INTERPRETING AN INCORPORATIVE STATUTE: THE ROLE OF FOREIGN AUTHORITY IN U.S. ASYLUM ADJUDICATION

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ABSTRACT

U.S. asylum law is based on a domestic statute that incorporates an international treaty, the U.N. Protocol Relating to the Status of Refugees. While Supreme Court cases indicate that the rules of treaty interpretation apply to an incorporative statute, courts analyzing the statutory asylum provisions fail to give weight to the interpretations of our sister signatories, which is one of the distinctive and uncontroversial principles of treaty interpretation. The Article highlights this significant omission and urges courts to examine the interpretations of other states parties to the Protocol in asylum cases. Using as an example the current debate over social visibility in defining a “particular social group,” which is a part of the definition of a “refugee” that has led to a circuit split, the Article shows an emerging international consensus on this issue and argues that the interpretations of our sister signatories should inform the analysis of U.S. courts. The Article also addresses some of the challenges involved in examining foreign authority, including: how to select and weigh such authority in the context of treaty interpretation; what weight, if any, courts should give to the interpretation of the European Union, which is comprised of states parties and has taken steps towards creating a Common European Asylum System; and how courts should treat the interpretations of the United Nations High Commissioner for Refugees, which is not a state party but assumes state-like functions in conducting refugee status determinations. The Article concludes that asylum and refugee law is an area ripe for deeper transnational dialogue, in which U.S. courts should play a critical part.
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INTRODUCTION

United States asylum law binds a domestic statute, the Immigration and Nationality Act ("INA"), to an international treaty, the 1967 Protocol Relating to the Status of Refugees ("Protocol"), by incorporating key parts of the Protocol directly into the statute, including the definition of a "refugee."¹ When U.S. courts interpret asylum law, they usually focus on the domestic statute, applying the rules for statutory interpretation and ignoring the incorporated treaty.² This method of interpretation results in a significant omission: courts fail to consider subsequent practice in the application of the treaty, such as the interpretations of our sister signatories. Although subsequent practice has no place in statutory interpretation, it plays an important role in treaty interpretation, promoting the uniform understanding of a contract among nations.³ This Article contends that U.S. courts should examine subsequent practice, especially the interpretations of other states parties to the Protocol, when analyzing the incorporative parts

² This issue is not unique to the United States. Richard Gardiner notes that “a particular problem in those states which transform treaties into domestic law by legislation is that it has not always been clear whether the courts will apply their own principles of interpretation, that is those used for any other domestic law, or whether they will import the rules of international law as the appropriate rules for an instrument governed by international law.” RICHARD K. GARDINER, TREATY INTERPRETATION 127 (2008).
³ See Foster v. Neilson, 27 U.S. 253, 314 (1829) (“A treaty is in its nature a contract between two nations, not a legislative act”); The Federalist No. 7 (Alexander Hamilton) (George W. Carey & James McCellan eds., 2001) (describing treaties as “contracts with foreign nations . . . agreements between sovereign and sovereign”); GARDINER, supra note 2, at 23 (“[T]he major role of subsequent practice as an element in treaty interpretation is one of the more prominent features distinguishing this from the approach to interpretation of formal legal instruments (such as legislation) in many national legal systems.”);
of the INA, because they are interpreting not only a domestic statute, but also an international treaty.

Part I of the Article argues that the rules of treaty interpretation apply to an incorporative statute such as the Refugee Act of 1980, which amended the INA to conform to the Protocol.\(^4\) The Supreme Court has implicitly recognized this principle by examining in the text, object, purpose, and drafting history of the 1951 Convention Relating to the Status of Refugee and the 1967 Protocol when interpreting incorporative statutory provisions. Strangely, however, the Court has stopped short of examining subsequent practice in the asylum context. A more explicit application of the rules of treaty interpretation would help ensure consideration of all of the relevant elements.

Part II then shows that properly applying the rules of treaty interpretation would require courts to give considerable weight to the interpretations of our sister signatories. The Supreme Court has reiterated this principle many times, and it remains uncontroversial, distinct from the intense debates over the role of foreign authority in interpreting the U.S. Constitution. Moreover, the Vienna Convention on the Law of Treaties, which has become part of customary international law, emphasizes the importance of subsequent practice, including the interpretations of other states parties.

In Part III, the Article provides an example of how the interpretations of our sister signatories could aid the analysis of U.S. courts by focusing on a specific issue that has resulted in a circuit split: whether “social visibility” is required to establish a “particular social group,”

one of the most ambiguous terms in the definition of a “refugee.”⁵ Since the Board of Immigration Appeals (“BIA”) introduced the “social visibility” requirement in 2006, two circuits have rejected it and at least one other is reconsidering this issue en banc.⁶ By showing an emerging international consensus around the definition of a “particular social group,” which does not require social visibility based on persuasive reasoning, Part III demonstrates how the interpretations of other states parties to the Protocol have the power to help shape the analysis of U.S. courts.

Finally, Part IV discusses some of the challenges involved in examining foreign authority. The first challenge pertains to methodology in selecting and giving weight to foreign authorities. The second challenge involves what courts should do with the interpretations of the European Union, a regional body comprised of states parties that has taken groundbreaking steps towards creating a common asylum system. The third challenge involves how courts should treat the interpretation of the United Nations High Commissioner for Refugees (UNHCR), which performs state-like functions but also is not a state party. Part IV pries open these difficult issues and invites further discussion rather than providing definitive answers.

⁵ A refugee is defined as a person who is outside his or her country and who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); see also Refugee Convention, supra note 1, art. 1(A)(2); Protocol, supra note 1, at art. I(2).

⁶ The BIA introduced the social visibility requirement in Matter of C-A-, 23 I. & N. Dec. 951 (BIA 2006) and Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69 (BIA 2007). The Seventh and Third Circuits have already rejected the social requirement. See Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (finding that the social visibility criterion “makes no sense”); Valdiviezo-Goldamez v. U.S. Att’y Gen., 663 F.3d 582, 589 (3d Cir. 2011) (finding that the BIA had failed to sufficiently explain and justify its additional of “particularity” and “social visibility” to the traditional requirements). The Ninth Circuit is reconsidering the issue of social visibility in Henriquez-Rivas v. Holder, -- F.3d – (9th Cir. 2012) (granting petition for rehearing en banc). This Article evolved from an amicus brief submitted in the Henriquez-Rivas case.
Incorporative statutes are rare creatures in U.S. law and surprisingly little scholarship has addressed them. This Article contributes to that small but growing body of scholarship by exploring the role that foreign authority should play in interpreting U.S. asylum law. Since asylum cases dominate the dockets of several circuits, understanding what body of rules to apply in interpreting the asylum provisions of the INA is an essential task with far-reaching consequences.

