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Leveraging Asylum

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Leveraging Asylum

JAMES C. HATHAWAY*

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I. INTRODUCTION

Until the mid-1980s, only refugees could invoke international law to resist removal to a dangerous country of origin. The evolution in international law since that time has been both fast-paced and profound.

This is most clearly true under European human rights law. No less an authority than the House of Lords has declared that the right of non-return extends not only to refugees, but to any person at risk of torture or inhuman or degrading treatment or punishment, and—at least where the risk is clear and extreme—applies also where there is a threat to: life; freedom from slavery; liberty and security of person; protection against ex post facto criminality; privacy and family life; or freedom of thought, conscience, or religion.  

But the dramatic expansion of protection is not limited to Europe. While less easily enforced than the rules of the European safety net, the combination at the

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2. See generally THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING (Philip Alston & James
global level of an explicit duty of non-return in the United Nations Torture Convention and of implied duties of non-return grounded in recent authoritative application of Articles 6 and 7 of the Civil and Political Covenant now establishes a principled limit on the right of most states to remove a broadly defined group of at-risk non-citizens from their territory. More embryonic support for an expanded duty to protect may be found in the Convention on the Rights of the Child and through invocation of international humanitarian law, specifically Common Article 3 of the Geneva Conventions.

The problem is that none of these new sources of international protection expressly defines how members of the broader class of non-returnable persons are to be treated. In contrast to the Refugee Convention, nearly all of which is devoted to defining the precise legal entitlements of members of the protected class (for example, to freedom of internal movement and to other civil liberties, as well as to key socioeconomic rights, including to work and to access education), the new protections against refoulement are bare-bones entitlements. Members of the beneficiary class may not be returned to the place of risk, but there is no express

Crawford eds., Cambridge Univ. Press 2000) (analyzing the strengths and weaknesses of the human rights treaty monitoring system).
5. See JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 369–70 (2005) ("[T]he insufficiency of the non-refoulement guarantee set by Art. 33 of the Refugee Convention is effectively remedied by the ability to invoke other standards of international law.").
6. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. See JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 173–96 (2007) (discussing the possible application of the "best interests" principle of children's rights to the context of minor asylum seekers). It is, of course, true that relevant norms under these accords are more substantively circumscribed than the Refugee Convention's open-ended focus on persons at risk of "being persecuted." But protection claims derived from the Torture Convention, the Civil and Political Covenant, the Convention on the Rights of the Child, and international humanitarian law are in other ways less constrained than is refugee status. In particular, there is no need to show the element of civil or political disfranchisement inherent in the Refugee Convention's "for reasons of" nexus requirement; and states are not authorized to deny protection on the basis of lack of deservingness as Article 1(F) of the Refugee Convention requires.
7. See, e.g., Oreljen v. Canada, [1992] 1 FC 592 (Can. FCA, Nov. 22, 1991) (accepting that the Geneva Conventions might be violated by refoulement, but refusing to incorporate them into the Immigration Act process). See generally HATHAWAY, supra note 5, at 369 (explaining how international humanitarian law "should be construed to preclude the forcible repatriation of aliens who have fled generalized violence or other threats to their security arising out of internal armed conflict in their state of nationality").
9. Id. art. 24.
10. Id. art. 22. See generally HATHAWAY, supra note 5, at 171–90 (detailing the various rights protections available to refugees at different levels of attachment).
11. Refoulement, literally forcing back, is the expulsion or return of a refugee from one state to another. BLACK'S LAW DICTIONARY 1307 (8th ed. 2004); THE PENGUIN FRENCH DICTIONARY 265 (Merlin Thomas & Raymond Escoffey eds., 1992). Non-refoulement is the right of refugees not to be returned, directly or indirectly, to a place where there is a risk of persecution. HATHAWAY, supra note 5, at 279. Specifically, Article 33 of the Refugee Convention grants protection against refoulement to refugees whose life or freedom would be threatened on account of race, religion, nationality, or membership of a particular social group or political opinion. Refugee Convention, supra note 8, art. 33.
12. Id.
duty in international law to provide them with any particular bundle of rights, much less to enfranchise them in the host community.

This situation is grave for the protected persons themselves and is potentially destabilizing for the governments and communities that host them. The same arguments advanced at the birth of refugee law, namely that the social inclusion of non-returnable persons is both ethically right and socially responsible, have clear contemporary resonance. Perhaps for this reason the European Union's 2004 Qualification Directive\(^\text{14}\) came remarkably close to granting Refugee Convention rights to all persons legally entitled to protection against refoulement, and is likely to be revised soon to go even further in that direction.\(^\text{15}\) Canada has already amended its domestic law to give the same rights to refugees and other legally non-returnable persons, with Australia and New Zealand poised to follow suit.\(^\text{16}\)

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15. The original draft of the Qualification Directive denied only two Refugee Convention rights to the beneficiaries of subsidiary protection. Council Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, EU Doc. 14643/1/02 REV 1 (Asile 68), 27 Nov. 2002. First, it was proposed that they would only be granted travel documents in limited circumstances. James C. Hathaway, *What's in a Label?*, 5 EUR. J. MIGRATION & L. 1, 8 (2003). Second, access to the labor market was to be denied for up to six months following the date of status recognition. *Id.* The rights afforded to beneficiaries of subsidiary protection were, however, diluted as a consequence of further drafting. The limitation on access to travel documents was retained. Qualification Directive, supra note 14, art. 25. The six-month limitation for access to the labor market was removed, but discretion was introduced allowing Member States to take into account the situation of the labor market when considering potential limitations on access to the labor market for beneficiaries of subsidiary protection. *Id.* art. 26. Discretionary exceptions were also introduced in relation to access to social welfare, access to health care, and the availability of family unification. *Id.* arts. 24, 28, 29. There is nonetheless a high correlation between the standards adopted for beneficiaries of subsidiary protection and Refugee Convention rights.

16. The Commission of the European Communities has announced its intention to "reconsider the level of rights and benefits to be secured for beneficiaries of subsidiary protection, in order to enhance their access to social and economic entitlements which are crucial for their successful integration, whilst ensuring respect for the principle of family unity across the EU." Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum, An Integrated Approach to Protection Across the EU*, at 6, COM (2008) 360 final (June 17, 2008).

The Commission's proposal finds support in a Staff Working document accompanying the Communication: "Given the fact that in practical terms the situation of the two groups is comparable, their level of rights should also be (close to) equivalent. A clear example is the lack of provisions in EU law on family reunification for subsidiary protection beneficiaries. A higher level of rights for these persons is necessary if the EU wants to avoid creating a subclass of protected persons and also to respond to the call of the Hague programme which mention[s] the establishment of a uniform protection status in the EU." Commission of the European Communities, Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum, An Integrated Approach to Protection Across the EU, Impact Assessment, at 20, SEC (2008) 2029 (June 17, 2008).

17. Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 97 (Can.).
But does international law actually require states bound by duties of non-refoulement beyond those in the Refugee Convention to adopt rights-granting measures of this kind? Is the provision of civil liberties and socioeconomic entitlements to non-returnable persons simply good policy, or is it legally compelled?

Recent scholarship suggests that granting rights to all non-returnable persons is not just advisable, but is already required by international law. First, it is said that even states not bound by relevant conventions are required by customary international law to honor the duty of non-refoulement in relation to a wide-ranging group comprised of both refugees and others facing the prospect of serious harm. Second, it is suggested that all persons who are entitled to protection against refoulement—not just refugees—must, by virtue of a conceptual fusion of the Refugee Convention and other human rights accords, be granted all of the refugee-specific entitlements codified in the Refugee Convention itself.

In essence, under the first claim, the protection of refugees against refoulement ceases to be a matter of treaty-based entitlement. Under the second claim, the specific treaty-based entitlements of refugees are deemed applicable to all beneficiaries of the duty of non-refoulement, whether refugees or not.

Taken together, the two claims amount to an assertion that there is today a legally binding and universally applicable right to asylum for all seriously at-risk persons. In short, the right to asylum has been leveraged through scholarly analysis despite its express rejection by states.

I believe that the analysis underlying the leveraged right to asylum is conceptually flawed. As I will show, there is no duty of non-refoulement that binds all states as a matter of customary international law and it is not the case that all persons entitled to claim protection against refoulement of some kind are ipso facto entitled to refugee rights. These claims are unsound precisely because the critical bedrock of a real international legal obligation—namely, the consent of states evinced by either formal commitments or legally relevant actions—does not yet exist.


20. MCADAM, supra note 6, at 1.

21. A right to asylum was rejected both in the drafting of the Refugee Convention, and at the 1977 Territorial Asylum Conference. See generally ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM (Almqvist & Wiksell Int'l 1980) (tracing the development and current status of international instruments dealing with territorial asylum); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 13–16 (1991) (summarizing the contemporary significance of the abortive effort to draft a binding commitment to grant asylum).
The leveraged right to asylum is attractive because it allows scholars simply to ordain law, rather than having to work to create a renewed protection architecture that convinces states that existing duties can be reconciled to national self-interest. But the effort to rebuild, rather than simply to ordain, is required precisely because rhetorical claims standing alone will not serve as a meaningful constraint on the behavior of states.\textsuperscript{22}

II. THE FIRST CLAIM: THE DUTY OF NON-REFOULMENT BINDS ALL STATES

The essence of the first claim is that because an express or implied duty of non-refoulement is recognized in the various treaties I have previously cited, it is now the case that all states—whether bound by a relevant treaty or not—are legally obligated to honor the duty of non-refoulement. This duty of non-refoulement applies not only to any refugee, but also to any potential victim of torture, cruel, inhuman, or degrading treatment or punishment,\textsuperscript{23} as well as to most persons facing risk to “life, physical integrity, or liberty.”\textsuperscript{24} The claim is that at least this one critical refugee right inheres in all persons who are in fact refugees or who face another serious human rights risk, regardless of treaty accession. How was this conclusion reached?

In a study commissioned and championed by the United Nations High Commissioner for Refugees (UNHCR), Eli Lauterpacht and Daniel Bethlehem invoke the decision of the International Court of Justice (ICJ) in the North Sea Continental Shelf Cases\textsuperscript{25} for the view that treaties “may influence the creation of... a rule of custom.”\textsuperscript{26} They argue that because the treaty-based norm of non-refoulement is of norm-creating character,\textsuperscript{27} enjoys widespread and representative state support,\textsuperscript{28} and has stimulated consistent relevant practice,\textsuperscript{29} “non-refoulement must be regarded as a principle of customary international law.”\textsuperscript{30} If sound, this analysis means that the duty of non-refoulement is no longer merely a matter of treaty-based obligation (applicable only to state parties) but instead now binds all states, including those which have never signed on to a relevant treaty.


\textsuperscript{23} Strictly as a matter of convenience, torture, cruel, inhuman or degrading treatment or punishment will be referred to herein simply as torture. Note, however, that the Torture Convention protects against refoulement only when there is a risk of torture, not when there is only a risk of cruel, inhuman, or degrading treatment. Torture Convention, supra note 3, art. 3.

