perspective on international law facilitates an equation of international law with whatever norms are of value to dominant states. By deeming the process through which norms and institutions are agreed to be as much law as the resultant norms and institutions themselves, and by equating political and economic power with legitimate rule-making authority, the policy-oriented school of international law provides a ready-made justification for defiance of established international norms and procedures by powerful countries.[16] After all, if rules and institutions established by consent are no more "law" than is the process of interstate power-brokering and influence, then rules and institutions can freely be ignored when they fail to serve the interests of hegemonic states. Indeed, where rules and institutions work counter to international homeostasis (i.e. the situation in which those who dominate continue to dominate), the extreme version of the thesis as articulated by

[14] A. D'Amato, "On the Sources of International Law," paper presented at the University of California at Berkeley, Jan. 18, 1996, at 68: "There are no mysterious 'sources' of international law. The rules of international law derive from the behavior (or practice) of states as they interact with each other within the international system. Both the states, and the system itself, have an overarching goal: to persist through time. Rules of law, accordingly, play a role in facilitating this persistence, primarily by signaling to states a class of prohibited behaviors. If a state ignores a prohibitory rule, it risks creating friction with other states that could lead to a rupture of systemic equilibrium."

[15] As Koskenniemi has argued, those who embrace an understanding of law predicated on the enforcement of so-called underlying values "have irrevocably left formalism for hermeneutics. Law is now how it is interpreted. As the 'deep-structural' values which the interpretation is expected to reveal do not exist independently of human purposes, we are down the slippery slope of trying to identify those purposes": M. Koskenniemi, "'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law," (2002) 65(2) *Modern Law Review* 159 (Koskenniemi, "The Lady"), at 164.

[16] See e.g. M. Reisman, "Unilateral Action and the Transformations of the World Constitutive Process: The Special Case of Humanitarian Intervention," (2000) 11(1) *European Journal of International Law* 3 (Reisman, "Unilateral Action").

D'Amato holds that an understanding of international law *must* be derived from the political process, even when it contradicts established rules and processes. The policy-oriented school of international law has thus spawned a new version of natural law thinking under which the will of powerful states is simply substituted for that of God or nature.[17]

This is not to say that a consent-based, positivist understanding of international law is without limitations of its own.[18] Most obviously, it is an error to believe that such a rule-based understanding of law will necessarily govern other than relatively routine forms of interaction among states. In the context of high

[17] For example, if a powerful state wants to avoid compliance with the duty to refrain from the unilateral use of force pursuant to the UN Charter, law as process serves the purpose. Simply redefine a Western-dominated unofficial network as a source of law and grant powerful states the right to interpret and act upon its prescriptions, and voilà: unilateral intervention in a foreign country is now legal. But what if that same unofficial network suggests the need to rid the world of land mines that kill and maim thousands of innocent civilians every year? Ironically, the policy-oriented school of international law as process can still serve the needs of powerful countries. Because key states remain the final arbiters of the result of the diffuse lawmaking conversation, no action need be taken if the social authenticity of the speakers is called into question. In short, the fungibility of policy-oriented views of international law can be manipulated in ways that the fairly clear requirements of legal positivism cannot. See e.g. Reisman "Unilateral Action," at 15. Even more moderate accounts of "modern custom" leave enormous room for the imposition of subjective preferences. For example, Roberts' "reflective interpretive concept" would derive customary norms from "commonly held subjective values about right and wrong that have been adopted by a majority of states in treaties and declarations": A. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation," (2001) 95(4) *American Journal of International Law* 757 (Roberts, "Traditional and Modern Approaches"), at 778. In the end, however, the vagueness of this standard leaves powerful states with extraordinary interpretive space.

[18] This study does not address in any detail criticisms which are relatively easily answered, e.g. those noted in Roberts, "Traditional and Modern Approaches," at 767 ff. First, it is said that a positivist understanding of customary law "lacks democratic legitimacy": ibid. This seems an odd criticism, since the reliance on the words of scholars, select international conferences, declarations understood to be non-binding, or on views articulated by powerful states – all relied upon by the proponents of so-called "modern custom" – seem significantly more anti-democratic. Second, it is said that traditional custom is "too clumsy and slow": ibid. But if speed is of the essence, the obvious answer is to proceed by way of treaty-making. Third, it is asserted that customary law has at times been declared on the basis of less than overwhelming practice. While this is true, the need for empirically verifiable acceptance by states under traditional custom at least provides an objective basis (absent from modern custom) to challenge the declaration of a customary norm. Fourth and finally, it is said that custom inaccurately assumes that states have perfect knowledge of state practice and an awareness that failure to respond will result in the imposition of legal obligations upon them. This seems doubtful: states *are* aware that they need to respond, and unlimited resources are no longer required in the age of the Internet and widely disseminated information on state practice in order for governments to be able to participate in (or to challenge) the creation of custom that would limit their sovereignty. See e.g. R. Gaebler and M. Smolka-Day, *Sources of State Practice in International Law* (2002).

stakes, inherently political situations, formal rules are unlikely to be outcome-determinative.[19] It is nonetheless better to concede the limited ambit of meaningful international law than to sacrifice the commitment to legal certainty and enforceability that positivism affords in most spheres of relatively routine interaction.[20]

Traditional positivism is also subject to the criticism that gender, racial, and other forms of bias permeate domestic legal systems, and hence limit the extent to which a state's agreement to be bound internationally truly reflects the consent of all of its people. While there is some force in this argument, positivism may nonetheless actually be a valuable means of taking critical insights about the reality of power onboard in practical ways. Specifically, a modern understanding of positivism as conceived here is anchored in recognition of the overarching and powerful commitment of international law to the establishment of broad-ranging, substantive equality.[21] Because no rule is immune from the duty of all states to ensure equal benefit of all laws to all persons, modern positivism both compels and facilitates the challenging of domestic legal and other constraints which disfranchise women and minorities.[22] So conceived, the commitment to respect for consent-based rules is in no sense antithetical to social and political

[19] Writing at the beginning of the twentieth century, this point was colorfully (if somewhat depressingly) made by Baker. "No general or admiral worth the name would pause in difficult strategy, or at the moment of victory, because some effeminate Article of the Second Hague Convention or other grandmotherly Conference forbade him to do so and so. All that can be hoped for is the exercise of well known, plain and intelligent rules which do not interfere with the act of war, but cause it to be waged with more humanity. Elaborate rules prescribed by the delegates sitting at ease in the Palace of Peace, or in any other place, will never be followed when the safety of an empire or life or liberty is in serious jeopardy": G. Baker ed., *Halleck's International Law* (1908), at vi. Even in a contemporary context, "formal rules work well in a domestic normality where situations are routine and the need to honor the formal validity of the law by far outweighs incidental problems in its application. The benefits of exceptionless compliance offset the losses ... But this is otherwise in an international emergency of some gravity ... The point of the rule (that is, the need to prevent serious and large scale violations of human rights) is more important than its formal validity ... In the international situation ... and especially if the situation is defined as a 'serious violation of fundamental rights,' the need to uphold the formal validity of the law cannot be compared to the weight of the impulse to act now": Koskenniemi, "The Lady," at 168–169.

[20] Specifically, a positivist understanding of international law may be said to count among its advantages "the distinctive formulation and interpretation of legal rules as a basis for clarity and stability; their reduction in writing to increase certainty and predictability; the elaboration of distinct legal institutions; the development of ethically autonomous professional roles, such as that of international judge; and the separation of legal argument from moral arguments as a means to overcome disagreement": Kingsbury, "Legal Positivism," at 422.

[21] See chapter 2.5.5 below.

[22] "[I]t does not suffice only to provide a hearing to the claims of the political other but also to include in political contestation the question about *who* are entitled to make claims and *what kinds* of claims pass the test of validity. Without such self-reflexivity formalism will

progress. To the contrary, a rule-based approach to international law actually supports efforts to compel governments to confront historic patterns of exclusion. This compatibility of criticality with the positivist project has been recognized at least since the time of Oppenheim:

> This task of the science of international law is very important and must not be neglected if we want international law to develop progressively and to bring more and more matters under its sway ... Nothing prevents us from applying the sharp knife of criticism, from distinguishing between what is good and bad according to our individual ideas, and from proposing improvements.[23]

At the very least, a consent-based understanding of international law ensures that as more socially inclusive understandings of power and politics evolve at the domestic level in an increasing number of states, these automatically impact the international lawmaking process as well (because the consent of these more inclusive systems of governance will be required to create new international law). In this sense, positivism reinforces and entrenches domestic gains on the international plane.