I. APPLYING THE PRINCIPLES OF TREATY INTERPRETATION TO THE REFUGEE ACT OF 1980, AN INCORPORATIVE STATUTE

The Supreme Court has recognized that one of Congress’s primary purposes in enacting the Refugee Act of 1980 was “to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968.” The Protocol binds its parties to comply with the substantive provisions of Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees (“Convention”) and incorporates the definition of a “refugee” set forth in the Convention. Consequently, “the definition of ‘refugee’ that Congress adopted . . . is virtually identical to the

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7 See Coyle, supra note 4, at 659-660 (noting that “the academic literature in the United States has paid relatively little attention to incorporative statutes”); Bassina Farbenblum, Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron, 60 DUKE L. J. 1059, 1069 (2011) (recognizing that “the Refugee Act is one of a small number of incorporative statutes that directly incorporate international treaty language and concepts into U.S. domestic law”)
8 See Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 DUKE L. J. 1635, 1647 (2010) (“In fiscal year 2008, immigration cases comprised 41 percent of the entire Second Circuit docks and 34 percent of the Ninth Circuit docket. To cope with its bloated docket, the Second Circuit has had to institute a no-oral-argument system for asylum caess.”).
10 See Protocol, supra note 1, at art. 1. The Protocol also eliminates the geographical and temporal restrictions to refugee status that were found in the Convention. Id. at art. 1.2-1.3; see also I.N.S. v. Stevic, 467 U.S. 407, 416 (1984).
one prescribed by Article 1(2) of the Convention.”¹¹ By conforming the legislation to the Convention and Protocol, Congress intended to give “statutory meaning to our national commitment to human rights and humanitarian concerns.”¹²

Since the Refugee Act of 1980 incorporated the Protocol, courts should construe its provisions according to the general rules of treaty interpretation, including examining the interpretations of other states parties.¹³ The Supreme Court has implicitly followed this principle of applying the rules of treaty interpretation to an incorporative statute. For example, in *I.N.S. v. Cardoza-Fonseca*, the Court analyzed the text and negotiating history of Article 1(2) of the Refugee Convention in construing the statutory phrase “well-founded fear.”¹⁴ Similarly, in *Sale v. Haitian Centers Council*, the Court analyzed the text and negotiating history of Article 33(1) of the Refugee Convention to determine the extraterritorial effect of the analogous nonrefoulement principle set forth in INA § 243(h)(1).¹⁵ By examining the ordinary meaning of the text of the Refugee Convention and the travaux preparatoires (preparatory works), the Court applied two of the general rules of treaty interpretation to cases based on the INA.

Oddly, however, in neither case did the Court examine the interpretations of other parties to the Protocol. Normally, under the rules of treaty interpretation set forth in Article 31(3)(b) of

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¹¹ Cardoza-Fonseca, 480 U.S. at 437.
¹³ See Guy S. Goodwin-Gill, *The Search For the One, True Meaning…, in The Limits of Transnational Law: Refugee Law, Police Harmonization and Judicial Dialogue in the European Union* 206 (Guy S. Goodwin-Gill and Hélène Lambert, eds. 2010) (arguing that the rules of treaty interpretation should be applied to refugee laws derived from the Convention and Protocol); Coyle, *supra* note 4, at 680 (arguing that courts should construe an incorporative statute as conforming to the incorporated treaty, applying the canons of treaty interpretation).
¹⁵ *Sale v. Haitian Centers Council*, 509 U.S. 155, 177-87 (1993). INA § 243(h)(1) provides that “[t]he Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country . . .”
the Vienna Convention on the Law of Treaties, subsequent practice that establishes the agreement of the parties, including the interpretations of the parties, would be considered, together with the context, prior to invoking “supplementary means of interpretation” under Article 32, which includes “the preparatory work of the treaty and the circumstances of its conclusion.” By skipping directly from the text to the preparatory work without any mention of “subsequent practice,” the Court elided an important element in treaty interpretation.

If this omission was due to the distraction or disguise of a domestic statute that veils the underlying treaty, the Court lifted that veil a couple years later when faced with another incorporative statute. In *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, the Court addressed whether a foreign arbitration clause in a bill of lading violated the Carriage of Goods by Sea Act (COGSA), which is a domestic statute modeled on an international treaty, the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading.\(^\text{16}\) The Court reasoned that none of the 66 states parties to the treaty has interpreted it as prohibiting foreign forum selection clauses. Since COGSA was “the culmination of a multilateral effort to establish uniform ocean bills of lading,” the Court “decline[d] to interpret our version of [the treaty] in a manner contrary to every other nation to have addressed this issue.”\(^\text{17}\) By examining the subsequent practice of other parties to the treaty – a factor relevant only to treaty interpretation and not to statutory interpretation -- *Sky Reefer* clarified any possible confusion about what set of rules apply to an incorporative statute.

As Justice Stevens explained more recently in his opinion in *Negusie*, “[w]hen we interpret treaties, we consider the interpretations of other nations, and we should do the same


\(^{17}\) *Id.* at 537.
when Congress asks us to interpret a statute in light of a treaty’s language.”

In addressing the question of statutory interpretation that the majority avoided, Justice Stevens applied the interpretive rules endorsed by Sky Reefer to determine whether a duress exception exists to the INA’s “persecutor bar,” which excludes people who have persecuted others from the definition of a “refugee.” After finding a duress exception based on the text of the Convention, which refers only to “crimes,” Justice Stevens turned to subsequent practice, reasoning that “[o]ther states parties to the Convention and Protocol likewise read the Convention’s exception as limited to culpable conduct,” citing decisions by the Federal Court of Canada, the U.K. Asylum and Immigration Tribunal, the Federal Court of Australia, and the New Zealand Refugee Status Appeals Authority.

The U.S. Courts of Appeal have also drawn on principles of treaty interpretation when construing parts of the INA that incorporate the Protocol. For example, the Ninth Circuit has “often looked to sources of international law for guidance in applying the asylum and prohibition of deportation provisions of the Refugee Act.” In particular, the Ninth Circuit and other circuit courts have frequently “acknowledged the Handbook on Procedures and Criteria for Determining Refugee Status, promulgated by the United Nations High Commissioner for Refugees, as a ‘significant source of guidance with respect to the United Nations Protocol.’” Unfortunately, the Handbook has provided little guidance on some of the most difficult issues, such as the definition of a “particular social group.” Nevertheless, the Ninth Circuit has relied

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18 Negusie v. Holder, 555 U.S. 511, 537 (Stevens J, joined by Breyer J, concurring in part and dissenting in part).
19 Id.
20 Id.
21 Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575-76 (9th Cir. 1986).
22 Id. at 1576.
23 Id.
on the drafting language of the Convention and the UNHCR Handbook in finding that a
“particular social group” need not be narrowly defined.24 Similarly, the court rejected a narrow
interpretation of the firm resettlement bar since “[t]he international obligation our nation agreed
to share when we enacted the Refugee Convention into law knows no such limits.”25 While
these cases provide support for applying the rules of treaty interpretation to the Refugee Act, like
_Cardoza-Fonseca_ and _Sale_, they fail to analyze subsequent practice.