\textsuperscript{24} Lauterpacht & Bethlehem, supra note 19, para. 253. The exception is for persons who face a threat to “life, physical security, or liberty” not rising to the level of a risk of “torture or cruel, inhuman or degrading treatment or punishment,” whose entitlement to protection against refoulement can be trumped by “overriding reasons of national security or public safety.” Id.


\textsuperscript{26} Lauterpacht & Bethlehem, supra note 19, para. 198.

\textsuperscript{27} Id. paras. 201–08. They add for good measure, that there is an “evident lack of expressed objection by any state to the normative character of the principle of non-refoulement.” Id. para. 216.

\textsuperscript{28} Id. paras. 209–10.

\textsuperscript{29} Id. paras. 211–15.

\textsuperscript{30} Id. para. 216. Somewhat confusingly, they also seem to suggest that non-refoulement is a general principle of international law, though they provide no analysis in support of that view. Id.
The basic notion that customary law may emerge from a treaty-based norm is well-accepted. At least since the Asylum Case, it has been recognized that the tree of customary international law can grow from the acorn of specific treaties. But the role of the treaty-based norm is essentially auxiliary: it crystallizes the content of the putative norm and provides a context within which the two essential elements of a customary norm—opinio juris and consistent state practice—can be located. In the case of the putative customary duty of non-refoulement, these two essential requirements for the emergence of customary international law are not met.

To begin, is there opinio juris sufficient to justify the putative norm? The rigid traditional understanding of opinio juris sive necessitatis—requiring that the observed uniformity of practice be a consequence of a sense of legal obligation—has, of course, given way to the less demanding requirement "of an express, or most often presumed, acceptance of the practice as law by all interested states." It is sufficient

32. See id. at 277 (including Colombia's unsuccessful argument for the existence of a rule of customary international law rooted in regional treaties).
33. "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, para. 27 (June 3). See also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, para. 183 (June 27) (quoting Continental Shelf, 1985 I.C.J. 13); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 64 (July 8) (quoting Continental Shelf, 1985 I.C.J. 13).
34. Thus, the norm must "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law." North Sea Continental Shelf Cases, 1969 I.C.J. 3, para. 72. While there was some concern in the case that the "equidistance principle" invoked as treaty-based custom met this test given its secondary character, there is little doubt that the duty of non-refoulement is of a norm-creating character. Id.
35. Id. para. 77; Nicaragua, 1986 I.C.J. 14, para. 183 ("[T]he material of customary international law is to be looked for primarily in the actual practice and opinio juris of States . . . .") (quoting Continental Shelf, 1985 I.C.J. 13, para. 27); INT'L LAW ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 6 (2000).
37. To be fair, customary international law is notoriously murky terrain. As Goldsmith and Posner write, "It is unclear which state acts count as evidence of a custom, or how broad consistent state practice must be to satisfy the custom requirement. It is also unclear what it means for a nation to follow a custom from a sense of legal obligation, or how one determines whether such an obligation exists." Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. CHI. L. REV. 1113, 1114 (1999). As a result, "international law arguments based on custom always suffer from a considerable degree of arbitrariness." Niels Petersen, Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation, 23 AM. U. INT'L L. REV. 275, 277 (2008).
38. Anthony D'Amato has strongly criticized the ICJ for commencing with analysis of opinio juris (rather than with analysis of whether there is consistent relevant state practice) in the Nicaragua case. Anthony D'Amato, Trashing Customary International Law, 81 AM. J INT'L L. 101, 102 (1987). But as Oscar Schachter has observed, "Even if the [reversal] seemed to place the cart before the horse, it did not depart in principle from the basic postulate that binding custom was the result of the two elements: State practice and opinio juris." Oscar Schachter, New Custom: Power, Opinio Juris and Contrary Practice, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531, 534 (J. Makarczyk ed., 1996).
39. Only if relevant state actions are "based on their being conscious of having a duty to [act in a particular way] would it be possible to speak of an international custom." The Case of the S.S. "Lotus", (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7).
40. KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 51 (1993). See also INT'L LAW
to show that states presently regard the putative norm as legally compelled, even if their concordant actions in keeping with the norm were not induced by a sense of legal duty. Moreover, there is good authority that opinio juris can be shown in many different ways. In its Nicaragua decision, for example, the ICJ held that "opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of . . . States towards certain General Assembly resolutions . . . support of [regional conference] resolution[s] . . . . [and] statements by State representatives." The views of most scholars are similarly inclusive.

Despite this very flexible approach to the material basis for identification of opinio juris, the specific facts relied upon by Lauterpacht and Bethlehem fall short. They ground their claim of opinio juris for a universally binding duty of non-refoulement on a combination of three indicia: first, the "near-universal acceptance" of a non-refoulement duty in various UN and regional treaties; second, the unanimous adoption by the General Assembly of the 1967 Declaration on Territorial Asylum; and third, the absence of express opposition to the principle of non-refoulement by the states which neither signed a relevant treaty nor were present in the General Assembly when the 1967 declaration was adopted.

The primary portion of the claim is substantively unsound. For a single rule of customary international law to emerge, the indicia of opinio juris must clearly relate to the same putative rule. In contrast, Lauterpacht and Bethlehem weave together disparate bits of opinio juris arising from distinct treaties dealing with distinct issues to locate opinio juris for a principle that is more comprehensive than any of the underlying commitments. Specifically, they argue that because all but nineteen UN ASS'N, supra note 35, at 10 ("[T]he main function of the subjective elements is to indicate what practice counts (or, more precisely, does not count) towards the formation of a customary rule."). As Kammerhofer writes, "The concept of opinio juris is arguably the centrepiece of customary international law. It is the most disputed, least comprehended component of the workings of customary international law. At the heart of the debate lies an important conflict: on the one hand, customary law-making seems by nature indirect and unintentional. On the other hand, law-making normally requires some form of intentional activity, an act of will. In the international legal system, great value has traditionally been placed in the states' agreement or consent to create obligations binding upon them." Jörg Kammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems, 15 EUR. J. INT'L L. 523, 532 (2004).

42. See, e.g., OPPENHEIM'S INTERNATIONAL LAW 28 (Sir Robert Jennings & Sir Arthur Watts eds., 2008) ("[The] subjective element may be deduced from various sources . . . ."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (2008) (listing various sources of opinio juris). But see J. Patrick Kelly, The Twilight of Customary International Law, 40 VA. J. INT'L L. 449, 487 (2000) ("Aspirational or recommendatory instruments, enacted while states remain unwilling to sign concrete treaties, provide compelling evidence that states lack the normative conviction necessary to create customary obligations, rather than evidence that states believe these norms are binding.").
43. Lauterpacht & Bethlehem, supra note 19, para. 209.
45. Declaration on Territorial Asylum, supra note 44; Lauterpacht & Bethlehem, supra note 19, para. 209.
46. Writing in relation to the practice component of customary law, Villiger observes that "the condition of uniform practice requires that the instances of practice of individual States and of States in general circumscribe, apply, or refer to, and thereby express, the same customary rule." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL OF THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 43 (2d ed. 1997).
member states "participat[e] in some or other conventional arrangement embodying non-refoulement"—that is, they have all agreed to be bound by at least one of Article 33 of the Refugee Convention, Article 3 of the Torture Convention, Articles 6 and 7 of the Civil and Political Covenant, or by a comparable provision under a relevant regional treaty—it is now possible to conclude that there is a sufficiently widespread and representative opinio juris for an overarching principle that "non-refoulement must be regarded as a principle of customary international law."

The incongruity of the claim arises from the fact that non-refoulement is merely a means to a protection end. The means itself can only be the subject of general acceptance within a particular context. That is, the assertion that all states accept the duty of protection against refoulement assumes some agreement about the circumstances in which the duty is owed. Yet there is no such agreement, since the evidence of opinio juris relied upon by Lauterpacht and Bethlehem sometimes relates to persons who have a well-founded fear of being persecuted; in other cases, to persons at risk of torture; and in still other circumstances, to persons at risk of other forms of human rights abuse. There is, in short, no common acceptance of the duty of non-refoulement related to any particular class of persons or type of risk, much less to their combined beneficiary class.

By way of analogy, one might consider the claim that there is opinio juris to support an international legal duty to issue an injunction. At one level, it is almost certainly true that the courts of virtually all states do, in fact, authorize injunctive relief in at least some circumstances. Yet it would be meaningless to claim a normative consensus on a duty "to issue injunctions" since there is no substantive accord on the circumstances in which the remedy is to be granted. The argument for opinio juris in support of a general duty of non-refoulement is similarly flawed. Lauterpacht and Bethlehem's assertion of agreement sufficient to count as opinio juris is a thinly veiled cobbling together of disparate commitments with only the veneer of a remedial mechanism—non-refoulement—in common. With no substantive commonality to the obligations agreed, no general opinio juris can be derived.

The second form of evidence of opinio juris relied upon by Lauterpacht and Bethlehem, the unanimous adoption by the General Assembly of the 1967 Declaration on Territorial Asylum,50 does have a common substantive core. Unfortunately for their project, the common core is limited to persons seeking "asylum from persecution,"51 a group far smaller than said by them to benefit from the customary norm.52 Equally fundamental, General Assembly resolutions cannot be relied upon in abstract as evidence of universal opinio juris.53 As the ICJ observed

48. Id. para. 216.
49. Id. paras. 173–208.
50. Declaration on Territorial Asylum, supra note 44.
51. Id. at pmbl., art. 1.
52. Specifically, persons threatened with persecution are one of the three groups said by Lauterpacht and Bethlehem to be entitled to protection against refoulement under a general customary duty. The other two are persons who face "a real risk of torture or cruel, inhuman or degrading treatment or punishment" and persons who face "a threat to life, physical integrity, or liberty." Lauterpacht & Bethlehem, supra note 19, para. 218.
53. There is a not-insignificant policy concern, noted by Thomas Franck:
in Nicaragua, the *opinio juris* is instead to be deduced from "the attitude of... States towards certain General Assembly resolutions."\textsuperscript{54} The Court noted that while General Assembly resolutions may be the basis for *opinio juris*,\textsuperscript{55} they have to be considered "in their totality."\textsuperscript{56} A critical part of that totality is the failure of the UN conference that convened in 1977 with the specific intent to transform the 1967 declaration into binding law.\textsuperscript{57} Lapenna notes that "the Committee met for [more than] four weeks and only three of the ten articles of the experts' draft Convention were discussed and voted on... The preoccupation of the majority of the states attending the Conference was that of safeguarding, to exasperation point, the sovereign right of a state to grant asylum."\textsuperscript{58} There has moreover been no


55. Some commentators take strong objection to this holding:

[A] customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. If voting for a UN resolution means investing it with *opinio juris*, then the latter has no independent content; one may simply apply the UN resolution as it is and mislabel it 'customary law.'

D'Amato, *supra* note 38, at 102. This critique is overstated, as the ICJ merely held that General Assembly resolutions could contribute to *opinio juris*; consistent state practice must also be identified. D'Amato no doubt makes his charge in view of the Court's regrettable assumption (rather than interrogation) of consistent state practice. The judgment is, however, clear that consistent state practice remains an essential element of customary international law formation. Nicaragua, 1986 I.C.J. 14, para. 184; INT'L LAW ASS'N, *supra* note 35, at 63 ("Given that General Assembly resolutions are not, in principle, binding, something more is needed to establish [opinio juris] than a mere affirmative vote (or failure to oppose a resolution adopted by consensus).")