A third concern is that the consent-based foundation of legal positivism is attenuated by its willingness to impose what amounts to a contract of adhesion on new states – those states that wish to be recognized must sign on to the established rules of general international law. While this is true, this violation of full-fledged consent theory is a less egregious intrusion on those states' self-determination than is the neo-natural law alternative, which effectively gives powerful states the right to define law not only at the moment of a new state's independence, but indefinitely. As Koskenniemi has observed, "the very claim that one is arguing from the position of authenticity – for example, a given notion of human rights, or self-determination – involves an objectionable attempt to score a political victory outside politics."[24] In contrast, legal positivism's insistence on the consent of states is not only a critical means of ensuring that international law is actually taken seriously by the states that it purports to bind. It is also the least illegitimate basis for a system that purports to govern in the absence of a mechanism for the direct enfranchisement of real people.[25] In Kingsbury's terms, "a formal international law based on consent has an

freeze into the justification of one or another substantive policy [emphasis in original]": Koskenniemi, "The Lady," at 174–175.

[23] L. Oppenheim, "The Science of International Law: Its Task and Method," (1908) 2(2) *American Journal of International Law* 313, at 318, 355, cited in Kingsbury, "Legal Positivism," at 426.

[24] Koskenniemi, "The Lady," at 173.

[25] As Kingsbury observes in relation to the work of Oppenheim, "an international society of states, a balance of power and a positivist conception of international law should all be pursued because they represented the best feasible means to attain ... higher normative goals": Kingsbury, "Legal Positivism," at 434.

increasing hold on the democratic imagination and on the growing number for whom anti-formalism is a specific or systemic threat."[26]

In sum, a positivist understanding of international law is an important means to advance both refugee rights, and the more general international human rights project. Evidence of consent by states establishes both substantive certainty and the political foundation required for meaningful accountability. It is an approach to international law which minimizes the potential for powerful states to bend the normative project to their will, and which sets a firm foundation from which to challenge exclusion of any part of a state's population from real participation in the decision about whether to consent to the establishment of new international law. Moreover, the major weakness of modern positivism – namely, that the analytical rigor of its rules of recognition results in a less extensive range of international legal norms than does the policy-oriented alternative – is, in fact, more apparent than real. As described in detail below, the current array of international norms of indisputable authority (in particular, of treaties) is a more than sufficient basis from which to advance the human rights project, including the protection of refugees.

1.1.1 Customary law

Under the modern positivist approach outlined above, any universal norm of human rights law must be the product of state consent. Thus, customary international law requires the existence of relatively constant and uniform state practice that has generated a sense of mutual obligation among states.[27] The process of striving for interstate agreement is no less real than in law-making by treaty, the key difference being simply that the medium of negotiation is action rather than words. There is customary law only where legally relevant actions coincide to such an extent that they can be said to represent an agreed standard of acceptable behavior.[28] As Simma and Alston note,

[26] Ibid. at 436. See also M.-E. O'Connell, "Re-Leashing the Dogs of War," (2003) 97(2) *American Journal of International Law* 446 (O'Connell, "Re-Leashing"), at 456, observing that "a return to stricter adherence to the positive sources of international law ... is generally the right [approach]."

[27] The *opinio juris* requirement of custom is most usefully understood in modern context to require that the practice be acknowledged by states to circumscribe the range of their sovereign authority. This may be inferred from consistent de facto reference to the standard, or from explicit invocation of its authority.

[28] "[I]f absolute and universal uniformity were to be required, only very few rules could rank as general customary rules of international law. Nevertheless, it appears that, because of the underlying requirement of consent, the condition of constancy and uniformity is liable on occasion to be interpreted with some rigidity when there is a question of ascertaining a customary rule of general validity": Lauterpacht, *Collected Papers*, at 62.

customary lawmaking is a process of inductive reasoning in which retrospection on empirical reality provides a normative projection for the future.[29]

Yet some maintain that the *actions* from which custom arises can consist solely of words.[30] By construing international legal discourse to be a form of state action,[31] it is possible to reach the startling conclusion that actual interstate practice is not requisite to the development of customary law.[32] Official statements that are neither formalized through treaty nor consistent with prevailing state practice are presented as authoritative representations of the state of international law.[33] In reality, however, pronouncements at conferences and in international fora cannot be said to show any intention to be bound.[34] More fundamentally, the proponents of this exaggerated definition of state "practice" deny the most elementary distinction between treaties and

[29] B. Simma and P. Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles," (1988–1989) 12 *Australian Year Book of International Law* 82 (Simma and Alston, "Sources of Human Rights Law"), at 89.

[30] "Statements are conduct. They count as examples of state practice regardless of the *opinio juris* that they also reflect": O'Connell, "Re-Leashing," at 448.

[31] As Byers has observed, "[t]he newly independent non-industrialized States found themselves in a legal system which had been developed primarily by relatively wealthy, militarily powerful States. They consequently sought to change the system. They used their numerical majorities to adopt resolutions and declarations which advanced their interests. They also asserted, in conjunction with a significant number of legal scholars (and perhaps with the International Court of Justice), that resolutions and declarations are instances of State practice which are potentially creative, or at least indicative, of rules of customary international law ... Powerful States, for the most part, along with some scholars from powerful States, have resisted these developments. They have emphatically denied that resolutions and declarations can be State practice": Byers, *Custom*, at 41.

[32] "Approximately two centuries after the rise of the positivist view, a new theory [of customary international law (CIL)] is beginning to take hold in some quarters. The theory derives norms of CIL in a loose way from treaties (ratified or not), UN General Assembly resolutions, international commissions, and academic commentary – but all colored by a moralism reminiscent of the natural law view": J. Goldsmith and E. Posner, "Understanding the Resemblance Between Modern and Traditional Customary International Law," (2000) 40(2) *Virginia Journal of International Law* 639 (Goldsmith and Posner, "Modern and Traditional"), at 640.

[33] "The passage of norms agreed upon in international conferences into customary law through the practice, including the acquiescence, of states constitutes a common, generally accepted method of building customary international law. But an attempt to endow customary law status instantly upon norms approved by consensus or near-consensus at international conferences raises serious questions": T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) (Meron, *Human Rights*), at 87. This more cautious approach is helpfully elaborated by Roberts, who suggests that there is a need to "broaden our understanding of state practice to include considerations of intrastate action ... obligations being observed ... and reasons for a lack of protest over breaches": Roberts, "Traditional and Modern Approaches," at 777.

[34] "[R]esolutions and recommendations ..., however sympathetic one may be towards their motivation and purpose, cannot themselves establish a legal rule binding in

custom: custom is not simply a matter of words, wherever or by whomever uttered,[35] but is a function of what is happening in the real world.[36]

1.1.2 General principles of law

As an alternative to custom, universally applicable human rights might also be established as general principles of law. As traditionally conceived, a general principle of law is established not on the basis of uniform state practice as under custom, but by virtue of the consistency of domestic laws across a significant range of countries. International law can validly emerge in such circumstances because states have already consented to the binding authority of the standard within their own spheres of governance. As extrapolations from the laws which states have themselves chosen to enact, general principles of law are in principle consistent with the consensualist foundation of international law.

In contrast, a revisionist formulation of this source of international law would not only embrace norms common to domestic legal systems, but would also validate key declarations of the General Assembly and other

international law": *Sepet and Bulbul v. Secretary of State for the Home Department*, [2003] UKHL 15 (UK HL, Mar. 20, 2003). See also *Garza v. Lappin*, (2001) 253 F 3d 918 (US CA7, June 14, 2001), at 924–925: "The American Declaration of the Rights and Duties of Man, on which the Commission relied in reaching its conclusions in Garza's case, is an aspirational document which, as Garza admitted in his petition ... did not on its own create an enforceable obligation on the part of the OAS member nations."

[35] The resolutions of the General Assembly may, however, provide evidence of *opinio juris*, or confirm the existence of a norm of customary international law: *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226, at para. 70. It remains the case, however, that inconsistent state practice precludes the development of a customary norm despite strong evidence of *opinio juris*: ibid. at para. 73.