In very rare cases, the U.S. Courts of Appeal have mentioned foreign authority in
analyzing the Refugee Act, but such references are made in passing, often as a footnote,
unhinged from a principled approach to treaty interpretation.26 For example, in _Castellano-
Chacon_, decided in 2003, before the BIA introduced its social visibility requirement, the Sixth
Circuit discussed internal versus external factors for defining a “particular social group” and
noted that this question “has divided courts in various countries,” contrasting a decision by the
Supreme Court of Canada with a decision by the High Court of Australia.27 The court did not,
however, provide any additional explanation of how these foreign authorities fit in with its
analysis. By mentioning subsequent practice in two countries, as well as the UNHCR’s
guidelines on “membership of a particular social group,” the court appears to reach towards the

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24 Perdomo v. Holder, 611 F.3d 662, 668 n. 7 (9th Cir. 2010).
25 Ali v. Ashcroft, 394 F.3d 780, 791 (9th Cir. 2005)
26 See Hernandez-Montiel v. INS, 225 F.3d 1084, 1993 n. 6 (9th Cir. 2000) (noting that the
court’s formulation of a “particular social group” is “similar to the Supreme Court of Canada’s
definition of the term”). The Ninth Circuit’s reference to the Canadian Supreme Court’s
decision in _Ward_ reflects the use of foreign authority to “gild the domestic Lily,” a phrase that
Melissa Waters coined to describe how the U.S. Supreme Court uses human rights treaties to
support its interpretation of a constitutional provision. Melissa A. Waters, _Getting Beyond the
Crossfire Phenomenon: A Militant Moderate’s Take on the Role of Foreign Authority in
Constitutional Interpretation_, 77 FORDHAM L. REV. 635, 643 (2008). In this technique,
“discussion of international law often seems to be tacked on as a sort of afterthought to a detailed
discussion of domestic law.” _Id._
27 Castellano-Chacon v. INS, 341 F.3d 533, 547-48 & n. 8 (6th Cir. 2003).
principles of treaty interpretation, but stops short of fully embracing them, recoiling with a showing of enormous deference to the BIA.\textsuperscript{28}

Just as Justice Stevens’ opinion in \textit{Negusie} rekindles the relevance of subsequent practice by other states parties to the Protocol, the concurring opinion of Judge Reinhardt on the Ninth Circuit in \textit{Delgado v. Holder} reaffirms the importance of applying \textit{all} of the principles of treaty interpretation to the Refugee Act. In analyzing the meaning of a “particularly serious crime,” which is a bar to asylum and withholding of removal, Judge Reinhardt notes that if he were interpreting this term in the first instance, he would endorse the interpretation that is “most consistent with the intent of the 1951 Refugee Convention” and that “\textit{has been adopted by other countries in interpreting identical provisions of their refugee laws.}”\textsuperscript{29}

These cases provide solid support for applying the same canons of interpretation to an incorporative statute that one would apply to the treaty itself, while at the same time highlighting how courts have often overlooked the role of subsequent practice as part of this analysis. The following Part II demonstrates that, under the rules of treaty interpretation, courts \textit{must} consider the interpretations of our sister signatories to the Protocol, pursuant to both Supreme Court precedents and the Vienna Convention on the Law of Treaties, which has become part of customary international law.

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\textsuperscript{28} \textit{Id.} at 548.

\textsuperscript{29} \textit{Delgado v. Holder}, 648 F.3d 1095, 1110 n.2 (9th Cir. 2011) (emphasis added).
II. GIVING “WEIGHT” TO THE INTERPRETATIONS OF OUR SISTER SIGNATORIES

A. The Principle of Giving “Considerable Weight” to the Interpretations of Our Sister Signatories

For the past quarter century, the Supreme Court has found “the opinions of our sister signatories to be entitled to considerable weight.” The Court introduced this principle in the context of interpreting the Warsaw Convention, which governs air carrier liability for international transportation. In *Air France v. Saks*, the Court adopted an interpretation of the Warsaw Convention “consistent with the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts.”

The court discussed decisions of a French court addressing the meaning of the term “accident” as well as writing by European legal scholars regarding Swiss and German law. Subsequently, in *El Al Israel Airlines*, the Court reviewed a broader array of foreign authority, including decisions by the U.K. House of Lords, courts in Canada, the New Zealand Court of Appeals, and the

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31 *Id.* at 400 (emphasis added).
32 *Id.* at 404. Consistent with the Supreme Court, the federal courts of appeal have also given weight to foreign authorities when construing international treaties. *See, e.g.*, Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc., 634 F.3d 1023, 1028 & n.5 (9th Cir. 2011) (noting that “Warsaw Convention precedent includes the judicial opinions of our sister signatories” and being “guided by the Ontario Supreme Court of Canada’s ruling that Article 29 of the Warsaw Convention does not apply to suits brought by one carrier against another”); In re B. Del C.S.B., 559 F.3d 999 (9th Cir. 2009) (examining a case from England to help determine whether immigration status could serve as a basis for holding that a child was not “settled” in the U.S. for purposes of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction); Furnes v. Reeves, 362 F.3d 702, 717 (11th Cir. 2004) (discussing precedents from the United Kingdom, Australia, South Africa, Israel, Canada, and France in analyzing an issue under the Hague Convention and stressing, “our reasons and conclusions are in harmony with the majority of the courts of our sister signatories that have addressed this treaty issue”); Forestal Guarani S.A. v. Daros Intern., Inc., 613 F.3d 395, 399 (3d Cir. 2010) (considering how foreign) (turning to foreign authority in analyzing a novel issue arising under the United Nations Convention on the International Sale of Goods, only to find that “[c]ourts in foreign jurisdictions and commentators alike [were] divided over how to proceed in such a scenario”)
Singapore Court of Appeal in analyzing whether the Warsaw Convention precludes an airline passenger from filing an action for damages under another source of law, even if the passenger cannot obtain a remedy under the Convention because her injury does not qualify as an “accident.”\footnote{El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999)} The Court concluded that the text, drafting history and underlying purpose of the Convention counseled “adherence to a view of the treaty’s exclusivity shared by our treaty partners.”\footnote{Id. at 176 n. 16. Justice Stevens, who dissented from the opinion, distinguished these foreign cases on the basis that they did not involve “nonaccidents.” \textit{Id.} at 179 (Stevens J, dissenting). He also felt “puzzled” by how the House of Lords reached their conclusion that a terrorist attacks was not a hijacking, citing cases from France and Israel that deemed hijackings to be accidents within the meaning of Article 17 of the Convention. \textit{Id.}}