56. Nuclear Weapons, 1996 I.C.J. 226, para. 71. "[I]t is necessary to look at its content and the conditions of its adoption; consistent state practice is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule." *Id.* An extreme interpretation is that

[This decision goes much farther than its predecessors in transforming [General Assembly resolutions] from exhortations or "soft law" principles into "hard law" prescriptions, at least in the eyes of the Court... Every resolution that purports to express a legal norm, even a "soft law" exhortation or aspiration, has the potential of being recognized by the Court as a binding and strictly enforceable obligation, at least for those states which did not expressly dissent from it.]

Fred L. Morrison, *Legal Issues in the Nicaragua Opinion*, 81 AM. J. INT'L L. 160, 161 (1987). As James Crawford helpfully reminds us, "[o]f course, the General Assembly is not a legislature. Mostly its resolutions are only recommendations, and it has no capacity to impose new legal obligations on States." JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 113 (2d ed. 2006).

57. See *supra* note 21.

58. Enrico Lapenna, *Territorial Asylum—Developments from 1961 to 1977—Comments on the
To rely on the 1967 asylum declaration as an indication of official acceptance of a comprehensive duty of non-refoulement—much less to isolate the nineteen abstaining countries and deem their failure to protest to be implied support—is disingenuous given the totality of the evidence of state attitudes.

The more plausible basis for General Assembly-based opinio juris—ironically, not invoked by Lauterpacht and Bethlehem—\(^6\) is the line of subsequent General Assembly calls to respect the duty of non-refoulement, often said to apply to "asylum seekers" as well as to the arguably more constrained category of refugees.\(^6\) While not as specific as the beneficiary category contended for,\(^5\) the regularity of the endorsement of non-refoulement in the General Assembly\(^6\) is noteworthy and goes some distance in support of the claim that there is opinio juris for a duty of non-refoulement owed to more than just Convention refugees.

The challenge, though, is that General Assembly resolutions are merely one factor to consider in the assessment of opinio juris. They must be weighed against contrary indications, in particular those emanating from states not already bound by the Conference of Plenipotentiaries, 16 A.W.R. BULL. 1, 4 (1978).

59. A helpful contrast is provided by the facts of the Fisheries Jurisdiction Case, which notes that the opinio juris contended for by Iceland—a provision for special treatment of states overwhelmingly dependent on fishing—initially "failed to obtain the majority required, but a resolution was adopted at the 1958 Conference concerning the situation of countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development." Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 3, para. 56 (July 25).

60. This argument is, however, made by the UNHCR. "The principle of non-refoulement has been consistently referred to by the United Nations General Assembly in its various resolutions on the High Commissioner’s Annual Report. The Office of UNHCR considers that these references to the principle of non-refoulement, taken together with the ... Conclusions of the [UNHCR] Executive Committee constitute further evidence of its acceptance as a basic normative principle." U.N. HIGH COMMISSIONER FOR REFUGEES, THE PRINCIPLE OF NON-REFOULEMENT AS A NORM OF CUSTOMARY INTERNATIONAL LAW: RESPONSE TO THE QUESTIONS POSED TO UNHCR BY THE FEDERAL CONSTITUTIONAL COURT OF THE FEDERAL REPUBLIC OF GERMANY IN CASES 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 para. 43 (1994).


62. See supra text accompanying note 24.

63. There is no pattern of substantial negative votes or abstentions of a kind that would negate the opinio juris value of the resolutions. Nuclear Weapons, 1996 I.C.J. 226, para. 71.
a treaty-based duty of non-refoulement. Apart from the failure of (and failure to resuscitate over the ensuing forty years) the territorial asylum initiative described above, the major contraindication is the persistent refusal of most states of Asia and the Middle East to be formally bound by the asserted comprehensive duty of non-refoulement. While such states have often agreed to admit refugees and other human rights victims, there is no evidence that whatever openness they have shown—often partial, and usually highly conditional—has been influenced by a

64. "To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly afterward became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favor of the equidistance principle." North Sea Continental Shelf Cases, 1969 I.C.J. 3, para. 76.

65. For example, the Thai Ministry of the Interior lists as one of its key functions the effort "to intercept and drive back refugees." U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2008, 7 (2008). The Malaysian Minister of Information similarly announced with respect to Acehnese refugees: "We will treat them as we do other refugees. We will detain them and send them back." Aceh Under Martial Law: Problems Faced by Acehnese Refugees in Malaysia, HUM. RTS. WATCH, Mar. 31, 2004, at 10 (quoting Khalil Yaacob). In India, there is no domestic legal framework for recognizing refugees. The Foreigners Act 1946 does not distinguish between undocumented migrants and refugees, and allows the government to arrest, detain, and deport any undocumented migrant. The Foreigner's Act, No. 31 of 1946, India Code (1993), v. 1; see Prabodh Saxena, Creating Legal Space for Refugees in India: the Milestones crossed and the Roadmap for the Future, 19 INT'L J. REFUGEE L. 246, 250 (2007) (describing The Foreigners Act 1946 in which refugees are not distinguished from aliens).

66. Reliance is sometimes placed on express acknowledgments of the duty of non-refoulement in bilateral arrangements between regional states and the UNHCR, but these are not in fact a dependable indicator of opinio juris. For example, despite having executed such an agreement Jordan simply closed its borders to Palestinian and Iranian Kurdish refugees in 2006 on the basis of capacity and concerns that the refugees would not depart even when the risk abated. Nowhere to Flee: The Perilous Situation of Palestinians in Iraq, HUM. RTS. WATCH, Sept. 9, 2006, at 38–39, available at http://www.hrw.org/en/node/11181/section/1 [hereinafter Nowhere to Flee].

67. Participation in both the Torture Convention, supra note 3, (containing an express duty of non-refoulement in Art. 3) and the Civil and Political Covenant, supra note 4 (containing an implied duty of non-refoulement in relation to Arts. 6 and 7) is fairly strong.

Approximately 70% of Asian states and 85% of Middle Eastern countries are parties to the Torture Convention, while 80% of Asian countries and 85% of Middle Eastern nations are parties to the Civil and Political Covenant. See The Secretary-General, Multilateral Treaties Deposited with the Secretary-General, ch. IV, U.N. Doc. ST/LEG/SER.E/26 (Vol. I) (Apr. 1, 2009), available at http://treaties.un.org/Pages/ParticipationStatus.aspx (providing a list of countries who are parties to the treaties). Notwithstanding the high participation rate, only two Asian states (Kazakhstan and the Republic of Korea) and one Middle Eastern country (Qatar) have accepted the competence of the Committee Against Torture in accordance with Article 22 of the Torture Convention. Similarly, only 50% of Asian state parties to the Civil and Political Covenant and no Middle Eastern country have accepted the competence of the Human Rights Committee to hear individual complaints under the Optional Protocol to the Civil and Political Covenant. Id. ch. IV, pt. 5.

Acceptance of a duty of non-refoulement vis à vis refugees in both of these regions is very low. Only 40% of Asian countries and 23% of Middle Eastern states have acceded to either the Refugee Convention or Protocol. Id. ch. V.

This refusal formally to be bound by the duty to avoid the refoeulement of refugees is long-standing. See Kay Hailbronner, Nonrefoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S 123, 128–29 (David A. Martin ed., 1988) (describing the longstanding refusal of Eastern European, Asia, and Near East states to ratify agreements containing non-refoulement clauses). The claim of opinio juris in support of a comprehensive duty of non-refoulement is thus undermined.

68. Lebanon's Memorandum of Understanding with the UNHCR, for example, states that "Lebanon does not consider itself an asylum country." U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2009—LEBANON (2009), available at http://www.unhcr.org/refworld/
sense of legal obligation (rather than, for example, by political or economic calculus, social or cultural affiliation, or a sense of moral responsibility). A former Chief Justice of India, for example, affirmed that “while courts in his country ‘have stepped in’ on occasion to prevent refugee deportations, ‘most often these are ad hoc orders. And an ad hoc order certainly does not advance the law. It does not form part of the law, and it certainly does not make the area clear.” As the ICJ noted in the North Sea Continental Shelf Cases, such actions do not support a finding of opinio juris.

The persistent reluctance of the majority of states in Asia and the Middle East to embrace a comprehensive legal duty to protect refugees and others against refoulement is problematic for a second reason. Customary international law formation sensibly gives particular attention to the views of states “specially affected” by the phenomenon sought to be regulated. With Asia and the Middle East hosting the majority of refugees in the world, yet failing clearly to affirm a duty to protect, the assertion of universal opinio juris based on General Assembly resolutions is especially fragile.

To be clear, I recognize that when a treaty-based norm stimulates a broadly embraced sense of obligation (in particular, among non-party states), opinio juris in...
support of a cognate customary international legal obligation may emerge. But there is no basis to conclude that just because most countries have accepted something that may broadly be termed a non-refoulement obligation—applying to at least some kinds of cases and some contexts—that there is a universally applicable duty of non-refoulement owed to the combined class of all refugees and other persons at risk of significant human rights abuse. Much less can opinio juris be located in General Assembly resolutions considered in isolation from the broader context of state attitudes towards the putative norm, particularly the attitudes of states especially affected by refugee flows.

But even if opinio juris could be located, the next question that must be addressed is whether there is evidence of consistent state practice that aligns with the putative norm (the second essential element for establishment of a customary law73). Sadly, there is in fact significant empirical evidence that undermines the claim of state practice in conformity with a broad-ranging and universally applicable duty of non-refoulement. For example, a recent survey of the fifty-two countries hosting the largest number of refugees found that thirty-five such states—that is, more than two-thirds of the states examined—had committed acts of refoulement or comparable physical endangerment.74 In nearly a quarter of the countries evaluated, the risk was adjudged to be intensifying over time.75 This data moreover exists against a long-standing and extensive pattern of refoulement across the world, including blatant refusals to allow refugees76 to access state territory,77 turn-back policies implemented by the closure of borders to refugees,78 the construction of blunt physical barriers to prevent the entry of refugees,79 summary ejection of refugees able physically to cross a border,80 removals ordered without access to a procedure to verify refugee status;81 expulsions resulting from the failure to ensure even basic procedural safeguards in

73. Hudson’s classic definition speaks of four elements, including “(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other States.” Manley O. Hudson, Article 24 of the Statute of the International Law Commission, U.N. Doc. A/CN.4/16 (1950), reprinted in [1950] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

Elements (a), (b), and (d) have converged over time in the requirement to demonstrate that “the conduct of States should, in general, be consistent with [the putative norm].” Nicaragua, 1986 I.C.J. 14, para. 186. Yet “[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from [actions prohibited by the putative norm].” Id. para. 185. Hudson’s element (c) remains a second and independent criterion for recognition of a rule of customary international law. Continental Shelf, 1985 I.C.J. 13, para. 27 (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States . . . .”).

74. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, supra note 72, at 22. Eleven of these states were found to have committed “some” acts of refoulement or physical endangerment while ten had committed “significant” acts and fourteen had committed “severe” acts. Id.

75. Id.

76. The most basic categories of Refugee Convention rights inhere provisionally in persons claiming to be refugees until and unless they are determined not to qualify for refugee status. HATHAWAY, supra note 5, at 156–60.

77. Id. at 279–81.

78. Id. at 281–82.

79. Id. at 282.

80. Id. at 283–84.

81. Id. at 284–86.
the assessment of refugee status, disguised removals under the rubric of “voluntary” repatriation, arms-length maneuvers to repel refugees in areas of arrogated jurisdiction beyond a state’s borders, and the establishment of non-entrée legal regimes that prevent refugees from even reaching the point of being able to present their cases for protection.

In short, there is a pervasive—perhaps even dominant—state practice that denies in one way or another the right to be protected against refoulement. These surveys of state practice are moreover restricted to the comparatively well-protected category of “refugees”; it is likely that the refoulement of the broader categories of human rights victims claimed by Lauterpacht and Bethlehem to be part of the beneficiary class of the customary norm is even more pervasive. How, then, can it be argued that there is relatively consistent state practice in conformity with the putative universal duty to protect refugees and other human rights victims against refoulement?

First, some argue that the depth and consistency of state practice required for the establishment of customary international law should not be overstated. So long as respect for non-refoulement remains the norm, it is suggested that the state practice requirement is met. Second, and impliedly allowing for the inadequacy of an empirical record of concordant practice, there is authority for the view that so long as there is an effort to justify acts of refoulement as permissible exceptions to the alleged norm, practice that is on its face violative of the norm is in fact supportive of it. And third and most significantly, it is claimed that while state practice is required, real state action on the ground may be overcome by alternative “practice” in the form of verbal commitments to protect refugees against refoulement. I will consider each of these claims in turn.

First, what of the view that the depth and consistency of state practice required for the establishment of customary international law should not be overstated? There has certainly been a trend in ICJ jurisprudence to soften the standard of uniformity required. The 1950 Asylum decision spoke of “constant and uniform usage,”88 the 1969 North Sea Continental Shelf Cases stated the test as “extensive and virtually uniform”89 practice, while the Nicaragua decision of 1986 noted that “absolutely rigorous conformity”90 is not required. It is thus easy to see why scholars are disinclined to set an overly demanding threshold of consistency of state practice. Brownlie, for example, opines that consistency of state practice “is very much a matter of appreciation.”91

82. HATHAWAY, supra note 5, at 287.
83. Id. at 287–89.
84. Id. at 290–91.
85. Id. at 291–99.
87. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, supra note 72, at 22.
91. BROWNLIE, supra note 42, at 7. Hersch Lauterpacht cautions, however, 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.” HERSCH LAUTERPACHT, The Sources of International Law, in INTERNATIONAL LAW: THE
That having been said, there is little doubt that clearly predominant global practice remains a requirement for the establishment of a customary legal duty. The ICJ’s exhortation in the Asylum decision, which stated that “fluctuation and discrepancy” in practice undermines the argument for custom, is both a helpful and understated indicator of the circumstances in which consensus through action is simply not present. While those seeking to downplay the relevance of practice often rely on the Court’s statement in Nicaragua that custom can arise despite “not infrequent” inconsistent practice, this obiter dictum must be balanced against the same judgment’s insistence that a “settled practice” be identified. More specifically, as Villiger writes, state practice for a customary norm binding all states must at least be “general” in the sense “that common and widespread practice among many States is required. While universal practice is not necessary, practice should be ‘representative,’ at least of all major political and socio-economic systems.

Assessed against even this relatively low benchmark, the case for identification of consistent state practice in line with a broadly inclusive duty of non-refoulement fails. Not only is there a record of refoulement in the majority of the states hosting most of the world’s refugees, with the practice becoming more common in roughly a quarter of them, but there is also a clear geopolitical skew to the pattern of non-compliance, with half of the major hosting countries with the worst records on refoulement located in Asia or the Middle East. To suggest that there is anything approaching a “settled practice” of non-refoulement, much less a settled practice that is geopolitically inclusive, defies analysis.

Nor is the case for a settled practice in line with the duty of non-refoulement assisted by a second argument, namely that breaches can sometimes support a finding of consistent state practice. The ICJ’s Nicaragua judgment, generally regarded as the most authoritative statement of this rule, is at pains to explain the

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93. Kelly, supra note 42, at 500 (“State practice, the material element, provides the concrete evidence of normative conviction.”).


95. In the same paragraph, the Court found that “[t]he existence in the opinio juris of States of the principle of non-intervention is backed by established and substantial practice.” Id. para. 207.

96. As such, Duffy’s conclusion “[t]hat states have rarely totally disregarded their duty not to ‘refoule’ individuals to face torture is evidence of the normative practice of non-refoulement” is not justified. Aoihe Duffy, Expulsion to Face Torture? Non-refoulement in International Law, 20 INT’L. J. REFUGEE L. 373, 387 (2008) (emphasis added).

98. VILLIGER, supra note 46, at 29.

99. See supra text accompanying note 74.

100. See supra text accompanying note 75.

101. See supra text accompanying note 74. This is not to say that states outside of Asia and the Middle East have solid records of avoiding refoulement. To the contrary, states around the world have often violated the putative norm. See supra text accompanying notes 76-85.

102. Of the 24 states assessed as presenting “systemic” or “severe” risks of refoulement, half are in Asia or the Middle East, namely China, Egypt, Iran, Iraq, Israel (including the Occupied Territories), Lebanon, Libya, Malaysia, Pakistan, Saudi Arabia, Syria, and Yemen. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, supra note 72, at 22.

103. See VILLIGER, supra note 46, at 42 (noting that in the Nicaragua case the court did not require rigorous conformity of state practice). See also D’Amato, supra note 38, at 101-03 (criticizing the court for easing the state practice requirement in the Nicaragua case).
basis for its holding that "instances of State conduct inconsistent with a given rule . . . treated as breaches of that rule" contribute to a finding of consistent state practice in support of the norm:

If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.105

In that case, the question was whether instances of foreign intervention in support of an internal opposition group espousing "worthy . . . political or moral values"—at least prima facie in breach of the putative norm of non-intervention—had been defended on the basis of justifications or exceptions said to be part of the putative norm itself. The manner in which the argument was rejected is instructive:

[T]he Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons concerned with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention . . . .107

Many of the same concerns arise from an examination of state practice of refoulement. To begin, most instances of refoulement appear not to be justified at all; they simply occur.108 And where an effort to justify refoulement is made, states tend to offer only blunt and unsubstantiated assertions that those seeking protection are not refugees or that the political cost of protection is too high.109 There is, in short,

105. Id.
106. Id. para. 206.
107. Id. paras. 207-08.
108. For example, Egypt recently sent Eritrean refugees back to Eritrea with no explanation or justification given. AMNESTY INT’L, EGYPT: FURTHER INFORMATION ON UA 348/08 FORCIBLE RETURN/TORTURE AND OTHER FORMS OF ILL-TREATMENT (2009). President Bush simply declared, "We will turn back any refugees that attempt to reach our shore, and that message needs to be very clear as well to the Haitian people." Press Release, Human Rights Watch, U.S.: Don't Turn Away Haitian Refugees (Feb. 25, 2004), available at http://www.hrw.org/en/news/2004/02/25/us-don-t-turn-away-haitian-refugees. As Kelly observes, "Nations do not regularly explain the legal basis of their actions, nor is it clear how to determine the normative belief of hundreds of states, many of whom have never had the opportunity or need to express their opinion on a particular principle." Kelly, supra note 42, at 470.
109. Greece has asserted that whole groups of persons seeking protection are not refugees, treating them simply as unauthorized migrants: "The Greek coast guard systematically forced boatloads of potential asylum seekers out of its national waters and back into Turkish territorial waters, sometimes deliberately damaging their boats to prevent their return or attempting to swamp them with waves, and,
rarely an effort made to justify turn-backs and other acts of refoulement by reference to the norm of non-refoulement itself, much less by arguing the applicability of the internal limitations to that duty. As such, inconsistent practice is just that: inconsistent, and hence at odds with the assertion of a customary legal duty.

This analysis leaves us with one final argument in support of state practice sufficient to ground a broad duty of non-refoulement in customary international law. The essence of the argument is that a very broad reading of "state practice" is justified under which words alone may amount to "practice." The proponents of this position look to many of the same statements relied upon to show opinio juris as the relevant practice in support of the norm, and thereby arrive at the conclusion that consistent state "practice" can be located despite the evidence of non-conforming "practice on the ground" previously identified.

It is in regard to this issue that the rules of customary law formation are most contested. As Kammerhofer explains, there is a tendency among many academics to define "practice" in a way that obviates the distinction between practice and opinio juris:

Behind the apparent dichotomy of "acts" and "statements" lies a more important distinction: that between one argument that sees practice as the exercise of the right claimed and the other that includes the claims themselves and thus blurs the border between the concept of "state practice" and "opinio juris."

This is indeed the nub of the controversy: despite the continued insistence of the ICJ that there are two, not one, essential elements to the formation of customary
international law, there seems to be a determined academic effort to downplay that requirement. The Final Report of the International Law Association (ILA) Committee on Formation of Customary (General) International Law provides a classic example of this propensity to confuse:

The Court has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements.  

The language used is quite extraordinary. The ILA does not say that the International Court of Justice has held that both elements of custom may be manifested by the same, presumably purely verbal, evidence, but rather simply that it “has not . . . said in so many words” that it cannot!  

This cautious, if convoluted, framing is warranted given the actual state of ICJ jurisprudence. The decision in Nicaragua, while often cited as the leading source of the notion that words alone can constitute state practice, did not actually reach that conclusion. The focus of the dispute was whether there was a customary norm prohibiting the threat or use of force against the territorial integrity or political independence of a state that parallels the treaty-based rule in Article 2(4) of the UN Charter. The Court was insistent that a customary norm could arise only upon proof of “the actual practice and opinio juris of States.” For good measure, it added:

The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law. . . . [I]n the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice.  

The common confusion about just what the Court decided arises from the fact that it took what can only be described as a fairly slipshod approach to the assessment of state practice before focusing on the issue of opinio juris. Implicit in its analysis that “[i]t is not to be expected that the application of the rules in question should have been perfect” and that “rigorous conformity” is too high a standard  

115. See supra note 35 and accompanying text.  
117. Id.  
119. Nicaragua, 1986 I.C.J. 14, para. 188.  
120. Id. para. 183 (quoting Continental Shelf, 1985 I.C.J. 13, para. 27).  
121. Id. para. 184.  
122. “In Nicaragua . . . the ICJ discussed the requirement of state practice, but neither analyzed, nor cited examples of this element.” Kelly, supra note 42, at 476, n. 112. See also Franck, supra note 53, at 118–19 (criticizing the Court’s reference to opinio juris as evidence of state practice); Frederic L. Kirgis, Jr., Custom on a Sliding Scale, 81 AM. J. INT’L L. 146, 147 (1987) (highlighting the inconsistencies between actual state practice and the norms embodied by opinio juris).  
is an assumption, though an empirically suspect one, \(^{125}\) that there was evidence on the facts of the case of relatively consistent state practice of non-intervention other than as authorized by the Charter. \(^{126}\) Because the parties chose not to contest the issue of state practice, the Court understandably focused its analysis on the *opinio juris* question, finding that a wide-ranging set of verbal acts could give rise to *opinio juris*. \(^{127}\)

However, the Court is explicit that these verbal acts are approved strictly as forms of *opinio juris*, not state practice. \(^{128}\) As such, and despite the failure of the Court to interrogate clearly the state practice dimension of the claim, it is disingenuous to suggest that its lack of precision in this regard amounts to an endorsement of a new theory of customary international law formation in which state practice is rendered virtually identical to *opinio juris*. If this had been the Court's intention, why would it have been at such pains to confirm the traditional two-part test and address the sufficiency of imperfect state practice?