[36] For example, in rejecting the argument that a system to prevent the departure of Roma refugee claimants from the Czech Republic was in breach of a customary international legal duty not to frustrate efforts to seek asylum, the House of Lords took note of many authoritative principles adopted in international fora and otherwise that might support such a position, but ultimately concluded that those principles had not "received the assent of ... nations": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 27. In reaching this conclusion, Lord Bingham cited the decision of Cockburn CJ in *R v. Keyn*, (1876) 2 Ex D 63 (Eng. Exchequer Division, Nov. 11, 1876), at 202, that "even if entire unanimity had existed in respect of the important particulars ... in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage": ibid. at para. 27.

major international deliberative bodies as general principles of law.[37] While more honest than the conversion of words into actions by "instant custom,"[38] this proposal flatly contradicts the most fundamental tenet of the international legal system, namely that there is no universal legislature or executive that can create law that is binding on all states. The General Assembly is constitutionally prohibited from engaging in general lawmaking,[39] and even the authority of the Security Council is delegated by states within the limits of Chapter VII of the United Nations Charter.[40] Yet the suggested renovation of the general principles framework would allow the simple pronouncement of the General Assembly on a matter within the *jus cogens* substantive sphere to give rise to international law.[41] This would be so even though the foundational norm itself had never been accepted as a source of legal obligation.

[37] See e.g. R. Falk, *The Status of Law in International Society* (1970), at 174–184; and G. Abi-Saab, "Cours général de droit international public," (1987) 207 *Recueil de cours* 173, at 173–178. "Admittedly, the dominant view understands this concept in a narrow sense, as referring to legal principles developed *in foro domestico*. But, as many writers have pointed out in various contexts, there is no necessity to restrict the notion of 'general principles' in this way. For the drafters of the Statute [of the International Court of Justice] the decisive point was that such principles were not to be derived from mere speculation; they had rather to be made objective through some sort of general acceptance or recognition by States. Such acceptance or recognition, however, may also be effected on the *international* plane" [emphasis in original]: Simma and Alston,"Sources of Human Rights Law," at 102.

[38] As Simma observed, "this is as far as mainstream theory, based on state consent, can take this issue; if we are to go beyond this, we will have to look to legal hermeneutics and linguistic theory": B. Simma, "Book Review," (1998) 92(3) *American Journal of International Law* 577, at 578.

[39] Charter of the United Nations, 59 Stat. 1031 (1945), done June 26, 1945, entered into force October 24, 1945 (UN Charter), at Arts. 10–18. These articles authorize the General Assembly to make binding decisions only on a range of administrative matters. "Article 18 [of the Charter] deals with '*decisions*' of the General Assembly 'on important questions.' These 'decisions' do indeed include certain recommendations, but others have dispositive force and effect. Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion of Members, 'and budgetary questions'": *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, at 163.

[40] "The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action": *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, at 168.

[41] The International Law Commission has affirmed that the peremptory character of a norm is fundamentally "the particular nature of the subject-matter with which it deals": International Law Commission, "Draft Articles on the Law of Treaties," at 67, cited in M. Ragazzi, *The Concept of International Obligations* Erga Omnes (1997) (Ragazzi, *Erga Omnes*), at 49.

The alliance of a reconstituted general principles lawmaking with the *jus cogens* doctrine raises a second concern. Classification as a general principle of law would follow not from compliance with formal rules of recognition, but from an assessment of whether the standard's subject matter resonates within a character-defined sphere of *jus cogens*. This formulation plays into the hands of those who posit the existence of some overarching philosophical structure on those rights established through the consensual process of interstate lawmaking.

1.1.3 Jus cogens *standards*

Properly conceived, the idea of *jus cogens* or higher, peremptory law, is a helpful way of bringing order to international law without feigning the existence of supranational authority. *Jus cogens* is a general principle of law based on the near-universal commitment of national legal systems to insulating certain basic norms from derogation.[42] It sanctions the establishment of an outer limit to the range of subjects on which states may legitimately contract, enforced by the invalidation of conflicting treaties. The *jus cogens* principle is recognized in the Vienna Convention on the Law of Treaties as the basis for giving precedence to any treaty that embodies "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[43]

Jus cogens is not, therefore, a source of law. It is rather a hierarchical designation that attaches to laws that have come into existence by the usual modes of international lawmaking. The attribution of status as "higher law" derives from the intersection of such a freestanding law with the general principle of law prohibiting agreements that are inconsistent with the most basic values of the international community.[44] *Jus cogens* is best understood as a means of giving greater enforceability to norms that have already acquired the status of universal law by operation of general principles or

[42] A. Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law," (1966) 60(1) *American Journal of International Law* 55, at 61. See also M. McDougal, H. Lasswell, and L. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980) (McDougal et al., *World Public Order*), at 339–340: "The newly emphasized notion of *jus cogens* had its origin, in various roughly equivalent forms, in national legal systems. In most legal systems, it is a key institutional postulate that some policies are so intensely demanded, and so fundamental to the common interest of the community, that private parties cannot be permitted to deviate from such policies by agreement. In fact, this notion is so widespread and so common that it could be said to be part of the general principles of law regarded as [an] authoritative source of international law."

[43] Vienna Convention on the Law of Treaties, 1155 UNTS 331, done May 23, 1969, entered into force Jan. 27, 1980 (Vienna Convention), at Art. 53.

[44] See generally F. Domb, "Jus Cogens and Human Rights," (1976) 6 *Israeli Yearbook of Human Rights* 104.

custom (including custom interacting with treaty).[45] Human rights that are matters of *jus cogens* are therefore "super rights" that trump conflicting claims.[46] It is not possible, however, for a right to have force as *jus cogens* without first acquiring status as law through one of the recognized modes of international lawmaking.

The challenge is to ensure that *jus cogens* is defined in a way that ensures evolution away from its parochial origins in natural law and which advances respect for the consensual premise of international lawmaking. In a world of diverse values, the most useful approach would be to build upon the accepted formalities of international lawmaking. There should be evidence that the putative *jus cogens* norm occupies a privileged position in the context of accepted traditional sources of international law.[47] Thus, for example, where custom and treaty law intersect, it may be reasonable to suggest that common normative standards may be said to be fundamental to transnational community values. One might similarly attribute privileged stature to a pervasively subscribed treaty, or to customary norms or general principles that have shown their durability through application to varied circumstances over time and across cultures. The uniting principle suggested here respects state control over international law, in that "higher law" evolves as a function of the extent and degree of affirmation by states.[48] It similarly acknowledges the

[45] Thus, for example, the International Law Commission has recommended not only that states be prohibited from recognizing as lawful a situation created by a serious breach of a peremptory norm, but that they also undertake to cooperate in bringing such a breach to an end: "Draft Articles on Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10, Ch. IV.E.1, adopted Nov. 2001 (International Law Commission, "Draft Articles"), at Arts. 40–41.

[46] "Third States would have the right and the duty to question the illegal act, and to refrain from recognizing it or giving it legal effect": Meron, *Human Rights*, at 200. More recently, the International Law Commission has determined that all states must take all lawful means to end human rights abuse which involves breach of a peremptory norm and are not required to recognize a situation created by such a breach: "Report of the International Law Commission," UN Doc. A/56/10 (2001), at Part II, Ch. III, Arts. 40–41.

[47] "[T]he important point about the expression 'acceptance and recognition' is not to decide in the abstract which source(s) can produce norms of *jus cogens*, but to assess whether the 'intrinsic value' of a certain rule and the fact that it is 'rooted in the international conscience' ... are reflected in the acceptance and recognition of that rule as a rule of *jus cogens*": Ragazzi, *Erga Omnes*, at 54.

[48] The human rights suggested by the International Law Commission to be peremptory norms – namely, freedom from slavery, genocide, racial discrimination, *apartheid*, and torture; and respect for the basic rules of international humanitarian law, and the right to self-determination – would likely all qualify as *jus cogens* norms based upon the approach recommended here. See "Report of the International Law Commission," UN Doc. A/56/10 (2001), at "Commentary to Article 26," para. 5; and "Commentary to Article 40," paras. 3–5. But note that the Supreme Court of Canada has characterized the prohibition of torture merely as "an emerging peremptory norm of international law": *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002).

truly exceptional nature of defining any standards to be matters of "high illegality" in an essentially coordinative body of law.[49]

At present, however, the utility of the *jus cogens* doctrine is threatened by a range of politically expedient actions. On the one hand, there is an unhealthy tendency on the part of some scholars in powerful states to equate hegemonic political or ideological traditions with universal values. This "character defined" approach to *jus cogens*, impliedly endorsed by the renovation of general principles previously outlined,[50] fails to recognize the impossibility in a pluralist world of defining peremptory norms based on particularized notions of which rights are intrinsic and undeniable.[51] Common human rights standards will be agreed to for varied reasons, and taking account of diverging world views. If there is to be a recognition of standards that trump other norms, the defining characteristic of these *jus cogens* principles must itself be accepted by all those it purports to bind.