Most recently, the Supreme Court confirmed the principle of giving “considerable weight” to our sister signatories to a treaty in \textit{Abbott}.\footnote{Abbott v. Abbott, 130 S.Ct. 1983, 1993 (2010) (internal quotation marks omitted).} There, the Court noted that this principle “applies with special force” where “uniform international interpretation of the Convention is part of the Convention’s framework.”\footnote{Id. at 1993 (internal quotation marks omitted).} In analyzing an issue of custody rights under the Hague Convention on the Civil Aspects of International Child Abduction, Justice Kennedy, writing for the majority, reviewed decisions from the United Kingdom, Israel, Austria, South Africa, Germany, Australia, and Scotland, finding “broad acceptance of the rule that \textit{ne exeat} rights are rights of custody,” while noting that a more restrictive interpretation by the Canadian Supreme Court was not on point and that French courts were “divided.”\footnote{Id. at 1993-94.} Moreover, “scholars agree[d] that there is an emerging international consensus that \textit{ne exeat} rights are rights of custody, even if that view was not generally formulated when the Convention was drafted in 1980.”\footnote{Id. at 1994.}
The principle that courts should consider the interpretations of other states parties when interpreting an international treaty remains uncontroversial. Indeed, some of its strongest champions are the more conservative members of the Supreme Court. In *Sanchez-Llamas*, the majority opinion by Chief Justice Roberts highlights the views of sister signatories in interpreting Article 36 of the Vienna Convention on Consular affairs, which requires authorities to notify detained foreign nationals of their right to contact their consulate.\(^{39}\) In discussing whether a violation of that right should lead to the suppression of incriminating statements, Justice Roberts stressed that “[t]he exclusionary rule as we know it is an entirely American legal creation” that “is still ‘universally rejected’ by other countries.”\(^{40}\) Accordingly, he found “no reason to suppose that Sanchez-Llamas would be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention.”\(^{41}\) Justice Roberts acknowledged that “in a few cases,” the United Kingdom, Australia, and Canada have recognized a discretionary rule of exclusion for violations of domestic statute implementing the Vienna Convention, but these cases apparently did not persuade him that Sanchez-Llamas would succeed in suppressing his statements in another country.\(^{42}\)

The dissent agreed on the importance of examining the interpretations of other states parties, and, in fact, relied on these foreign precedents in disputing the majority’s conclusion that Sanchez-Llamas would be denied suppression in all contracting states. The cases from Australia and Canada supported the dissent’s position that suppression may be an appropriate remedy in

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\(^{40}\) *Sanchez-Llamas*, 548 U.S. at 343-44.

\(^{41}\) *Id.* at 344.

\(^{42}\) *Id.* at 344 n.3.
some circumstances. While the dissent conceded the absence of such decisions from civil law countries, it reasoned that this absence “tells us nothing at all,” since the criminal justice system in civil law systems allow judges to simply disregard improperly obtained evidence, discount its significance, or adjust the final sentence, rather than formally suppressing the evidence. The dissent noted that one case from Germany denying a request to suppress was the only support for the claim that the petitioners were asking the United States for a remedy that other countries deny. Thus, the disagreement between the majority and dissent in Sanchez-Llamas, as in Abbott, did not concern whether to examine foreign precedents, but, rather, what conclusions to reach in light of those precedents. Similarly, both the majority and dissent engaged in a detailed discussion of relevant decisions by the International Court of Justice, recognizing that such decisions merit “respectful consideration,” since “uniformity is an important goal of treaty interpretation,” but disagreeing about the results.

Justice Scalia’s dissent in Olympic Airways v. Husain, which involved an issue of interpretation under the Warsaw Convention, also stressed the principle of consulting foreign precedents when interpreting an international treaty. This dissent clearly distinguishes between examining foreign precedents to help interpret the U.S. Constitution, which Justice Scalia abhors, and examining foreign precedents when interpreting an international treaty, which he wholeheartedly endorses. Justice Scalia criticized the majority for “its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues

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43 Id. at 394-95 (Breyer J, dissenting, joined by Stevens J, Souter J, and Ginsburg J in part).
44 Id. at 395-96 (Breyer J, dissenting, joined by Stevens J, Souter J, and Ginsburg J in part).
45 Id. at 396 (Breyer J, dissenting, joined by Stevens J, Souter J, and Ginsburg J in part).
46 Id. at 382-83.
48 Id.
before us.” 49 Discussing decisions by “appellate courts in both England and Australia . . . squarely at odds with [the] holding,” he forcefully argued that “[w]e can, and should, look to decisions of other signatories when we interpret treaty provisions.” 50 As Melissa Waters explains, Justice Scalia’s analysis indicates that when other countries have already rejected a certain interpretation of a treaty, then the United States should follow their lead as long as it is reasonable, even if there are other, equally reasonable interpretations. 51

When interpreting the Refugee Convention or Protocol, the opinions of our sister signatories should apply with “special force,” as they did in Abbott, because “uniform international interpretation . . . is part of the [treaty’s] framework.” 52 The goal of uniform international interpretation is built into the framework of the Protocol through Article 2.1, which specifically requires states parties to cooperate with the UNHCR and to “facilitate its duty of supervising the applications of the Provisions of the present Protocol.” 53 This provision mirrors Article 35 of the Refugee Convention and echoes its Preamble, which stresses that UNHCR “is charged with the task of supervising international conventions providing for the protection of refugees” and “recognize[es] that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.” 54 Since UNHCR strives to promote uniform interpretation of the Protocol and Convention by issuing guidelines and other materials, requiring states parties to cooperate with UNHCR makes uniform interpretation part of the treaties’ framework. By acceding to the Protocol and agreeing to

49 Id.
50 Id. at 600 (emphasis added).
52 Abbott, 130 S. Ct. at 1993 (emphasis added).
53 Protocol Relating to the Status of Refugees, supra note 1, at art. 2.1,
54 Preamble to the Refugee Convention, supra note 1.
cooperate with UNHCR, the United States agreed to promote uniform interpretation of the treaty. Thus, when interpreting the Protocol, the principle of giving weight to the opinions of our sister signatories applies with special force.