It follows that the notion that verbiage without concordant state practice gives rise to customary law is at best *de lege ferenda* rather than settled law. Four main arguments favor this approach: \(^{129}\) plain meaning allows it; it avoids a detrimental reliance concern; states want it; and it promotes international order and human values.

On the first point, Villiger argues that "the term 'practice' is general enough—thereby corresponding with the flexibility of customary law itself—to cover *any act or behaviour of a State*, and it is not . . . entirely clear in what respect verbal acts originating from a State would be lacking." \(^{130}\) While linguistically plausible \(^{131}\) and with at least some support in the jurisprudence, \(^{132}\) the double-counting of the same words as both *opinio juris* and relevant practice is difficult to square with the ICJ's continued insistence on both evidence of state practice and *opinio juris*. \(^{133}\) If words evincing acceptance as law are the essence of *opinio juris*, a court inclined to view

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124. *Id.*.


126. Having found "abstention" from the use of force other than as authorized by the UN Charter, the Court turned to the issue of *opinio juris*. Nicaragua, 1986 I.C.J. 14, para. 188.


128. "The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from . . . the attitude of the Parties and the attitude of States towards certainly General Assembly resolutions . . . . It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rules (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter." *Id.* para. 188.

129. The arguments made by Donaghue—that verbal "practice" is neither more ambiguous in purport nor necessarily any more politically motivated than practice on the ground—are not really arguments in favor of treating verbiage as practice; rather, they are counterpoints to arguments made against this position. Donaghue, *supra* note 118, at 332.


131. The primary meaning of "practice," however, focuses on "habitual doing or carrying out of something; usual or customary action or performance; action as opposed to profession, theory, knowledge, etc." 2 SHORTER OXFORD ENGLISH DICTIONARY 2309 (Oxford University Press 5th ed. 2002).

132. *See supra* note 118. But see text at notes 122–127, indicating why a careful reading argues against this interpretation.

133. *See supra* note 35.
words as sufficient state practice ought simply to have dispensed with the dual requirement—which the ICJ has not.

Villiger advances a second argument for treating words alone as practice that is grounded in the importance of avoiding detrimental reliance. He writes that "whatever a State feels or believes when making a statement, at least other States may come to rely on this statement, and the original State may even be estopped from altering its position." 134 This is a circular argument. If it is clear that only practical actions "on the ground" count as relevant state practice, then the risk of detrimental reliance is disposed of because there is no reasonable basis for other states to put stock in statements standing alone.

A third argument, advanced by Oscar Schachter, is that in at least some circumstances states seem to want statements standing alone to be treated as practice relevant to the formation of custom:

[In] the contemporary international milieu governments have felt a need for new law which, for one reason or another, could not be fully realized through multilateral treaties.... For one thing, the processes of treaty negotiation are often slow and cumbersome.... In these circumstances, it has been natural for States to turn to law-declaring resolutions of the General Assembly.135

In Schachter's view, there is implied consent for treating at least this one form of "words alone"—namely, law-declaring resolutions adopted unanimously or without significant dissent136—as instant customary international law.

This is, of course, a narrower point than the general argument in favor of treating words generally as state practice. Schachter is far from alone in wishing to see at least some resolutions of international organizations, in particular resolutions of the General Assembly,137 treated as a special example of "state practice."138 As Jennings and Watt opine, "the concentration of state practice now developed and displayed in international organisations and the collective decisions and activities of the organisations themselves may be valuable evidence of general practice accepted

134. VILLIGER, supra note 46, at 22.
135. Schachter, supra note 38, at 533–34.
136. Id. at 534–35.
137. 1 ROBERT JENNINGS, COLLECTED WRITINGS OF SIR ROBERT JENNINGS 10 (1998) ("Perhaps the difficulty arises in part from the attempt to differentiate too clearly between practice and the opinio juris. They are rather aspects of the same idea. Even the older writers do not always mean by 'practice' the mere habit of acting in a certain way but rather the evidence, in the form of dispatches, opinions, arguments and so on, which support the existence of an opinio juris. Seen thus, the possible effect of a generally acclaimed General Assembly resolution falls easily into place in the orthodox scheme of things.").
138. Others are more cautious in this regard. See LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 236 (1988) ("Collective resolutions by States in international organizations are not sufficient by themselves to generate customary norms. There has to be evidence of additional State practice which is consistent with those collective resolutions."); CRAWFORD, supra note 56, at 114 ("State practice is just as much State practice when it occurs in the context of the General Assembly as in bilateral forms. The practice of States in assenting to and acting upon law-declaring resolutions may be of probative importance, in particular where that practice achieves reasonable consistency over a period of time.").
as law in the fields in which those organisations operate.”

There are nonetheless several concerns.

First, the fact that the General Assembly is explicitly denied the right to engage in general lawmaking activities should give pause before attributing special lawmaking force to its resolutions. Second, it seems contradictory to argue that governments have effectively consented to use of the General Assembly as a lawmaking forum in order to overcome the (presumably overly demanding) procedural requirements of lawmaking by treaty when those same governments have declined either to amend the rules of treaty-making or the Charter to provide for the speedy process Schachter assumes they want. And finally, where precisely is the evidence that states, rather than scholars, want a speedy, less formal lawmaking process? The only example Schachter provides in support of his thesis is the adoption in 1946 of resolutions condemning genocide as a crime and approving the Nuremberg Principles. Both the paucity of examples and the fact that Schachter’s cited instances led to subsequent codification in treaty form suggest that support for the “states want it” thesis is modest at best.

This leaves us with one final argument for treating verbal statements as practice: that the world needs a lawmaking process capable of generating results in some core areas, even if state consent cannot be located through one of the general modes, including via consistent practice in the case of custom. In advancing this thesis, Schachter forthrightly acknowledges its instrumentalist tenor, writing that “[t]he problem of inconsistent practice (i.e. violations) comes up sharply in respect of declared norms of international human rights. . . . In the face of these facts, it is hard to conclude that the declared norms are confirmed by general and consistent practice.” He is equally candid in noting that “[m]ost international lawyers seek to minimize the violations by emphasizing strong verbal condemnations and denials. . . . [But] [t]he notion that contrary practice should yield to opinio juris challenges the basic premise of customary law.”

139. Oppenheim’s International Law, supra note 42, at 31; accord Villiger, supra note 46, at 21 (“For most members of the State community, the UN and similar bodies have become the most important fora in which to express themselves collectively or individually.”).

140. U.N. Charter arts. 10–18 (authorizing the General Assembly to make binding decisions only on a range of administrative matters).

141. Kelly, supra note 42, at 497 (“[S]tates could amend the U.N. Charter to create a new, more democratic process at the U.N. General Assembly. Similarly, resolutions passed in a prescribed form could bind all members specifically voting for a measure. States could approve an even more radical measure that would specifically bind all states to norms upon passage of a law-defining resolution by an appropriate supermajority.”).

142. Schachter, supra note 38, at 534.


144. A weaker version of this thesis is that treating words as practice “has many beneficial functions,” in particular ease of access to documentation of practice and the ability to change international law without breaking it. Villiger, supra note 46, at 21–22 (emphasis removed). While these technical points have merit, it is difficult to imagine that either is so pressing that it justifies a revision of a core rule of international lawmaking.

145. Schachter, supra note 38, at 538.

146. Id.
Schachter’s solution is to endorse that contradiction in relation to only a subset of customary lawmaking, where putative norms “are strongly supported and important to international order and human values.” He argues that in this context “the norm has to be maintained despite violations” because “they are brittle in the sense that violations are likely.” A more systematized version of this approach is offered by Frederic Kirgis, who asserts that the two elements of customary lawmaking—opinio juris and consistent state practice—should be viewed “not as fixed and mutually exclusive, but as interchangeable along a sliding scale”:

The more destabilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable.

Despite the fact that Kirgis speaks of what international decision makers do, his analysis relies only on the Nicaragua case to support the claim that “a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.” For reasons previously given, this is not in my view an accurate interpretation of the Nicaragua case. Even if advanced simply as a thesis de lege ferenda, there are good reasons not to endorse the proposed instrumentalist “gloss over” of the duty to show relatively consistent state practice in support of the putative customary norm.

Most fundamentally, this view of custom is a disingenuous circumvention of the requirements of lawmaking by treaty. If words alone are to evince state consent to

147. Id. at 538-39. Schachter cites in particular “the prohibitions of aggression, genocide, slavery, torture and systematic racial discrimination . . . [and] the humanitarian law of armed conflict.” Id. He distinguishes these areas from “the law on jurisdiction, immunities, State responsibility, and diplomatic privileges,” where he does not believe the requirement of consistent state practice can be satisfied by words alone. Id. at 538.

Other commentators reach the same conclusion. See, e.g., Jan Wouters & Cedric Ryngaert, Impact on the Process of the Formation of Customary International Law, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 111, 112 (M. Kamminga & M. Scheinin eds., 2009) (“It will be argued that the more important the common interests of states or humanity are, the greater the weight that may be attached to opinio juris as opposed to state practice. If the stakes are high, inconsistent state practice may be glossed over, and a high premium may be put on states’ statements and declarations, inter alia in multilateral fora, in identifying customary law combined with general principles of law.”).

148. Schachter, supra note 38, at 539.

149. Kirgis, supra note 122, at 149. But as Donaghue observes, “Arguments that practice, or opinio juris . . . form part of a sliding scale are clearly incorrect as they fail to recognize the purpose of the inclusion of these elements in Article 38 [of the ICJ Statute].” Donaghue, supra note 118, at 330–31.

150. Kirgis, supra note 122, at 149. See also INT’L LAW ASS’N, supra note 35, at 13 (“When defining State practice—the objective element in customary law—it is necessary to take account of the distinction between what conduct counts as State practice and the weight to be given to it.”).

151. Kirgis, supra note 122, at 148–49. Contra WOLFKE, supra note 40, at 41 (“Views questioning the necessity of one of the . . . two elements . . . have no foundation in international legal practice.”).

152. See supra text accompanying notes 118–128.

153. Kelly appropriately refers to these theories as “normative discourse masquerading as empirical.” Kelly, supra note 42, at 497.