Conversely, there are those in the less developed world who see *jus cogens* as a way to override international law established without their full participation, thereby accelerating the pace of global institutional and normative reform.[52]

[49] "Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by use of terms like 'fundamental' or, in respect of rights, 'inalienable' or 'inherent.' Such classifications have not had much success, but have intermittently affected the interpretation of treaties by tribunals": I. Brownlie, *Principles of Public International Law* (2003) (Brownlie, *Public International Law*), at 488. For example, the Supreme Court of Canada addressed the question whether the prohibition of torture is a peremptory norm under international law in a very cautious way. "Although the Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established, peremptory norm, suggests that it cannot be easily derogated from": *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002).

[50] See chapter 1.1.2 above.

[51] "In fact, the [International Law Commission] commentary and most authors on the subject essentially contend that peremptory rules exist because they are needed ... The urgent need to act that the concept suggests fundamentally challenges the consensual framework of the international system by seeking to impose obligations on dissenting states that the 'international community' deems fundamental": D. Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility," (2002) 96(4) *American Journal of International Law* 833, at 843.

[52] "The numerical majority favoring far-reaching and rapid changes in the existing international legal order ... discovered an ideal opportunity to reformulate community interests and some of its basic rules of behavior. The temptation has emerged to use *jus cogens* as a possible normative vehicle for introducing sweeping reforms dictated by the majority. While writers from developing countries display a growing interest in the non-consensual foundations of *jus cogens* [citing to T. Rao, "International Custom," (1979) 19 *Indian Journal of International Law* 515, at 520], recent practice indicates that the Third World decision makers do not hesitate to use the *jus cogens* concept for legislative purposes": Danilenko, *Law-Making*, at 239.

Recognizing the numerical strength of the less developed world in the General Assembly, there have been efforts to characterize its resolutions as constitutive of *jus cogens*. But this approach runs afoul of the principle, described above, that *jus cogens* is not a source of law, but is rather a label that attaches to an otherwise validly conceived law because of its centrality to collective consensus on basic standards. Because the General Assembly and its subordinate bodies have no general lawmaking authority,[53] their resolutions are not usually binding.[54] There is therefore no law to which the *jus cogens* designation can adhere. The only exceptions would be where the resolution is simply the codification of a preexisting custom or general principle of law, or where it has achieved such status over time since passage of the resolution.

It is, of course, perfectly legitimate to argue for the replacement of traditional modes of international lawmaking by a more parliamentary, community-based system of supranational authority. It is, however, duplicitous to pretend that there is presently agreement in favor of such a shift. It is doubly dishonest to argue that the *jus cogens* rule, designed to bring order to established forms of law, can be relied upon to assert the existence of an order of authority superior to standards devised through the three established modes of lawmaking.

1.2 The present scope of universal human rights law

The most fundamental problem with the various efforts to expand the scope of international law is that states have generally not been willing to acknowledge their force. As the gap between declared universal law and the practice of states widens, advocates of an expansive interpretation of universal human rights norms may inadvertently be contributing to the destruction of a meaningful system of general interstate obligation toward humankind. The net result of the persistent overstatement of the reach of custom, general principles, and *jus cogens* is not, as presumably hoped, the effective incorporation of new standards into a clear and practical system of enforceable duties. Instead,

[53] "The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision, but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned": *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, at 165.

[54] "Although the decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited legal effects in other spheres, it may be said, by way of a broad generalization, that they are not legally binding upon the Members of the United Nations": *South West Africa (Voting Procedure)*, [1955] ICJ Rep 67, at 115 (Separate Opinion of Judge Lauterpacht). This is not to say, however, that they may not contribute to the evolution of customary international law, by providing relevant evidence of *opinio juris*: *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226, at para. 70.

wishful legal thinking sends the signal that the very notion of universal human rights law is essentially rhetorical, thereby diluting the force of whatever standards truly command (or may one day command) the respect of states. In the end, this melding of international law and politics yields little beyond politics.[55]

Some may counter that the distinction between the law and the politics of human rights is in any event artificial. At one level, this is true. International law is in general the product of power, and is a system of authority premised on the retention of power by nation-states. More profoundly, international law unquestionably entrenches rules that privilege the goals of those states that presently dominate international life, with concomitant marginalization of the aspirations of less powerful countries.[56] The conclusion might therefore be reached that the effective melding of law and politics through sweeping pronouncements on the content of universal human rights law at worst serves simply to make clear the artificial or unprincipled elevation of certain norms to the realm of binding authority.[57]

While perhaps principled, this analysis is strategically flawed. It is simply not true that the international political process is a more hospitable environment for the generation of fair-minded and equitable standards of acceptable conduct than is the international lawmaking regime.[58] International politics, no less than international law, is dominated by the strategic concerns of present-day power-holders. Moreover, even where standards evolve in arguably democratic fora such as the General Assembly of the United Nations, it is abundantly clear that the highly politicized nature of such processes provides no guarantee that the interests of the intended beneficiaries of human rights law will be well served. Most important, and in contrast to international law (and most forms of domestic politics), international politics affords no structure within which states must justify their stewardship of human rights in a public and expert forum.

[55] "Despite certain special characteristics, such as the types of evidence marshalled to establish customary human rights, human rights cannot but be considered a subject within the theory and discipline of public international law. Undue emphasis on the uniqueness of human rights will not advance their acceptance, on the broadest possible scale, as international law": Meron, *Human Rights*, at 101.

[56] See generally B. S. Chimni, *International Law and World Order* (1993).

[57] "Modern customary international law (CIL) does not constrain nations any more than old CIL did. When nations decline to violate CIL, this is usually because they have no reason to violate it. Nations would act no differently if CIL were not a formally recognized source of law. Modern CIL is mostly aspirational, just as old CIL was": Goldsmith and Posner, "Modern and Traditional," at 672.

[58] This is conceded even by some of those who would effectively merge international law and politics. McDougal et al. note that "[t]he procedures in the General Assembly are so crude and cumbersome that prescriptions may still be manipulated to serve special interests rather than common interests": McDougal et al., *World Public Order*, at 277.

For these reasons, the cause of human dignity is best served by the maintenance of a credible and recognizable distinction between the law and the politics of international human rights. This bifurcation does not take anything away from resort to the political process as one mechanism to promote respect for human dignity. It does, however, ensure that in at least some circumstances, a rule-based alternative can be invoked in support of human rights.

When, then, can a particular interest be said to be enforceable against all states as a matter of universal human rights law? First, some human rights may have the status of customary international law. The test is whether they can be located within a relatively constant and uniform interstate practice that has generated a sense of mutual obligation among states. There must be a coincidence of relevant *actions*, not simply official statements, sufficient to establish an agreement among states to be bound to a particular standard of conduct. Pronouncements in universal fora and elsewhere may help to establish that states view themselves as legally obligated to adhere to established patterns of conduct (*opinio juris*). There is, however, no substitute for that conduct.[59]

Second, some universal human rights may flow from general principles of law, meaning that they are pervasively recognized as binding norms across the domestic laws of states. The existence of a clear pattern of relevant domestic legislation, like practice and *opinio juris* in the case of custom, provides suitably clear evidence of the intention of states formally to be bound.

Third, universal human rights law might also be set by a treaty of genuinely universal reach. In this regard, particular attention should be paid to the Charter of the United Nations, thus far the only treaty that may establish human rights obligations that bind all members of the international community.[60]

[59] Thus, for example, the House of Lords declined to find a customary international right of conscientious objection to military service on the grounds that despite significant *opinio juris*, "evidence before the House does not disclose a uniformity of practice ... Of 180 states surveyed ..., some form of conscription was found to exist in 95. In 52 of those 95 states, the right of conscientious objection was found not to be recognized at all ... It could not, currently, be said that there is *de facto* observance of anything approaching a uniform rule": *Sepet and Bulbul v. Secretary of State for the Home Department*, [2003] UKHL 15 (UK HL, Mar. 20, 2003), at para. 18. The same conclusion had been reached by Laws LJ in the Court of Appeal, though he helpfully observed that "a universal practice need not be shown": *Sepet v. Secretary of State for the Home Department*, [2001] EWCA Civ 681 (Eng. CA, May 11, 2001), at para. 77.