B. The Complexities of When to Give Weight and How Much Weight to Give

The Supreme Court cases discussed above confirm strong support by all members of the Court for the principle of giving considerable weight to foreign authority when interpreting an international treaty. At the same time, however, these cases highlight some confusion about the role of foreign authority even in the narrow context of treaty interpretation. For example, Justice Stevens’ dissent in Abbott, joined, in an unusual combination, by Justice Thomas and Justice Breyer, maintains that it is only appropriate to examine the interpretations of our sister signatories when the text of the treaty is ambiguous.\(^{55}\) The case on which the dissent relies for this proposition, however, actually states that “[t]he clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.”\(^{56}\) This language indicates that even if the text is clear, it is still important to consider the interpretations of our sister signatories, which is consistent with Article 32 of the Vienna Convention on the Law of Treaties. Article 32 permits courts to have recourse to “supplemental means of interpretation” not only when the text is ambiguous, but also to “confirm” an interpretation based on the text, object, purpose, or context of the treaty.\(^{57}\) Thus, the dissent in Abbott suggests confusion or disagreement by at least


some members of the Court as to when it is appropriate to consider the views of other states parties to a treaty.

Compounding this confusion, the dissent in Abbott raises questions about how much foreign authority the Court should consider, what weight to give this foreign authority, and how uniform the foreign authority must be to influence the Court’s interpretations. While Justice Stevens’ dissent acknowledged that “the views of our sister signatories to the Convention deserve special attention,” he found that “we should not substitute the judgment of other courts for our own.” Justice Stevens reasoned that a “handful of foreign decisions . . . provide insufficient reasons to depart from [his] understanding of the meaning of the Convention, an understanding shared by many Courts of Appeals.” He also “fail[ed] to see the international consensus . . . among [the] varied decisions from foreign courts,” finding them, “at best, in equipoise.” Thus, although the majority considered authority from ten different countries, the dissent found this number insufficient to be persuasive. Moreover, while the majority found consensus among all but two of the countries (Canada and France), with Canada simply not being “on point,” the dissent found insufficient uniformity to change its own perspective.

The decision in Olympic Airways echoes these concerns. There, the majority chose not to attach much weight to a few decisions by intermediate appellate courts in the U.K. and Australia, whereas Scalia’s dissent stressed the importance of following those decisions. The majority stressed that “courts of last resort--the House of Lords and the High Court of Australia—have yet to speak” on the issue at hand. Thus, in addition to raising the questions about the number

59 Id. at 2008-09 (emphasis added).
60 Id. at 2009.
of foreign authorities available, Olympic Airways raises questions about what level of courts must address an issue in order for their interpretations to merit considerable weight.

The dissent in Sanchez-Llamas adds yet another dimension to this conundrum by highlighting how differences between common law and civil law systems can color the way we perceive their judicial decisions. While Justice Breyer’s dissent examines how the role of judges in civil law systems may dampen the need for defendants to file motions to suppress, his point about the different nature of legal systems has broader implications. The mere fact that civil law countries generally do not recognize the principle of stare decisis, for example, puts these countries at a disadvantage when the Court focuses on uniformity in judicial decisions in reviewing the interpretations of our sister signatories to a treaty.

Lastly, Abbot, Sanchez-Llamas, Olympic Airways, and El Al Israel all show how judges reviewing the same foreign authorities can reach different conclusions about their significance. In each of these cases, the majority and dissent examined the same foreign decisions, but parted ways on whether to follow them, distinguish them based on their facts, or dispute their legal analysis. Thus, just as judges differ on how to construe U.S. cases and arrive at opposite outcomes, judges approach foreign authorities in the same contested manner.

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63 See MARY ANN GLEN DON et al., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 263 (2d ed. 1999) (contrasting the common law tradition, where precedent “exists separately as law to be followed,” with the civil law tradition, where precedent is merely “noted . . . as teaching something”); but cf. JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 208 (1994) (arguing that “entire bodies of law in civil law systems have been built up by judicial decisions in a manner closely resembling the growth of anglo-American common law”).
C. The Role of Foreign Authority Under the Vienna Convention on the Law of Treaties

Some of the confusion and complexities discussed above may stem from a flexibility in the Supreme Court’s standard of “giving weight” that does not exist to the same extent in the rules of treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31.1 provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Article 31.3(b) goes on to explain that “[t]here shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” As noted in the Introduction, the prominent role given to “subsequent practice” under the Vienna Convention is a key feature that distinguishes treaty interpretation from the interpretation of a domestic statute. This emphasis on subsequent practice reflects how treaties are closer to contracts than to legislation, requiring mutual understanding and agreement among the signatories. According to one commentator, “concordant practice of the parties is best evidence of their correct interpretation” of a treaty.

Judicial decisions that reflect a consistent interpretation among states parties may serve as indicators of subsequent practice. Even where judicial decisions do not meet the standard

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64 See Vienna Convention, supra note 57, at art. 31-32.
65 Vienna Convention, supra note 1, at art. 31.1
66 Id. at art. 31.3(b).
68 Id.
69 Id.
70 See Goodwin-Gill, supra note 13, at 209-10, 218; see also Klaus Ferdinand Gärditz, International Decisions, 101 AM. J. INT’L L 627, 634 (2007) (“Decisions of domestic courts are state practice. . . . In addition, domestic adjudication constitutes subsequent practice, which is of importance to treaty interpretation pursuant to Article 31(3)(b) of the Vienna Convention on the
required to show “subsequent practice” under Article 31.3(b), they still serve as a “supplemental
tools of interpretation” under Article 32 of the Vienna Convention. Article 32 permits the use
of such “supplemental means” when Article 31 leaves the meaning ambiguous or leads to an
unreasonable result, or simply to confirm the meaning derived under Article 31. Although the
United States has not ratified the Vienna Convention and the Supreme Court does not explicitly
rely on it, the U.S. Courts of Appeal, as well as some state courts, apply Articles 31 and 32 as
customary international law. Moreover, Supreme Court precedents reflect the same general
principles of treaty interpretation set forth in the Vienna Convention, including the importance of
subsequent practice. While the Supreme Court may accept “a wider notion of context” in
treaty interpretation, including considering a more expansive range of “preparatory works” under