154. Wouters & Ryngaert, supra note 148, at 112.

155. Kelly, supra note 42, at 537 (“T]hat [customary international law] furnishes a means to develop universal norms when actual agreement is difficult or inconvenient, cannot justify norms when there is no genuine acceptance.”).
be bound, then those words are required to be formalized as treaty. To treat a wide variety of words uttered in less exacting circumstances but as binding in and of themselves would, as Kelly rightly asserts, be to "constitute a new legislative form of lawmaking, not [customary international law] based on state behavior accepted as law." Proponents of an exaggerated definition of state "practice" deny the most elementary distinction between treaties and custom: custom is not simply a matter of words, wherever or by whomever uttered, but is a function of what is happening in the real world. Custom, as distinguished from treaty, is about negotiation via practice. The effective obliteration of the consistent practice requirement advocated by many scholars is thus conceptually flawed. As Wolfke has acerbically observed, "[R]epetitive verbal acts are also acts of conduct... but only to customs of making such declarations... and not to customs of the conduct described in the content of the verbal acts." This is not a purely formalist point. The huge variation in theories of which words count as practice makes clear that the risk of subjectivity and political distortion inherent in the transmutation of words into practice is extreme. Kelly

156. WOLFKE, supra note 40, at 40-41 ("Without practice (consuetudo), customary international law would obviously be a misnomer, since practice constitutes precisely the main differentia specifica of that kind of international law.").

157. INT'L LAW ASS'N, supra note 35, at 2 ("Customary law is by its very nature the result of an informal process of rule-creation, so that the degree of precision found in more formal processes of law-making is not to be expected here.").

158. See supra text accompanying notes 39-42.

159. Kelly, supra note 42, at 486.

160. The resolutions of the General Assembly may provide evidence of opinio juris, or confirm the existence of a norm of customary international law. Nuclear Weapons, 1996 I.C.J. 226, para. 70. It remains the case, however, that inconsistent state practice precludes the development of a customary norm despite strong evidence of opinio juris. Id. para. 73.

161. The International Court of Justice has taken the position that "[w]hen it is the intention of the State making [a] declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253, 267 para. 43 (Dec. 20); Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457, 472 para. 46 (Dec. 20); endorsed in Nicaragua, 1986 I.C.J. 14, paras. 39-40.

It seems clearly to have been the Court's intention to constrain this doctrine; however, the same result could readily have been avoided by reliance on such general principles of law as acquiescence or estoppel. A WTO panel has appropriately urged caution in the application of this approach, noting that "[a]ttributing international legal significance to unilateral statements made by a State should not be done lightly and should be subject to strict conditions...." Panel Report, United States—Sections 301-310 of the Trade Act of 1974, WT/DS152/R, para. 7.118 (Jan. 27, 2000).

162. Wolfke, supra note 40, at 41-42 ("The misunderstanding resulting from such a broad interpretation of State practice arises from the fact that it neglects the very essence of every kind of custom, which for centuries has been based upon material deeds and not words.").

163. Kelly, supra note 42, at 494 ("The strategic advantage of elevating [customary international law] to a rule of recognition is that it allows the theorist to redefine the requirements of [customary international law] from empirical law to a preferred process while retaining its formal authority.").

164. Wolfke, supra note 40, at 42.

165. See Kelly, supra note 42, at 495-96 (noting the difficulties in determining whether new practices have definitively emerged and variations in definitions).

166. Id. at 458 ("Normative scholars, advocates, and self-interested states are misusing an empirical source of law to articulate their preferred norms as if they were propounding a constitution rooted in common culture.... I do believe that in a diverse world without a consensus on values, a general
rightly points to the likelihood of cultural bias\textsuperscript{166} in the selection of which norms are "important to international order and human values,"\textsuperscript{169} "important [to] the common interests of states or humanity,"\textsuperscript{170} or which address concerns that are "destabilizing or morally distasteful":\textsuperscript{171}

Powerful states use "non-empirical" [customary international law] to justify the exercise of power without actual acceptance. Environmental and human rights activists, on the other hand, envision [customary international law] as an instrument for progressive change.\textsuperscript{...} [Customary international law] is an inapt instrument for all of these uses. The clever use of arbitral decisions, general \textit{dicta} from a few ICJ cases, the glorification of general and ambiguous non-binding instruments, or the reconceptualization of [customary international law] do not establish either requirement of customary law. Custom takes its authority from the belief in the normative quality of resolved experience, not the manipulation of legal instruments.\textsuperscript{172}

In sum, "[t]his impressionistic disarray allows the scholar, advocate, or judge in the few cases that are adjudicated to subjectively arrive at a conclusion affected by normative predilection. The [customary international law] of human rights is a product of the normative perspective of academics and advocates practicing human rights law, not the social facts of states accepting legal norms."\textsuperscript{173}

Given the inherent subjectivity\textsuperscript{174} of treating some, but not all, words as customary law without need for concordant practice, it should come as little surprise that relevant assertions of customary duty rarely attract compliance by states.\textsuperscript{175} It is surely true that "[t]he less powerful nations ... would be unlikely to accept the 'claims' approach of D'Amato\textsuperscript{176} or the New Haven school because it would diminish their role in law formation."\textsuperscript{177} It is equally clear that the view favored by many in...
less powerful nations that “the accumulation of non-binding international instruments creates binding legal obligations is,” as Kelly notes, “not one which is widely shared by [more powerful] states and has been specifically rejected by the United States.”\textsuperscript{178} This is the critical answer to scholars, such as Schachter, who argue for the revaluation of words as practice based on the need to secure critical social ends. If compliance is not in fact advanced by the assertion of words alone as customary international law,\textsuperscript{179} and there is little evidence that it is,\textsuperscript{180} then on what basis does the appeal to necessity really stand? And if the alleged necessity really does exist in the context of a \textit{shared} assumption of critical need, as most theorists assume it should, then there will in any event be little difficulty proceeding to a treaty to concretize that agreement.\textsuperscript{181}

\begin{itemize}
\item [\textsuperscript{178}] Id. at 489. As Byers has observed, “The 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.” Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law 41 (1999).
\item [\textsuperscript{179}] Kelly, supra note 42, at 540–41 (“[T]he [customary international law] process does not encourage compliance. With few effective means of enforcing norms, the international system relies on commitment and reciprocal self-interest for compliance. Nations that played no role in the formation of norms nor had their interests considered are unlikely to honor such norms.”).
\item [\textsuperscript{180}] In the context of the asserted duty of non-refoulement, see for example, Hathaway, supra note 6, at 279–300. But the customary legal argument recently found favor before Justice Hartmann of the Hong Kong Court of First Instance. C. v. Director of Immigration, [2008] HKEC 281 (C.F.I.), HCAL No. 132/2006, available at http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp. Reviewing not only the Lauterpacht and Bethlehem opinion but also relevant UNHCR Executive Committee conclusions and the full range of scholarly positions, the judge determined that “[o]n balance . . . it must be recognized that the principle of non-refoulement [as] it applies to refugees has grown beyond the confines of the Refugee Convention and has matured into a universal norm of customary international law.” Id. at 27–34. Extraordinarily, the judgment makes this finding against an express acknowledgment that “a good many states have . . . by their actions been unambiguous in their repudiation of the norm as it has evolved in customary international law.” Id. at 30. Indeed, it observes that UNHCR proclamation of the non-derogable nature of the customary duty of non-refoulement “was made by the Executive Committee . . . against the backdrop of ‘widespread violations of the principle of non-refoulement.’” Id. at 31. In the end, however, the court refused the declaration sought by the applicants on the ground that Hong Kong has been a persistent objector to the norm—a conclusion reached not on the basis of real evidence of persistent objection, but rather on legally doubtful basis that in the context of “the refusal to accede to the Refugee Convention, the refusal to enlarge the terms of the Immigration Ordinance, the making of specific reservations concerning immigration and the often-stated policy against asylum—Hong Kong’s refusal to pass legislation incorporating the rule is equivalent to passing legislation for the purpose of excluding it.” Id. at 36. For a detailed description of this case, see Oliver Jones, Customary Non-Refoulement of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective, 58 INT’L & COMP. L.Q. 443, 447–68 (2009).
\item [\textsuperscript{181}] Kelly, supra note 42, at 538 (“If nations have, in fact, accepted legal norms and possess the necessary normative conviction, then the vast majority of states should have little difficulty signing a treaty. Modern communications and transportation have simplified the logistics of international meetings, reducing treaty negotiations and international decisionmaking to a common occurrence.”).
\end{itemize}
III. THE SECOND CLAIM: NON-REFUGEES ARE ENTITLED TO REFUGEE RIGHTS

Jane McAdam's pioneering study, *Complementary Protection in International Refugee Law*, links neatly to Lauterpacht and Bethlehem's analysis. McAdam's thesis is that all persons who are entitled to be protected against *refoulement* are—despite their non-refugee-status—entitled to the same rights as refugees who meet the requirements of the Refugee Convention. To be clear, McAdam's argument is not simply that non-returnable persons are entitled to all generic, internationally recognized human rights. Her claim is specifically that all persons who are non-returnable under international law benefit from the entitlements which the Refugee Convention grants to refugees who satisfy the refugee definition set in Article 1 of that treaty.

McAdam's claim at times appears to be (appropriately) aspirational. She is clearly correct that there is a "protection gap" arising from the fact that most of the new duties of *non-refoulement* have simply been read into treaty law by authoritative interpretation of the supervisory bodies. In contrast to the Refugee Convention's explicit design as an instrument to codify the rights of its beneficiary class, the incremental and opportunistic way in which broader duties of *non-refoulement* evolved provided no comparable opportunity to secure clear agreement on the rights of the expanded class of persons entitled to protection against *refoulement*. Non-removable non-refugees have thus been forced to rely on generic (and hence often insufficiently attentive) rights set out in general human rights law. McAdam acknowledges that customary law has not intervened to fill this void, forthrightly conceding that state practice does not presently support the attribution of refugee-specific rights to other persons benefiting from protection against *refoulement*.

182. MCADAM, supra note 6.

183. Id. at 1. The one critical exception asserted by McAdam relates to persons who would fall afoul of the exclusion clauses of the Refugee Convention. See id. at 223–42 (listing the exclusion clauses and situations not covered by the Refugee Convention).

184. McAdam's analysis of the beneficiary class is not grounded in customary international law. She focuses instead on the various treaty-based regimes which expressly or by interpretation give rise to a duty of *non-refoulement*. See id. at 53–196 (analyzing the rights of refugees based on the European Union Qualification Directive, the Torture Convention, the ECHR, the Civil and Political Covenant, and the Convention on the Rights of the Child). There is, however, no basis in principle to distinguish the rights of persons entitled to protection against *refoulement* under a treaty from those entitled to the same protection by virtue of customary international law.

185. Id. at 201 ("In the human rights context, however, [*non-refoulement*] has been separated from these other rights to provide the trigger for protection without any corresponding legal status. The result is a protection gap.").

186. HATHAWAY, supra note 5, at 91–93.

187. The clear exception is Article 3 of the Torture Convention, which contains an explicit duty of *non-refoulement* yet does not define the rights of the beneficiary class. Torture Convention, supra note 3, art. 3(1). Expert analysis of this treaty provides no explanation for the omission. MANFRED NOWAK & ELIZABETH MCArTHUR, THE UNITED NATIONS AGAINST TORTURE: A COMMENTARY 126, 195–224 (2008).