[60] "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail": UN Charter, at Art. 103. The Convention on the Rights of the Child, UNGA Res. 44/25, adopted Nov. 20, 1989, entered into force Sept. 2, 1990, enjoys comparably broad accession. Yet because of the relative power of one of the two states which are not parties – the United States of America – it is difficult to argue that this treaty can be treated as a source of universal obligation.

1.2.1 Human rights under customary international law

It must be acknowledged at the outset that the very nature of customary international law sits uncomfortably with the search for universal norms of human rights. Customary law exists to formalize interstate practice that has come to represent an agreed benchmark of acceptable relations between and among states. Custom has legitimacy as law only because interstate behavior is accepted by states as an ongoing medium of negotiation. It is clearly understood by governments that there is no customary law until there is both agreement on "terms" signaled by constant and relatively uniform interstate practice, and a sufficient expression of the willingness of states to be bound by that agreement. This structure is highly unlikely to produce universal human rights norms, as was observed by Lord Hoffmann in the House of Lords:

> I do not think it is possible to apply the rules for the development of rules of international law concerning the relations of states with each other (for example, as to how boundaries should be drawn) to the fundamental human rights of citizens against the state. There are unhappily many fundamental rights which would fail such a test of state practice, and the Refugee Convention is itself a recognition of this fact. In my opinion, a different approach is needed. Fundamental human rights are the minimum rights which a state ought to concede to its citizens. For the purpose of deciding what these minimum rights are, international instruments are important even if many states in practice disregard them ... [because they] show recognition that such rights ought to exist.[61]

The essential problem with reliance on custom is that human rights will only rarely be subject to the kind of interstate give and take that is the essence of customary lawmaking.[62] The requisite pattern of dealing may, for example, be observed in regard to the rights of aliens, where the mutual self-interest of states of nationality and the states in which aliens are located has produced observable patterns of affirmative protection and forbearance.[63] Relevant interaction between and among states regarding the rights of human beings generally, however, is rare.[64]

[61] *Sepet and Bulbul v. Secretary of State for the Home Department*, [2003] UKHL 15 (UK HL, Mar. 20, 2003), per Lord Hoffmann at para. 41.

[62] "The customary law of human rights is not established by a record of claims and counter-claims between the foreign ministries of countries concerned with the protection of their rights as states and the rights of their respective nationals": Meron, *Human Rights*, at 100.

[63] See chapter 2.1 below.

[64] International humanitarian law is another area where states have a comparatively clear self-interest in ensuring mutual respect for basic norms of human dignity during conflict. As such, it is not surprising that customary norms have also evolved in this field. Thus, the International Court of Justice has observed that the Regulations under the Fourth Hague

Schachter made a creative effort to overcome this problem by counting the willingness of states to condemn particular forms of human rights abuse as a relevant form of interstate dealing.[65] His argument is that consistent censure of invidious conduct is a sufficiently clear pattern of interaction to render the condemned conduct contrary to customary law. The problem with this approach, however, is that the activity consistently engaged in by states (study and condemnation) is not the subject of the putative customary norm (for example, freedom from arbitrary detention).[66] Because the basis of customary law formation is concrete performance or self-restraint *in regard to* the matter said to acquire binding force, the behavior relied upon by Schachter can at best reinforce as customary law the Charter-derived *droit de regard*.[67] But it is not authority for the existence of new substantive norms of universal human rights law.

A more compelling renovation of customary international lawmaking to accommodate the possibility of evolution in human rights law might be based on scrutiny of the actual human rights records of states. The treatment a state metes out to its own population has not usually been understood to be an ongoing process of negotiating acceptable international standards of conduct. It may, however, be possible to locate the required appreciation of legal significance in the Charter's good faith undertaking to act in support of human rights.[68] If this commitment is viewed as a sufficient "signal" to states of the potential legal relevance of their human rights conduct, the basis exists

Convention of 1907 "were prepared 'to revise the general laws and customs of war' existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the 'rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war' (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996 (I), p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law": *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Gen. List No. 131, decided July 9, 2004, at para. 89.

[65] O. Schachter, *International Law in Theory and Practice* (1991) (Schachter, *International Law*), at 337–340.

[66] "The performance of most substantive human rights obligations ... lacks this element of interaction proper; it does not 'run between' States in any meaningful sense": Simma and Alston, "Sources of Human Rights Law," at 99.

[67] This duty of states to submit to scrutiny by the General Assembly and its specialized human rights bodies is discussed in chapter 1.2.3 below at pp. 46–47.

[68] State members "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55," which include "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion": UN Charter, at Arts. 56 and 55(c).

to search for evidence of both constant and relatively uniform state practice and *opinio juris*.

Yet even application of this understanding of customary lawmaking could not justify the list of universally binding human rights commonly contended for. A composite list of the human rights argued by senior publicists to have acquired force as matters of customary law includes freedom from (1) systemic racial discrimination; (2) genocide; (3) slavery; (4) extrajudicial execution or enforced disappearance; (5) torture, cruel, inhuman, or degrading treatment; (6) prolonged arbitrary detention; and (7) serious unfairness in criminal prosecution.[69] Of these, only the first – freedom from systemic racial discrimination – appears to be a clear candidate for customary international legal status. While race-based discrimination remains prevalent in much of the world,[70] formally codified racial disfranchisement is now virtually unknown.[71] Coupled with the explicit and powerful *opinio juris* supplied by no less a source than the Charter of the United Nations,[72] systemic racial discrimination is sensibly understood to be a violation of customary international law.

[69] This list includes those rights identified as matters of customary international law by any of American Law Institute, *Restatement of the Law: The Foreign Relations Law of the United States* (1987); Brownlie, *Public International Law*; R. Jennings and A. Watts eds., *Oppenheim's International Law* (1992) (Jennings and Watts, *Oppenheim's*); Meron, *Human Rights*; Schachter, *International Law*; or P. Sieghart, *The Lawful Rights of Mankind* (1985) (Sieghart, *Rights of Mankind*).

[70] Indeed, the World Conference against Racism "recognize[d] and affirm[ed] that, at the outset of the third millennium, a global fight against racial discrimination, xenophobia and related tolerance and all their abhorrent and evolving forms and manifestations is a matter of priority for the international community": "Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance," UN Doc. A/CONF.189/12 (2001), at para. 3.

[71] With the demise of the South African *apartheid* system, only relatively isolated cases of systemic racial discrimination remain. For example, the Roma are subject to a citizenship law in the Czech Republic that is conceived in a way that renders them de jure stateless; under Hungarian law, and throughout much of Central and Eastern Europe, the Roma are systemically denied many of the essential rights of citizenship: see e.g. A. Warnke, "Vagabonds, Tinkers, and Travelers: Statelessness Among the East European Roma," (1999) 7 *Indiana Journal of Global Legal Studies* 335, at 356, 359; and "Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination," UN Doc. E/CN.4/2000/16, Feb. 10, 2000, at para. 35. Formal racial disfranchisement is also clear in Malaysia's "New Economic Policy," which – while its days may be numbered – still reserves the majority of government jobs and university places for indigenous Malays to the exclusion of the ethnic Chinese population: "The slaughter of sacred cows," 367 *The Economist* 10 (Apr. 5, 2003).

[72] "The Purposes of the United Nations are ... [t]o achieve international cooperation in solving international problems ... and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion": UN Charter, at Art. 1(3). See chapter 1.2.3 below, at p. 44.

In contrast, however, the need to identify relatively constant state practice defeats the assertion of customary international legal status in relation to the balance of the asserted interests. While perhaps a close case,[73] even the assertion of a right to freedom from genocide is difficult to reconcile to a raft of contemporary genocides, including those in Afghanistan,[74] Bangladesh,[75] Bosnia,[76] Burundi,[77] Cambodia,[78] East Timor,[79] Guatemala,[80] Iraq,[81] Rwanda,[82] and Sudan.[83] Indeed, the pervasiveness of this phenomenon has led Kushner and Knox to characterize the present era as "an age of genocide."[84] State practice is moreover consistent, at best, with an extremely

[73] Most authoritatively, the International Court of Justice has suggested that freedom from genocide is a universal legal norm. "The origins of the [Genocide] Convention show that it was the intention of the United Nations to condemn and punish genocide as a 'crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and the spirit and aims of the United Nations ... The first consequence arising from this conception is that the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation": *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] ICJ Rep. 15, at 23.

[74] D. Bronkhoerst ed., "Genocide: Not a Natural Disaster: A Report on the National Conference on Genocide, Rotterdam, The Netherlands, 10 October 1997," Centre for Conflict Research, Amsterdam (1997).