Home, 35 HOUSTON L. REV. 623, 649-50 (1998) (describing domestic courts as important “law-
declaring fora” that define and interpret the norms of international law); cf. ICJ Statute art.
38(1)(b).
71 Goodwin-Gill, supra note 13, at 209-10.
72 See, e.g., Gonzalez v. Gutierrez, 311 F.3d 942, 950 n. 15 (9th Cir. 2002), abrogated on other
grounds by Abbott, 130 S.Ct. 1983 (2010) (“While the United States is not a signatory to the
Vienna Convention, it is the policy of the United States to apply articles 31 and 32 as customary
international law”); Fujitsu Ltd. V. Federal Exp. Corp. 247 F.3d 423, 433 (2d Cir. 2001) (“we
apply the rules of customary international law enunciated in the Vienna Convention on the Law
of Treaties”); Kreimerman v. Casa Veerkamp, 22 F.3d 634, 638 (5th Cir. 1994) (“Although the
United States is not a party to the Vienna Convention, it regards the substantive provisions of the
Vienna Convention as codifying the international law of treaties.”); Aquamar, S.A. v. Del
Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1296 n. 40 (11th Cir. 1999) (same, quoting
Kreimerman); Evan Criddle, The Vienna Convention on the Law of Treaties in U.S. Treaty
Interpretation, 44 VA. J. INT’L L. 431, 434 (2004) (“No member of the [Supreme] Court has
eyer appealed to the Vienna Convention for an independent and controlling rule of decision.”).
73 See also Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217, 226 (1996) (stating that the
“postratification understanding of the contracting parties” has traditionally served as an aid to
signatories counts as evidence of the treaty’s proper interpretation, since their conduct generally
evines their understanding of the agreement they signed.”); Trans World Airlines, Inc. v.
Franklin Mint Corp., 466 U.S. 243, 260 (1984) (“The conduct of the contracting parties in
implementing the contract in the first 50 years of its operation cannot be ignored.”). Richard
Gardiner notes that
Article 32 than traditionally accepted, the Court still “weighs relevant factors in a broadly similar manner to that required by the Vienna rules.”

The International Court of Justice has also confirmed the importance of subsequent practice in treaty interpretation, explaining that “it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty” and is well-established as a mode of interpretation in the jurisprudence of international tribunals. U.S. courts therefore have a solid legal foundation under U.S. Supreme Court precedents, the Vienna Convention on the Law of the Treaties, and the decisions of the ICJ for examining foreign authority as a form of subsequent practice when interpreting the Protocol.

II. THE EXAMPLE OF “SOCIAL VISIBILITY”: HOW THE VIEWS OF OTHER STATES PARTIES COULD AID U.S. COURTS ANALYZE A COMPLEX ISSUE

This section focuses on an important question currently being litigated in the U.S. Courts of Appeal as an example of how the examination of foreign authority can help guide courts in their interpretation of the definition of a “refugee.” That question, which has already resulted in a circuit split and is currently being reconsidered by the Ninth Circuit en banc, is whether a “particular social group” must be socially visible. The term “particular social group” is one of the most ambiguous parts of the definition of a refugee. Under the Convention, Protocol and U.S. asylum law, a “refugee” is defined as an individual who is outside of his or her country and

74 Gardiner, supra note 2, at 136-38.
76 The Seventh and Third Circuit have rejected social visibility as a requirement for establishing a “particular social group.” See Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (finding that the social visibility criterion “makes no sense”); Valdiviezo-Goldamez v. U.S. Att’y Gen., 663 F.3d 582, 589 (3d Cir. 2011) (finding that the BIA had failed to sufficiently explain and justify its additional of “particularity” and “social visibility” to the traditional requirements). The case currently pending before the Ninth Circuit is Henriquez-Rivas v. Holder, -- F.3d – (9th Cir. 2012) (granting petition for rehearing en banc).
who has a well-founded fear of persecution in that country on account of race, religion, nationality, political opinion, or membership in “a particular social group.”\(^{77}\) How to interpret the “particular social group” ground for asylum has been the subject of much jurisprudence and scholarly debate, both in the U.S. and abroad, but U.S. courts have rarely considered our sister signatories’ interpretations of this term.\(^{78}\)

The BIA’s seminal decision in *Acosta* defined a “particular social group” as a group that shares “a common, immutable characteristic,” one that “either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”\(^{79}\) This definition profoundly influenced courts around the world.

Common law countries with well-developed bodies of refugee law have all endorsed *Acosta*’s “protected characteristic” approach and rejected social visibility as a requirement. While civil law countries generally provide little reasoning in their asylum decisions, they still highlight the importance of a common characteristic. Moreover, the House of Lords has interpreted the European Union’s Minimum Qualification Directive, which represents the first substantial step towards establishing a Common European Asylum System, as presenting the protected characteristic and social perception approaches as *two examples* of how to define a “particular social group,” rather than as dual requirement.\(^{80}\) This interpretation of the Directive

\(^{77}\) See supra note 5.

\(^{78}\) Two cases where U.S. courts did mention foreign authorities in interpreting a “particular social group” are *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1993 n. 6 (9th Cir. 2000) and *Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 & n. 8 (6th Cir. 2003), noted above.


is consistent with UNHCR’s Guidelines, which also describes these approaches as alternative tests. This section discusses relevant decisions from both common law and civil law countries to show how a comparative approach can aid U.S. courts in analyzing this issue.

A. Common Law Countries

The common law countries discussed below have issued well-reasoned decisions about the meaning of a “particular social group,” endorsing Acosta’s the protected characteristic approach and rejecting social visibility as a requirement.

1. Canada

The Supreme Court of Canada has found that Acosta proposed “a good working rule” for defining a “particular social group” in a way that “take[s] into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.” The court set forth three possible categories for a particular social group:

(1) groups defined by an innate or unchangeable characteristic;

(2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should be forced to forsake the association; and

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81 UNHCR, Guidelines on International Protection: Membership of a Particular Social Group within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (May 7, 2002), at paras. 11, 13 [hereinafter UNHCR Guidelines]. The amicus brief submitted by UNHCR elaborates further on this standard.

82 Canada (Attorney-General) v. Ward, [1993] 2 S.C.R. 689, 739 (Can.).
(3) groups associated by a former voluntary status, unalterable due to its historical permanent.  

None of these categories focuses on social perception.

In 1992, Canada’s Immigration and Refugee Board issued a position paper on the particular social group ground that provides additional insight.  

The Board set forth a two-part test very similar to UNHCR’s current approach. First, the adjudicator should determine whether the group shares “an internal characteristic,” which may be innate, immutable, or fundamental to identity or human dignity. If no such characteristic exists, the adjudicator may still find a social group based on external perceptions of the group.  The Board clearly viewed these two standards as alternatives. Thus, Canada has considered the role of external perceptions, but has rejected it as a requirement.