188. MCADAM, supra note 6, at 253 ("The strong theoretical claims of human rights law unfortunately do not always sit comfortably with the realities of State practice.").

189. Id. at 3 ("There is not yet a consistent understanding of what that resultant legal status [of the beneficiaries of complementary protection] should entail, although this book advances the argument that a status identical to Convention status ought to apply."); id. at 5 ("Though a number of States have traditionally respected these additional *non-refoulement* obligations, they have been reluctant to grant beneficiaries a formal legal status analogous to that enjoyed by Convention refugees."); id. at 11 ("States
She points instead to the comparability of needs between those non-removable, at-risk, non-citizen refugees and those non-removable, at-risk, non-citizen others. McAdam encourages us to recognize the flexibility of the Refugee Convention’s rights regime, noting that “there is nothing intrinsic in the Convention regime that prevents its extension to persons outside the article 1A(2) definition . . . .” There is much force to this argument, at least as a sensible policy option.

I believe there is much to commend a second and more legally aggressive argument briefly alluded to by McAdam. Moving beyond the purely normative, she points to the utility of non-discrimination law as a basis for compelling states to grant non-removable others the same rights granted to non-removable refugees. Arguing that “there is no legal justification for distinguishing between the status of Convention refugees and beneficiaries of complementary protection,” McAdam asserts that “[t]o invoke the Convention refugee definition as intrinsically and exclusively legitimate in giving rise to a privileged alien status is . . . both historically inaccurate and legally flawed.” Noting that international law “permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed,” she neatly sets the stage for invocation of the broad-ranging duty of equal protection of the law, especially that set by Article 26 of the Civil and Political Covenant. Unless the differential allocation of rights between refugees and other non-removable, at-risk, non-citizens is demonstrably “objective and reasonable,” the same rights must be extended to both groups. As such, both in state parties to the Refugee Convention and in countries that grant refugees preferred rights in practice, the duty of equal protection is in my view a powerful basis upon which to assert the need to enfranchise the broad category of persons in receipt of protection against refoulement with refugees.

But McAdam’s claim is neither simply normative nor based on equal protection obligations. Regrettably in my view, she insists that there is a present legal

have sought to distinguish them from Convention refugees by granting them fewer rights and entitlements.”; id. at 17 (“In many cases, healthcare, employment, social security, and other rights which Convention refugees receive are denied. Accordingly, the extent of protection may be little more than non-refoulement through time.”).

190. Id. at 217 (“In real terms, the situation of Convention refugees and non-excludable beneficiaries of complementary protection is very similar.”).

191. MCADAM, supra note 6, at 210.

192. Id. at 219-20.

193. Id. at 11.

194. Id. at 198.

195. Id. at 220.

196. Id. at 197 (“[T]here is no legal justification for differentiating the rights of beneficiaries of international protection based on the source of the protection need.”).

197. Civil and Political Covenant, supra note 4. McAdam does not, however, explicitly reference this critical provision. But see HATHAWAY, supra note 15, at 7-8, n. 26 (discussing the principle of non-discrimination against members of the subsidiary class); and especially Pobjoy, supra note 18 (arguing that those entitled to complementary protection should benefit from many refugee rights by virtue of the principle of non-discrimination under Article 26 of the Civil and Political Covenant).

198. See HATHAWAY, supra note 5, at 123-47 (analyzing “reasonable and objective” in non-discrimination law).

199. MCADAM, supra note 6, at 17 (“[T]he Convention operates as a lex specialis for all persons in need of international protection—a specialized blueprint for legal status, rights, and obligations, irrespective of the legal source of the protection obligation.”) (emphasis added); id. at 197 (“[B]eneficiaries of complementary protection are entitled to the same legal status as Convention refugees
obligation to assimilate refugees and other beneficiaries of protection against *refoulement* for purposes of rights entitlement because the recognition of non-refugee-specific duties of *non-refoulement* amounts to an indirect amendment of the scope of the Refugee Convention. She writes:

[I]nstead of the Convention’s terms being formally expanded by a Protocol or an amendment to the text itself, the development of human rights-based *non-refoulement* has extended eligibility for protection, while the Convention may be appropriately viewed as articulating the resulting status.

More explicitly:

As a specialist human rights refugee treaty comprising one part of a holistic human rights regime, it is argued that the Convention’s application has been extended through the expansion of *non-refoulement* under human rights law (and, by analogy, to protection granted in accordance with humanitarian and international criminal law), rather than by the conventional means of a Protocol. Since the scope of *non-refoulement* has been broadened by subsequent human rights instruments, this necessarily widens the Convention’s application.

I believe this analysis to be in error.

Going even farther than the Lauterpacht and Bethlehem analysis, McAdam accords a reified place to the duty of *non-refoulement*. Her premise is that the Refugee Convention is essentially a treaty concerned with identifying persons who should be granted protection against *refoulement* and then with defining the rights that attach to persons in receipt of protection against *refoulement*. Under this rubric, since refugees are only a part of the “*non-refoulement*-acquiring class” which is in her view the basis for accessing Refugee Convention rights, refugees can receive no more rights than other beneficiaries of protection against *refoulement*.

But the Refugee Convention is not an instrument that is organized around granting rights to a beneficiary class defined by the duty of *non-refoulement*. Codification of the duty of *non-refoulement* was actually far from the core of the Refugee Convention’s purposes; indeed, as initially proposed, Article 33 would have

....") (emphasis added); id. at 252 (“[T]he extended scope of non-refoulement under international human rights and humanitarian law imposes a two-fold obligation on States: to refrain from removing persons to territories where they face a substantial risk of particular kinds of ill-treatment; and to provide such persons with a legal status equivalent to that of Convention refugees.”) (emphasis added).

200. Indeed, McAdam speaks of the beneficiaries of complementary protection as “refugees who fall outside the framework of the major international treaties, the 1951 Refugee Convention and the 1967 Protocol.” Id. at 1.

201. Id. at 10–11.

202. Id. at 11.

203. MCDAM, supra note 6, at 209.

204. Id. at 200 (“Non-refoulement is certainly the most fundamental principle of refugee law—indeed, its application to persons in need of international protection might be described as ‘qualifying’ or ‘constitutive’ of their status. The question, who are the beneficiaries of international protection?, is a converse way of asking, who is protected by the principle of non-refoulement?”).

205. Id.

206. Id. at 252.
applied only to refugees arriving with pre-authorization in a state party. As a matter of historical fact, there is no basis to suggest that the Refugee Convention exists to delineate the entitlements of persons granted protection against refoulement.

And even if the Refugee Convention were a treaty intended to define the rights of the beneficiaries of non-refoulement (rather than about the rights of refugees), how does one amend the express beneficiary class of the treaty by stealth? Would it really follow that the express scope of a treaty concerned to provide rights to the beneficiaries of protection against refoulement automatically expands to embrace persons granted comparable protection under other instruments, or under customary international law? Given the clarity of rules about the amendment of treaties how exactly can it be that “the [broadened] scope of non-refoulement [under] subsequent human rights instruments, . . . necessarily widens the [Refugee] Convention’s application,” as McAdam suggests?

Her theory of indirect amendment is that “[t]he Refugee Convention provides the clearest statement of international law’s treatment of persons in need of international protection and, as such, this treaty may be seen as providing the status for a more broadly constituted notion of ‘refugee.’” The Refugee Convention amounts, in McAdam’s view, to “a form of lex specialis (specialist law) for all those in need of international protection, and provides an appropriate legal status irrespective of the source of the State’s protection obligation.” What is really being said here?

Assuming that McAdam is right (as I believe to be the case) that the Refugee Convention’s rights regime is “the clearest statement” of duties owed to aliens in need of protection, why then does it follow—“as such,” to use McAdam’s language—that it defines the rights of persons to whom it does not textually apply? If the question were whether this would be desirable, the answer is likely “yes.”

207. HATHAWAY, supra note 5, at 302. Indeed, the duty of non-refoulement did not appear in pre-1933 refugee conventions, having been added then as an afterthought to fill a perceived void in the scope of the duty of non-expulsion found in Article 32. Id.


209. MCADAM, supra note 6, at 209.

210. Id. at 11 (emphasis added).

211. Id. at 1 (emphasis added and removed).

212. It should, however, be acknowledged that generic international human rights law in some instances offers protections that exceed the scope of guarantees in the Refugee Convention itself. For example, rights to both physical security and to access the necessities of life, not codified in refugee law, can be established for refugees and other non-citizens by reliance on the Human Rights Covenants. See HATHAWAY, supra note 5, at 439–514 (demonstrating that the Human Rights Covenants offer protections for rights that the Refugee Convention is silent on).

213. McAdam at some points attempts a historical argument. MCADAM, supra note 6, at 198 (“[I]f historical definitions are considered, then persons who today ‘only’ fall within complementary protection would in some cases have been recognized as refugees under previous formal legal definitions, and persons who today fall within article 1A(2) of the Refugee Convention may in the past have been denied protection.”). Assuming the point to be accurate, it nonetheless has no necessary present legal significance for purposes of interpreting the (present, Article 1A(2)-based) refugee definition.

214. However, in the European context of primary concern to McAdam, there is actually little value to be secured by assimilation of the rights of subsidiary protection beneficiaries to those of Convention refugees. As set out in supra note 16, the main difference in rights allocation between these groups within Europe concerns the length of residence permits and availability of family reunification—neither being a subject regulated by the Refugee Convention. Non-discrimination analysis is thus a more plausible basis to close the gap on these and most other points. See Pobjoy, supra note 18 (arguing that the principle of...
But McAdam's is not a mere normative claim; rather, she states it as a legally required conclusion based on no more than the principled logic that the refugee rights list is a good fit with the needs of others. Yet as she forthrightly concedes, not even the regime for stateless persons, drafted contemporaneously with the Refugee Convention, grants all of the same rights to that group as are bestowed upon refugees. It is legally impossible to insist that the beneficiary class for refugee rights has been de jure expanded to include all those protected against refoulement, whether refugees or not, in the absence of any argument based on treaty amendment or on the rise of either a customary or general principles norm.

Nor is the argument assisted by McAdam's appeal to the notion of lex specialis. This general principle of international law exists primarily to resolve a conflict between competing international norms; it is also sometimes invoked to justify reliance on specialized norms to interpret the scope of more general rules. But neither the primary nor secondary meaning of lex specialis provides a legal basis for extending a treaty's beneficiary class to embrace persons outside its textual ambit.

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non-discrimination may entitle those with non-refoulement protection to equal treatment).

215. McAdam, supra note 6, at 12–13 ("[H]uman rights law alone does not provide a sufficient status for beneficiaries of complementary protection. Despite the theoretical universality of human rights law, in reality characteristics such as nationality or formal legal status can significantly affect the extent of rights an individual is actually accorded. . . . [O]nly the Refugee Convention creates a mechanism—refugee status—by which [rights] attach, and which does not permit derogation."); id. at 197 ("[T]he beneficiaries of complementary protection are entitled to the same legal status as Convention refugees, given their analogous circumstances and the Convention's function as a form of lex specialis for persons protected by the norm of non-refoulement.").