[75] A. Jongman ed., *Contemporary Genocides: Causes, Cases, Consequences* (1996) (Jongman, *Contemporary Genocides*); P. Chakma, "The Genocide in the Chittagong Hill Tracts," (1989) 5(3) *Seeds of Peace* 4, at 4–6; A. McGregor, "Genocide in Chittagong Hill Tracts," (1991) 2 *On the Record* 11.

[76] G. Andreopoulos, *Genocide: Conceptual and Historical Dimensions* (1994) (Andreopoulos, *Genocide*).

[77] C. Sherrer, *Genocide and Crisis in Central Africa: Conflict Roots, Mass Violence and Regional War* (2002) (Sherrer, *Genocide and Crisis*); C. Jennings, *Across the Red River: Rwanda, Burundi and the Heart of Darkness* (2000) (Jennings, *Red River*); R. Lemarchand, *Burundi: Ethnic Conflict and Genocide* (1995).

[78] Jongman, *Contemporary Genocides*; Andreopoulos, *Genocide*.

[79] Andreopoulos, *Genocide*.

[80] "Genocide and Mass Murder in Guatemala, 1960–1996," (1999) 23 *ISG Newsletter* 9, at 9–12, 17.

[81] Jongman, *Contemporary Genocides*; Andreopoulos, *Genocide*.

[82] Sherrer, *Genocide and Crisis*; Jennings, *Red River*; Andreopoulos, *Genocide*.

[83] H. Fein, "Genocide by Attrition in Sudan and Elsewhere," (2002) 29 *ISG Newsletter* 7, at 7–9; R. Omaar and A. De Waal, *Facing Genocide: The Nuba of Sudan* (1995); M. Salih, D. Guha-Sapir, and T. Cannon, "Resistance and Response: Ethnocide and Genocide in the Nuba Mountains, Sudan," (1995) 36(1) *GeoJournal* 71, at 71–78.

[84] T. Kushner and K. Knox, *Refugees in an Age of Genocide: Global, National and Local Perspectives During the Twentieth Century* (1999). See also R. Falk, "The Challenge of Genocide and Genocidal Politics in an Era of Globalization," in T. Dunne and N. Wheeler eds., *Human Rights in Global Politics* (1999), at 177. A more general global, historical overview of genocide is provided in I. Charney, *Encyclopedia of Genocide* (1999).

narrowly defined right to be free from slavery;[85] a broader view suggests that there are not less than 27 million, and perhaps as many as 200 million, slaves in the world today.[86] Non-conforming state practice is also a serious impediment to recognition of the last four of the proposed list of seven putative customary human rights. In 2002 alone, there were credible reports of extrajudicial execution and of enforced disappearance in thirty-three countries; of torture, cruel, inhuman, or degrading treatment in one hundred and six states; of prolonged arbitrary detention in fifty-four countries; and of major unfairness in criminal prosecution in thirty-five states.[87] The generality and pervasiveness of abusive

[85] "The cumulative evidence contained in this report substantiates *prima facie* that, although chattel-slavery in the former traditional sense no longer persists in any significant degree, the prevalence of several forms of slavery-like practice continues unabated": B. Whitaker, "Slavery: Report prepared by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities," UN Doc. E/CN.4/Sub.2/1982/20/Rev.1, at 37. More than a decade later, however, continuing instances of chattel-slavery were documented in Brazil, Mauritania, Sudan, and Thailand: Anti-Slavery International, Factsheets D (1994), E (1994), and G (1994). See also B. Lance, *Of Human Bondage: An Investigation into Slavery in Present-Day Sudan* (1999) and R. Funari, "Brazil – Slaves to Misery," (April 2002) *Anti-Slavery Reporter* 8, at 8–9.

[86] "My best estimate of the number of slaves in the world today is 27 million. This number is much smaller than the estimates put forward by some activists, who give a range as high as 200 million, but it is the number I feel I can trust [based on a 'strict definition of slavery']": K. Bales, *Disposable People: New Slavery in the Global Economy* (2000), at 8–9. The higher number of as many as 200 million slaves includes persons subject to chattel-slavery, serfdom, debt bondage, servile forms of marriage, and exploitation as children: Anti-Slavery International, Factsheet G (1994). A broad definition of slavery is consistent with the approach of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 UNTS 3, done Sept. 7, 1956, entered into force Apr. 30, 1957. This broader understanding adds significantly to the complexity of calculating the actual number of slaves in the world. For example, the UN Working Group on Contemporary Forms of Slavery has appealed to "Governments concerned [to] carry out independent and comprehensive surveys, at the local level, to identify the number and location of people held in debt bondage": "Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Sixth Session," UN Doc. E/CN.4/Sub.2/2001/30, July 16, 2001.

[87] These statistics are based on Amnesty International, *Report 2003* (2003). The geographical breakdowns are as follows. Extrajudicial execution: seventeen (Africa), nine (Americas), two (Europe and Central Asia), five (Middle East and North Africa). Enforced disappearance: five (Africa), twelve (Americas), four (Asia Pacific), six (Europe and Central Asia), six (Middle East and North Africa). Torture, cruel, inhuman or degrading treatment: twenty-one (Africa), twenty (Americas), twenty (Asia Pacific), twenty-seven (Europe and Central Asia), eighteen (Middle East and North Africa). Detention without charge or trial: seventeen (Africa), seven (Americas), fourteen (Asia Pacific), four (Europe and Central Asia), twelve (Middle East and North Africa). Major unfairness in criminal prosecution includes reports of prisoners of conscience: six (Africa), two (Americas), eight (Asia Pacific), six (Europe and Central Asia), thirteen (Middle East and North Africa).

state behavior in regard to even these core interests therefore contradict any assertion of customary legal protection.

1.2.2 Human rights derived from general principles of law

An alternative approach more in keeping with the structure of international law may therefore be to search for universal human rights within the general principles of law. As argued by Simma and Alston, "the concept of a 'recognized' general principle seems to conform more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted though widely violated."[88] In keeping with accepted modes of international lawmaking, the relevant test of a general principle of law is whether the proposed universal standard has been pervasively recognized in the domestic laws of states.[89] If the only evidence of "acceptance" consists of declarations and other non-binding statements at the domestic or international level, there is an insufficient basis upon which to assert the norm as binding on states. Formalization in domestic law, like constant and relatively uniform interstate practice coupled with *opinio juris*, affords concrete evidence of intention to be bound.

Perhaps because commentators usually appeal to customary international law to justify the proclamation of new universal human rights, there are no official surveys that conclusively document the extent to which human rights have been codified in the laws of states. In several important cases, this information gap could be closed by synthesis of existing country-specific data on compliance with international human rights undertakings. Because some human rights treaties explicitly require state parties both to enact domestic legislation to protect one or more human rights and to report their efforts to an international supervisory body, the information base already exists to seek out new universal human rights norms rooted in the general principles of law.

For example, states adhering to the Genocide Convention agree to enact legislation to punish all acts intended to destroy, in whole or in part, a

[88] Simma and Alston, "Sources of Human Rights Law," at 102.

[89] It is, of course, difficult to provide a precise quantification of the degree of support required. An indication of the strength of support that should exist before amendment of truly fundamental principles comes into force is, however, provided by the Statute of the International Criminal Court, UN Doc. A/CONF.183/9, done July 17, 1998, entered into force July 1, 2002. Art. 121 of that treaty provides that while amendments to it may be adopted by a two-thirds majority of state parties, an amendment will come into force only once seven-eighths of state parties have accepted or ratified the amendment. If that figure were extrapolated to the broader context, a general principle of law should be located in the domestic laws of some 168 countries.

national, ethnic, racial or religious group.[90] State parties to the International Covenant on Civil and Political Rights undertake to protect by domestic law the right of every human being not to be arbitrarily deprived of life.[91] The Convention against Torture requires effective legislative measures to prevent acts of torture.[92] The Slavery Convention, Supplementary Convention on the Abolition of Slavery, International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination against Women all require states to enact a formal prohibition on slavery and the slave trade in all their forms.[93] The International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination go beyond the Charter's prohibition in principle of systemic discrimination to require legislation

[90] Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res. 260A(III), adopted Dec. 9. 1948, entered into force Jan. 12, 1951 (Genocide Convention), at Art. V. In contrast to the other instruments discussed here, there is no periodic reporting requirement under the Genocide Convention which facilitates evaluation of compliance with this obligation. An effort in the 1980s by the Sub-Commission on Human Rights to survey relevant domestic legislation yielded only twenty-three responses: B. Whitaker, "Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide," UN Doc. E/CN.4/Sub.2/1985/6. Official verification of pervasive compliance with this duty to legislate is therefore presently lacking, though a recent study notes that "[a] large number of States have enacted legislation concerning the prosecution and repression of genocide, most by amending their penal or criminal codes in order to add a distinct offence": W. Schabas, *Genocide in International Law: The Crime of Crimes* (2002), at 4–5. Yet the same author urges caution in assessing the practical effect of the Genocide Convention. "Fifty years after its adoption, [the Genocide Convention] has fewer than 130 State parties, a rather unimpressive statistic when compared with the other major human rights treaties of the United Nations system which, while considerably younger, have managed to approach a more general degree of support by the nations of the world. The reason is not the existence of doubt about the universal condemnation of genocide, but unease among some States with the onerous obligations that the treaty imposes, such as prosecution or extradition of individuals, including heads of State": ibid. at 3.