2. The United Kingdom

The U.K. House of Lords has also long embraced Acosta’s definition of a “particular social group.” In Shah and Islam, the Lords not only endorsed Acosta, but rejected additional requirements outside of the protected characteristic framework. Specifically, Lord Steyn reasoned that it was “not justified [] to introduce . . . an additional restriction of cohesiveness,” because “[t]o do so would be contrary to the ejusdem generis approach so cogently stated in

83 Id.
84 Immigration and Refugee Board, Preferred Position Paper, “Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution” (March 1992); see also Maryellen Fullerton, A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group, 26 CORNELL INT’L L. J. 505, 540-41 (1993) (discussing the Immigration and Refugee Board’s approach).
85 Fullerton, supra note 84, at 540.
86 Id.
87 Id. at 541.
Lord Hoffmann likewise endorsed *Acosta*, rejecting an additional element of cohesiveness that was “irrelevant” to the principle of non-discrimination and did not apply to any of the other protected grounds. The same reasoning supports rejecting an element of social visibility.

In fact, in 2006, the House of Lords did consider and reject the notion of an additional “social recognition” requirement analogous to the BIA’s social visibility test. This issue arose in the context of interpreting the EU Council’s Qualification Directive, which was adopted on April 29, 2004 as part of the process for establishing a Common European Asylum System.

In order to promote a shared understanding of “membership in a particular social group,” Article 10(1)(d) of the Qualification Directive provides, in relevant part:

(d) a group shall be considered to form a particular social group where in particular:

(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

The implementing regulation uses the same language except that it replaces “in particular” with the words “for example.” Both phrases – “in particular” and “for example” – indicate that the

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89 *Id.* at 643.
90 *Id.* at 651.
93 *Id.* (emphasis added). As stated in footnote 80, this Directive was amended in December 2011, but the relevant language quoted here remained the same.
protected characteristic and social perception approaches are *two ways* to establish a “particular social group,” rather than dual requirements.

This is precisely how the House of Lords interpreted the Qualification Directive in *Fornah and K*. Lord Bingham reasoned that if Article 10(d) “were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then . . . *it propounds a test more stringent than is warranted by international authority.*” He therefore supported UNHCR’s view that “*the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met.*” His decision stressed that UNHCR’s interpretation was “clearly based on a careful reading of the international authorities” and “provide[s] a very accurate and helpful distillation of their effect.” Similarly, Lord Hope of Craighead found that “*it would be a mistake to insist that [social] recognition is always necessary.*” Lord Brown of Eaton-Under-Heywood agreed, entirely accepting UNHCR’s definition and concluding that the Qualification Directive “will . . . have to be interpreted consistently with this definition.” Thus, the House of Lords has squarely rejected any additional requirement of social recognition/visibility.

3. **Ireland**

In interpreting Ireland’s 1996 Refugee Act, “the Irish courts have consistently drawn

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96 *Id.*
97 *Id.* at para 15 (Bingham J) (emphasis added).
98 *Id.* at para 46 (Lord Hope) (emphasis added).
99 *Id.* at para 118 (Lord Brown).
upon, and accepted as persuasive, leading cases on the concept of a ‘particular social group,’ from the USA, Canada, and the UK.” ¹⁰⁰ Specifically, the Irish courts have followed the protected characteristic approach set forth in Acosta, Ward, and Shah and Islam, discussed above. ¹⁰¹

4. Australia

Of the common law countries, only Australia has emphasized social perception in analyzing claims based on membership of a protected social group, but it has clarified that social perception is not a requirement. In Applicant A, Justice McHugh of the High Court of Australia discussed the “external perceptions of the group.”¹⁰² He confirmed Acosta’s idea that the members or a particular social group must share “some characteristic, attribute, activity, belief, interest or goal that unites them,” but also opined that “[i]f the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group.”¹⁰³ The Full Court of the Federal Court of Australia later interpreted Justice McHugh’s opinion in Applicant A as requiring not only a common characteristic, but also “recognition within the society that the collection of individuals is a group that is set apart from the rest of the community.”¹⁰⁴

The High Court, however, subsequently clarified its interpretation of a particular social group in Applicant S, explicitly holding that social perception is “not a requirement,” although it

¹⁰⁰ Siobhán Mullally, Speaker Across Borders: The Limits and Potential Transnational Dialogue on Refugee Law in Ireland, in THE LIMITS OF TRANSNATIONAL LAW, supra note 13, at 164.
¹⁰¹ Id. at 164 n. 70.
¹⁰³ Id. (emphasis added).
may be relevant to the analysis.\textsuperscript{105} The High Court explained that Justice McHugh’s opinion in \textit{Applicant A} merely expounded on the idea that a particular social group must be distinguished from society at large, and that “\textit{[o]ne way in which this may be determined is by examining whether the society in question perceives there to be such a group}.”\textsuperscript{106} The Court stressed that “\textit{[t]he general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society}.”\textsuperscript{107}

The Court understood that making social perception a requirement could seriously distort the analysis, as “[c]ommunities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community.”\textsuperscript{108} “Those communities do not recognize or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.”\textsuperscript{109} Justice McHugh’s opinion in \textit{Applicant S} confirms that “it is not necessary that a ‘particular social group’ be \textit{recognized} as a group that is set apart from the rest of society.”\textsuperscript{110} Indeed, he found that “[t]o require evidence of a recognition or perception by the society . . . is to \textit{impose a condition that the Convention does not require}.”\textsuperscript{111} Thus, the High Court of Australia, which spawned the idea of social perception, has since rejected it as a requirement.

5. New Zealand

Rodger Haines, Chairperson of New Zealand’s Refugee Status Appeals Authority


\textsuperscript{106} \textit{Id.} at para 27 (emphasis added).

\textsuperscript{107} \textit{Id.} (emphasis added).

\textsuperscript{108} \textit{Id.} at para 34.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.} at para 61 (McHugh J) (emphasis added).