216. Id. at 212.

217. At one point, McAdam suggests that "it would in any case be futile for instruments like the CAT to enumerate the legal status arising from the application of non-refoulement since the Refugee Convention (as the lex specialis) already provides an appropriate status for any person protected by that principle." Id. at 209–10. Putting to one side the mis-characterization of the Refugee Convention as lex specialis, there is surely no prohibition against other treaties providing for differently defined protected status of their beneficiaries. The Convention relating to the Status of Stateless Persons, for example, does precisely that—a point ironically noted by McAdam. Id. at 212. Yet McAdam goes so far as to insist that the fact that Article 1A(1) of the Refugee Convention—which assimilated pre-World War II so-called "statutory refugees" to Convention refugees for purposes of rights entitlement—"mandates against the creation of additional statuses for persons in need of international protection who do not fall within the Convention definition." Id. at 210 (emphasis added).

218. McAdam rightly invokes the intention of the drafters of the Refugee Convention that the treaty "[e]xpress[ed] the hope that the Convention relating to the Status of Refugees will have value as an instrument for bringing about the objectives of the Convention, the treatment for which it provides." U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Geneva, Switz. July 2–25, 1951, Final Act, Rec. E, U.N. Doc. A/CONF.2/108/Rev.1; McAdam, supra note 6, at 11. But that hortatory statement is no basis to insist that this is a binding obligation. Cf. id. at 209 (referring to "the Convention's function as a 'charter of minimum rights to be guaranteed to refugees,' which the drafters envisaged would extend to additional groups of refugees") (emphasis added).

219. Id. at 209–10.


221. See International Law Commission, Fragmentation of International Law: Topic (a): The Function of the Lex Specialis Rule and the Question of 'Self-Contained Regimes': An Outline (2005), at 4 ("The maxim lex specialis derogat lex generali is usually dealt with as a conflict rule. However, it need not be limited to conflict. In the Neumann case, the European Court of Human Rights observed that the provision on compensation in case of unlawful arrest . . . was not lex specialis in relation to the general rule
Rather, the core meaning of lex specialis is that where two rules of international law—one specific, one more general—deal with the same subject matter, the more specific rule governs in the event of conflict. Lex specialis does not require that general rules be ignored where they can be applied without infringing the specific rule; to the contrary, “[f]or the lex specialis principle to apply . . . there must be some actual inconsistency between [the two rules], or else a discernible intention that one provision is to exclude the other.” Conde provides a helpful example:

(F)reedom of religious expression (“manifestation of religion”) can be considered a lex specialis of the norm of freedom of expression. It carves out a particular area of a more general subject for special normative treatment. It is usually used in the interpretation of treaty norms as a rule that states that a specific rule will always overrule a general rule covering the same subject.

Therefore, if a treaty provision on religious freedom were framed in absolute terms whereas another treaty on freedom of expression in general were framed with permissible limitations, a state party to both treaties would be obliged to respect religious freedom without reliance on the limitations allowed under the general accord. But this primary understanding of lex specialis clearly does not support the view that non-refugees are entitled to refugee rights by virtue of the similarity of their predicament. Because there is simply a legal void to be filled in relation to non-refugees, there is no conflict of rules that lex specialis can assist to resolve.

The secondary role of lex specialis is similarly irrelevant to McAdam’s argument. In addition to defining the “trump” in the case of legal conflict, lex specialis may be invoked as an interpretive aid, most commonly to assist in the construction of a general provision in relation to a matter also governed by a more specific norm. In the Nuclear Weapons decision, for example, the ICJ invoked lex specialis to require that the right not to be arbitrarily deprived of one’s life, found in the Civil and Political Covenant’s (general) provision, be construed—in the context on compensation . . . . The former did not set aside the latter but was to be ‘taken into account’ when applying the latter. In both cases—that is, either as an application of or an exception to the general law—the point of the lex specialis rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to replace the general.”).
of armed conflict—in a way that takes account of the more specific provisions of the simultaneously applicable rules of international humanitarian law.\textsuperscript{226} And in the Israeli Wall case, the court again relied on lex specialis to compel assessment of the legality of the wall not only by reference to the general provisions of human rights law, but also taking account of the more specific rules of international humanitarian law.\textsuperscript{227}

While not resolving a conflict in the same direct way as it does when playing its primary "trump" role, the interpretive variant of lex specialis promotes the same general end—the avoidance of normative conflict—but in a more subtle way by refusing to allow generic norms to be construed or applied in isolation from more specialized rules.\textsuperscript{228} This makes sense because, as Grotius observed, in determining the true intentions of state parties, "the preference is given to such [treaties] as are more particular, and approach nearer to the point in question."\textsuperscript{229} But the importance of interpreting general rules in harmony with more specific rules does not advance McAdam's thesis that the absence of rules defining the status of the broader class of non-returnable persons must be filled by effectively recasting the Refugee Convention's beneficiary class.

In sum, lex specialis is a general principle of law concerned with determining the relationship between norms. It exists primarily in order to resolve a conflict between two binding standards—not, as McAdam tacitly suggests, to fill a normative void. Non-removable non-refugees can readily benefit from generic human rights without any infringement of the Refugee Convention's special provisions for refugees, so there is no normative conflict of either the direct or indirect variety. Because there is no normative conflict, lex specialis has no legal relevance to the definition of the scope of the duty to protect non-refugees.\textsuperscript{230}

This is not to suggest that there are not good reasons in principle to extend many, if not all, Refugee Convention rights to the broader class of persons protected against refoulement. To the contrary, as observed above, the duty of equal protection may compel that result in at least some cases. But there is no extant legal basis to assert that all legally non-returnable persons are entitled de jure to claim all Refugee Convention rights.

\textsuperscript{226} Nuclear Weapons, 1996 I.C.J. 226, para. 25.
\textsuperscript{227} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Israeli Wall), Advisory Opinion, 2004 I.C.J. 136, 178 para. 106 (July 9).
\textsuperscript{228} By way of an example of an argument invoking lex specialis in order to ground the continued relevance of specialized norms despite the subsequent development of less generous but broader norms, see Alice Edwards, Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the 'International Protection' of Refugees, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 421, 429 (R. Arnold & N. Quenivet eds., 2008).
\textsuperscript{229} HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 193 (A.C. Campbell trans., 1625).
\textsuperscript{230} In any event, the result of such a characterization would not be to give rights to additional classes of non-removable non-citizens, but rather to deny to refugees the benefit of generic human rights entitlements, a position which McAdam clearly does not support. MCADAM, supra note 6, at 11, 253. See Penelope Mathew, Review: James Hathaway, The Rights of Refugees under International Law, 102 AM. J. INT'L L. 206, 207 (2008) ("[T]he [Refugee] Convention is not to be treated as lex specialis enabling one to restrict the implications of general human rights law.").
IV. CONCLUSIONS

Conceptual clarity on these issues matters. The net result of the persistent overstatement of the reach of international refugee law is not, as presumably hoped, the effective incorporation of new standards into a clear and practical system of enforceable duties. For example, consider the reaction of the English Court of Appeal when invited by UNHCR to find that the duty of non-refoulement had evolved beyond the text of Article 33. The UNHCR wanted to prohibit efforts by member states to stymie the departure of would-be refugees from their own country. UNHCR frankly acknowledged the basis for its submissions to this end:

[T]he primary questions in this legal action do not turn on the text of the [Refugee] Convention. Rather, they turn on understanding the international protection regime as a complex of international practice and precepts drawn from refugee law, human rights law and general principles of international law... Where, as in the present case, issues arise that strictly do not fall within the Convention’s textual scope, its objectives and purposes should act as a reliable guide.

The Court appropriately rejected this argument in clear terms. It approvingly cited the ICJ’s view that “although the principle of good faith is ‘one of the most basic principles governing the creation and performance of legal obligations... it is not in itself a source of obligation where none would otherwise exist’... Most fundamentally, the Court refused to expand the duty of non-refoulement beyond what the text of the Refugee Convention would reasonably bear simply because such an expansion would prove beneficial to at-risk persons. Adopting the earlier view of the High Court of Australia, the court asserted instead that the Convention, like many international and municipal instruments, does not necessarily pursue its primary purpose at all costs. The purpose of an instrument may instead be pursued in a limited way, reflecting the accommodation of the differing viewpoints, the desire for limited achievement of objectives, or the constraints imposed by limited resources... It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.

231. Oppenheim’s International Law, supra note 42, at 23 ("[T]he concept of a ‘source’ of a rule of law is important, since it enables rules of law to be identified and distinguished from other rules (in particular from rules de lege ferenda) . . . .").
232. See HATHAWAY, supra note 5, at 31–33 (arguing that overstating the scope of international law undermines its force and threatens to merge international law with politics).
233. R. (European Roma Rights Centre and others) v. Immigration Officer at Prague Airport, [2003] EWCA (Civ) 666, para. 28 (Eng.).
235. Id. para. 46 (quoting Dawson, J. in Applicant “A” and Another v. Minister for Immigration and Ethnic Affairs and Another (1997) 190 C.L.R. 225, 248 (Austl.).)
It is of course true that the reform of international law is a slow and often frustrating process, especially when reform presents few strategic, much less immediate, advantages to state parties. But the history of the last two decades makes clear that refugee law reform is not a Sisyphean pursuit. We can already draw on an extraordinary expansion of the duty of non-refoulement under the Civil and Political Covenant, as well as under regional norms. We can build on the potential for major gains in this regard under both the Convention on the Rights of the Child, and by reliance on international humanitarian law. We can also ground the arguments for rights-attribution to non-refugee beneficiaries of protection against refoulement in the duty of non-discrimination.\textsuperscript{236} While less glamorous and surely less immediate,\textsuperscript{237} this patient and incrementalist strategy allows us to pursue reform from within the relatively secure space of legal obligation. In contrast, if the scope of extant legal obligation is exaggerated, we impliedly jettison accrued gains and descend into the realm of pure policy—a space in which refugee rights are far too often deemed dispensable in the pursuit of narrow definitions of state self-interest.

In what may seem an ironic twist, those committed to expansion of the scope of protection must therefore concede that, contrary to the claim of Lauterpacht and Bethlehem, there is no customary international legal obligation enjoining states not bound by relevant conventions to honor the duty of non-refoulement in relation to refugees and others facing the prospect of serious harm. And, contrary to McAdam’s view, it is not the case that all persons entitled to protection against refoulement must, by virtue of a conceptual fusion of the Refugee Convention and other human rights accords, be granted all of the refugee-specific entitlements codified in the Refugee Convention itself.

There is, in short, no leveraged right to asylum.

\textsuperscript{236} See supra text accompanying notes 3–7.

\textsuperscript{237} KELLY, supra note 42, 539–43 ("Universally recognized treaties can be achieved, but they require political will, compromise, and attention to the sensibilities of all perspectives. . . . If the goal is a world legal order, then the attempts to universalize standards, without the participation and consent of states, impede progress rather than promote it.").