[91] International Covenant on Civil and Political Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 (Civil and Political Covenant), at Art. 6(1).

[92] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, adopted Dec. 10, 1984, entered into force June 26, 1987 (Torture Convention), at Arts. 2(1) and 4.

[93] Slavery Convention, 60 LNTS 253, done Sept. 25, 1926, entered into force Mar. 9, 1927, at Art. 6, as amended by Slavery Protocol, 212 UNTS 17, done Oct. 23, 1953, entered into force July 7, 1955; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, done Sept. 7, 1956, entered into force April 30, 1957, at Arts. 1, 5, 6, and 8(2); Civil and Political Covenant, at Art. 8(1); and Convention on the Elimination of All Forms of Discrimination against Women, UNGA Res. 34/180, adopted Dec. 18, 1979, entered into force Sept. 3, 1981 (Discrimination Against Women Convention), at Art. 6.

variously to end all forms of generalized discrimination, outlaw hate propaganda, and establish affirmative protections against discrimination.[94] Where states have reported their various laws to fulfil legislative responsibilities under these treaties, it may therefore be possible to define a general principle of law to coincide with the seminal treaty norm.

In view of the large number of states that have formally undertaken to legislate regarding these five human rights, they seem particularly ripe for scrutiny under the rules of general principles lawmaking. There are some indications that positive results are likely. The United Nations Center for Human Rights has, for example, already declared that "[a]s a legally permitted labour system, traditional slavery has been abolished everywhere."[95] Similarly, a study issued by the Institut Henri Dunant affirmed that "[a]lmost every State has some form of legislation prohibiting detention officials, or any individual, from torturing or treating a detainee inhumanly,"[96] and that even the "few states [which] do not have specific legislative protection against torture ... have alternative protections against action such as ill treatment."[97] If fortified by careful and probing analysis of domestic legislative records, reliance on general principles of law therefore offers the possibility of expanding universal human rights law in a manner consonant with the accepted formalities of international lawmaking. To date, however, this critical groundwork remains largely undone. Much less are there legally authoritative declarations of the status of particular human rights as general principles of law.

1.2.3 Human rights set by the United Nations Charter

Because of the real challenges of asserting international human rights law grounded in either custom or general principles, the most compelling basis upon which to posit the existence of a universal law of human rights is sometimes located in the Charter of the United Nations. That accord sets unambiguous human rights obligations only for states that exercise

[94] Civil and Political Covenant, at Arts. 20(2) and 26; Discrimination Against Women Convention, at Art. 2(b), (c), (f), and (g); and International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2106A(XX), adopted Dec. 21, 1965, entered into force Jan. 4, 1969 (Racial Discrimination Convention), at Arts. 2(1)(d) and 4(a), (b).

[95] United Nations Center for Human Rights, "Fact Sheet No. 14: Contemporary Forms of Slavery" (1991), at 4, available at www.unhchr.ch (accessed Nov. 19, 2004).

[96] P. Williams, "Treatment of Detainees: Examination of Issues Relevant to Detention by the United Nations Human Rights Committee" (1990) (Williams, "Treatment of Detainees"), at 31. The extent of state compliance with the duty to avoid torture or inhuman treatment while in detention has recently been surveyed in the context of persons seeking refugee status: Lawyers' Committee for Human Rights, "Review of States' Procedures and Practices Relating to Detention of Asylum-Seekers" (2002).

[97] Williams, "Treatment of Detainees," at 31.

trusteeship authority on behalf of the United Nations.[98] The source of a more general duty to respect human rights, in contrast, is usually located in the ambiguous pledge made by states in Arts. 55 and 56 to "take joint and separate action in cooperation with the Organization" in furtherance of human rights and fundamental freedoms.[99] It is not self-evident, however, that this "pledge" of cooperative action imports an agreement to be held accountable in law for breaches of human rights.[100] Indeed, there is force in Jennings' view that the most that can be derived from these articles is a good faith obligation to act in support of the Charter.[101] The language of Arts. 55 and 56 is too

[98] UN Charter, at Arts. 75–85. This view was affirmed by the International Court of Justice in its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, [1971] ICJ Rep 6, at para. 131: "Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions and limitations exclusively based on grounds of race, color, descent or national or ethnic origin which constitute a denial of fundamental rights is a flagrant violation of the purposes and principles of the Charter."

[99] An *obiter* reference in *United States Diplomatic and Consular Staff in Teheran*, [1980] ICJ Rep 3, at para. 91 affords indirect support for viewing the Charter as a binding source of human rights obligations. In contrast, in the decision in *Military and Paramilitary Activities in and Against Nicaragua*, [1986] ICJ Rep 14, at para. 261, the Court suggests that a good faith undertaking to observe human rights should be regarded as a form of political, rather than legal, obligation.

[100] The drafting history of Arts. 55 and 56 also provides reason to doubt the intention for the Charter to give rise to general human rights obligations. "It is interesting to observe that the text of what is now article 56 originally suggested a pledge 'to take separate and joint action and to co-operate with the Organization.' This clearly suggested 'separate action' by members of the organization regardless of whether or not other members took any action. The USA found this formula unacceptable; other drafts were unacceptable to other delegations and, accordingly, the present text emerged. From the drafting history one may deduce that no obligation to take action exists unless it is in co-operation with the Organization": P. Gandhi, "The Universal Declaration of Human Rights at Fifty Years: Its Origins, Significance and Impact," (1998) 41 *German Yearbook of International Law* 206 (Gandhi, "Universal Declaration"), at 225.

[101] "There is no provision in the Charter laying down *expressis verbis* that there is a legal obligation resting upon nations to observe human rights and fundamental freedoms. However, in basic constitutional instruments such as the Charter, there is less room for reasoning that although one of the objects of the United Nations is to promote respect for human rights and fundamental freedoms, its members are not under a duty to respect and observe them; or that the pledge – the undertaking – of Art. 56 can, as a matter of good faith, have any other meaning. The members of the United Nations are under *at least a moral – and, however imperfect, a legal* – duty to use their *best efforts*, either by agreement or, whenever possible, by enlightened actions of their own judicial and other authorities, to act in support of a crucial purpose of the Charter. Nevertheless, the provisions of the Charter on the subject do not themselves signify a full and effective guarantee of human rights on the part of international society [emphasis added]": Jennings and Watts, *Oppenheim's*, at 989.

hortatory and vague to create a legal duty to adhere to a comprehensive human rights regime.

Indeed, the text of Arts. 55 and 56 would sustain the argument that whatever enforceable human rights pledge is made is strictly context-specific. The language of Arts. 55 and 56 *requires* states to honor their human rights pledge only if failure to do so might jeopardize conditions of stability and well-being between or among nations. This is because the binding commitment of states in Art. 56 is simply to take action "for the achievement of the *purposes* set forth in Article 55 [emphasis added]." Art. 55, in turn, posits human rights as one of three initiatives that should be promoted by the United Nations to realize the objective of creating "conditions of stability and well-being that are necessary for peaceful and friendly relations among nations based on respect for the equal rights and self-determination of peoples." The *purposes* of Art. 55, which Art. 56 binds states to promote, are therefore pursuit of stability and well-being among nations. Respect for human rights is an instrumentality through which the United Nations is to advance this objective, but it is not in itself a purpose of Art. 55. From this perspective, states have not committed themselves to an all-embracing human rights undertaking, but are duty-bound to respect human rights only if non-compliance would adversely affect interstate relations. This interpretation establishes reciprocity of rights and enforceability, since the Security Council is empowered to demand the compliance of states only as far as necessary "for the maintenance of international peace and security."

On this reading of the Charter, it is unclear whether there could be any such thing as an authoritative interpretation of the human rights commitment made by states in the United Nations Charter. This is because the obligations of states and the reciprocal power of the Security Council do not presume any need to define human rights. States are accountable not for failure to adhere to human rights *per se*, but for actions that are disruptive of peaceful and friendly relations among nations. It is immaterial whether the cause of the disruption is or is not a breach of human rights. Similarly, the Security Council is not restricted to intervention simply when particular norms are at risk: its authority, like the obligations of states, is defined solely by an evaluation of risk to international peace and security. In sum, because the structure of the Charter presents no need to distinguish human rights from other interests, it cannot logically be argued that its effectuation requires the reading-in of externally defined human rights norms.

The importation of a broad range of human rights standards into the Charter is difficult to justify even if one were to adopt the more liberal view of Arts. 55 and 56 as creating a legally binding duty to promote human rights in good faith. Incorporation by reference of such standards is usually justified on the grounds that because the Charter does not contain an endogenous definition of the duty to respect "human rights and fundamental freedoms,"

core standards subsequently adopted by the United Nations should acquire universal force as authoritative interpretations of the Charter-based obligations.[102] Yet the question arises whether there really is a substantive gap of the kind that would warrant incorporation by reference of much of the *corpus* of international human rights law.

Specifically, the Charter's commitment to non-discrimination on the grounds of race, sex, language, or religion is explicit.[103] One might moreover assume United Nations competence to address any human rights that have attained universal stature by operation of custom or general principles,[104] and most certainly any rights within the *erga omnes* sphere.[105] Given these definitive points of reference, there is no basis to assert that the pledge of states would be rendered meaningless absent the importation of human rights standards from various declarations and treaties. That is, there is nothing patently unreasonable in the suggestion that whatever human rights obligations are assumed by states under the Charter are of relatively narrow scope.

Moreover, the idea of invoking the Charter to give indirect universal legal force to either the Universal Declaration of Human Rights, or to the two

[102] See e.g. L. Sohn, "The Human Rights Law of the Charter," (1977) 12 *Texas International Law Journal* 129, at 133. The authorities for and against this proposition are canvassed in Gandhi, "Universal Declaration," at 228–234.

[103] "The Purposes of the United Nations are: ... (3) To achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion": UN Charter, at Art. 1(3). See chapter 1.2.1 above at p. 36.

[104] In *Military and Paramilitary Activities in and Against Nicaragua*, [1986] ICJ Rep 14, at para. 267, the International Court of Justice confirmed the legitimacy of scrutiny of human rights norms which exist independently of treaty: "The Court also notes that Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a 'legal commitment' by Nicaragua towards the Organization of American States to respect these rights; *the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights* [emphasis added]."

[105] "An essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis à vis another state in the field of diplomatic protection. By their very nature, the former are the concerns of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive ... from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of a universal or quasi-universal character": *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, [1970] ICJ Rep 3. The notion of a norm *erga omnes* reflects the view that "international law does not only govern the reciprocal relations between states, but also involves considerations going beyond the mere sum of their individual interests": Ragazzi, *Erga Omnes*, at 218.

Human Rights Covenants, is cause for concern.[106] The Declaration was passed as a non-binding resolution of the General Assembly.[107] It was the clear intention of states that the Declaration serve as a foundational statement of principle, with legal obligations to follow from accession to what became the two Covenants.[108] Moreover, despite the clear evidence of respect generated since 1948 for the principles enshrined in the Declaration, the International Court of Justice has not yet found the Universal Declaration of Human Rights to be a source of binding obligations. In the *Nicaragua* case, for example, the Court could not "find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections."[109] More

[106] Justice Callinan of the High Court of Australia, for example, has observed that "the Universal Declaration of Human Rights ... [is] still in many respects an aspirational rather than an effective and enforceable instrument": *S157/2002 v. Commonwealth of Australia*, [2003] HCA 2 (Aus. HC, Feb. 4, 2003), per Callinan J. at para. 116. But see e.g. R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963).

[107] "The language of the Universal Declaration, the circumstances and the reasons of its adoption, and, above all, the clearly and emphatically expressed intention of the States, Members of the United Nations, who voted for the Resolution of the General Assembly, show clearly that the Declaration is not by its nature and by the intention of its parties a legal document imposing legal obligations": H. Lauterpacht, *International Law and Human Rights* (1950), at 408. Thus, "[t]he [Universal] Declaration has been of considerable value as supplying a standard of action and of moral obligation. It has been frequently referred to in official drafts and pronouncements, in national constitutions and legislation, and occasionally – with differing results – in judicial decisions. These consequences of the Declaration may be of significance so long as restraint is exercised in describing it as a legally binding instrument": Jennings and Watts, *Oppenheim's*, at 1002–1004.

[108] See Gandhi, "Universal Declaration," at 239: "The reason why the Declaration was adopted so speedily may ... be put down to the fact that most governments present at the Paris session of the General Assembly clearly believed they were not adhering to a document imposing legally binding norms. The General Assembly had already instructed the Human Rights Commission to prepare a convention (or two Covenants as they later emerged) covering the same rights: such an operation would have been completely otiose if it had been intended that the terms of the [Universal Declaration of Human Rights] should be legally binding."

[109] *Military and Paramilitary Activities in and Against Nicaragua*, [1986] ICJ Rep 14, at para. 261. In contrast, Art. 21(3) of the Universal Declaration of Human Rights provides that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures": UNGA Res. 217A(III), Dec. 10, 1948 (Universal Declaration). In a similar vein, the International Court of Justice declined to recognize the *erga omnes* character of the right to protection against denial of justice even though Arts. 7–11 of the Universal Declaration of Human Rights speak to this issue: *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, [1970] ICJ Rep 3, at para. 91.

generally, the Court has (appropriately) "rhetorically relied on the [Universal] Declaration as a touchstone of legality,"[110] but has otherwise insisted that there is no basis in law to equate a "political pledge" made in a non-binding accord to a legal obligation to respect human rights.[111] The alternative of effectively reading-in the content of the Human Rights Covenants (or other treaties) is even more problematic, since that approach amounts to giving universal force to treaties open to particularized accession, and agreed to in fact by substantially less than the whole of the international community. If the Human Rights Covenants were intended to function as universally applicable definitions of universally binding, Charter-based human rights undertakings, why would formal accession by states be made purely optional?

While not a source of legally binding obligations, a more expansive human rights jurisdiction resides with the General Assembly and the specialized human rights organs established under its authority.[112] Art. 13 of the Charter empowers the General Assembly to initiate studies and make recommendations for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Art. 10 authorizes discussion in the General Assembly of any such questions. Ultimately, however, these powers are in the nature of a *droit de regard*: the General Assembly and its subordinate bodies may scrutinize and discuss human rights, they may even recommend that states bring pressure to bear on non-compliant governments, but they have no right to require conformity

[110] Schachter, *International Law*, at 337. Of particular relevance is the *obiter dictum* that "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the *principles* of the Charter of the United Nations, as well as with the *principles* enunciated in the Universal Declaration of Human Rights [emphasis added]": *United States Diplomatic and Consular Staff in Teheran*, [1980] ICJ Rep 3, at para. 91. The fact that the breach of "principles" of both the Charter and the Universal Declaration is not characterized as a breach of *law* is noteworthy.

[111] "The Organization of American States Charter has already been mentioned, with its respect for the political independence of member States; in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members 'agree to dedicate every effort' ... It is evident that provisions of this kind are far from being a commitment to the use of particular political mechanisms": *Military and Paramilitary Activities in and Against Nicaragua*, [1986] ICJ Rep 14, at para. 261. A dissenting opinion of Judge Tanaka, however, takes the opposite view. "[T]he Universal Declaration of Human Rights adopted by the General Assembly in 1948, although not binding itself, constitutes evidence of the interpretation and application of the relevant Charter provisions": *South West Africa Case (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase*, [1966] ICJ Rep 6, at 293 (Dissenting Opinion of Judge Tanaka).

[112] These include the Commission and Sub-Commission on Human Rights, the Commission on the Status of Women, and the High Commissioner for Human Rights. See generally H. Steiner and P. Alston, *International Human Rights in Context* (2000) (Steiner and Alston, *International Human Rights*), at 597–602.