\textsuperscript{111} \textit{Id.} at para 68 (emphasis added).
(“RSAA”), states that Acosta’s approach “has been adopted also in New Zealand.”\textsuperscript{112} New Zealand has embraced “[t]he Acosta ejusdem generis interpretation of ‘particular social group’” because it “firmly wed[s] the social group category to the principle of the avoidance of civil and political discrimination.”\textsuperscript{113} In rejecting social perception as an alternative formulation, the RSAA reasoned that “by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be particular social group.”\textsuperscript{114}

\textbf{B. Civil Law and Hybrid Law Countries}

Civil law countries do not have a rich jurisprudence on refugee issues like the common law countries, and their analysis of a “particular social group” is usually spare. According to a study of twenty EU states conducted by the European Council on Refugees and Exiles in 2008, “[l]egislation in Hungary, Ireland, Luxembourg, the Netherlands, Norway, Romania and Sweden requires \textit{only one of the criteria} from article 10 [of the Qualification Directive] (innate characteristic or social perception), in keeping with the majority view of international law.”\textsuperscript{115} Moreover, “Austria and Portugal apply this definition in jurisprudence.”\textsuperscript{116} Greece has not yet transposed the directive into national law but indicates that \textit{one} of the criteria is sufficient.\textsuperscript{117}

While the study suggests that Belgium, Czech Republic, France, Germany, Poland, Slovakia, and Slovenia require \textit{both} criteria to be met for a particular social group, a closer

\begin{footnotesize}
\footnotesize\textsuperscript{112} Refugee Appeal No. 1312/93 \textit{Re GJ} [1995], 1 NLR 387 (N.Z.), available at \url{http://www.refugee.org.nz/rsaa/text/docs/1312-93.htm}.


\footnotesize\textsuperscript{114} Refugee Appeal No. 1312/93 \textit{Re GJ} [1995], 1 NLR 387 (N.Z.).


\footnotesize\textsuperscript{116} \textit{Id.}

\footnotesize\textsuperscript{117} \textit{Id.} at 155

\end{footnotesize}
examination of these countries’ responses to the survey calls this categorization into question. For example, Belgium notes that “this interpretation is, in practise, flexible,” suggesting that both criteria are not truly requirements. In Poland, “various decisions both the Office for Aliens and the Refugee Board were not consistent in the interpretation of the particular social group concept.” Slovenia indicates that, before the Directive, “this aspect was not included in the assessment of ‘particular social group,’” so the actual practice remains to be seen. Cases from Germany, France and Belgium also call into question whether these three countries require both criteria in practice. Such cases are discussed below, along with South Africa, which has a hybrid legal system and does not require social perception to define a particular social group.

1. Germany

Judge Tiedemann of the Administrative Court in Frankfurt am Mein reports that “[t]here is no established interpretation of the Convention ground of social group in Germany.” He states that “[t]he German jurisprudence on the Convention ground ‘membership of a particular social group’ is very sparse,” and “[t]he few cases in which courts do make a statement concerning the question of a the social group ground are not illuminating.”

Some cases do, however, shed at least a little light on the analysis of German courts. In 1983, pre-Acosta, the Wiesbaden Administrative Court considered both popular perception and the perspective of an objective observer in determining that a homosexual from Iran belonged to

\[\text{Id. at 155-56.}\]
\[\text{Id. at 155.}\]
\[\text{Id. at 135; see also id. at 20.}\]
\[\text{Id.}\]
a particular social group based on his sexual orientation.\textsuperscript{123} Two post-\textit{Acosta} decisions, on the other hand, focused instead on internal characteristics. In 1988, the Federal Administrative Court observed that “homosexuality can be considered as an attribute that could be ground[s] for asylum, \textit{if it is an irreversible personal characteristic}.”\textsuperscript{124} Similarly, in 1993, the High Administrative Court “ruled that homosexuality as a ground for asylum is relevant only in cases of non-reversibility.”\textsuperscript{125} Thus, the German courts have focused on external perceptions in some cases and internal, immutable characteristics in others, even when examining the very same issue. Maryellen Fullerton confirms that different analytical approaches seem to “co-exist in German jurisprudence” without any attempt at “synthesis.”\textsuperscript{126}

According to the ECRE’s study, the Federal Ministry of Interior has interpreted Art. 10(1)(d) of the Minimum Qualification Directive to require both criteria, but Germany stresses that its own law contains more favorable provisions than the Directive.\textsuperscript{127} Germany considers persecution based solely on gender as persecution based on a “particular social group,” and has applied this principle to groups that are often \textit{not visible}, such as in cases involving female genital mutilation, forced marriage, honor crimes, and homosexuality.\textsuperscript{128} Moreover, Judge Tiedemann has explained that “the right of asylum will \textit{always} be granted in accordance with

\textsuperscript{123} Fullerton, \textit{supra} note 84, at 534 (citing Judgment of April 26, 1983, No. IV/I E 06244/81, Verwaltungsgericht Wiesbaden [Wiesbaden Administrative Court]).

\textsuperscript{124} See Case Abstract IJRL/004, 1 INT’L J. REF. L. 110 (1989); see also Tiedemann, \textit{supra} note 121, at para. 2.6; Refugee Appeal No. 1312/93 \textit{Re GJ} [1995], 1 NLR 387 (N.Z.), \textit{supra} note 112 (discussing the German cases mentioned here).

\textsuperscript{125} HÉLÈNE LAMBERT, SEEKING ASYLUM: COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES 82-83 (1995) (internal quotations omitted)

\textsuperscript{126} Fullerton, \textit{supra} note 84.

\textsuperscript{127} ECRE Studay, \textit{supra} note 115, at 133 (citing Guidelines issued by the Federal MOI on 13 October 2006).

\textsuperscript{128} Id. at 133-34. In rejecting the social visibility requirement, the Seventh Circuit reasoned that the BIA had found groups to be “particular social groups” without reference to social visibility in the past, citing cases involving female genital mutilation and homosexuality. \textit{See} Gatimi \textit{v.} Holder, 578 F.3d 611, 615-16 (7th Cir. 2009).
article 16a GG [German Constitution], if somebody is persecuted because of a personal characteristic which is unalterable for him . . . comparable to that of race or nationality (or religious belief).”

In practice, then, Germany grants asylum based on an immutable characteristic, even if that characteristic is not socially visible.

2. France

Like German jurisprudence, the decisions of La Commission Des Recours Des Refugies (CRR), the appeal body responsible for refugee status determinations in France, generally involve limited legal reasoning. A case called *Ourbih*, involving an Algerian transsexual, does, however, present a more analytic definition of a “particular social group.” There, the Conseil d’Etat, which is the highest administrative court, rejected the CCR’s decision to deny asylum, reasoning that the CCR had not properly examined the evidence to determine whether transsexuals were regarded as a social group in Algeria “by reason of the common characteristics which define them in the eyes of the authorities and of society.”

At first glance, this statement seems to combine both the protected characteristic and social perception approach. When the case was returned to the CCR for reconsideration, however, the CCR held on May 15, 1998 that “transsexuals in Algeria could constitute a particular social group because of a common characteristic that set them apart and exposed them

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129 See Tiedemann, supra note 121.
131 *Id.* at 281 (quoting the Conseil d’Etat’s decision in *Ourbih*) (translated from French).
to persecution that was tolerated by the authorities in Algeria.”  

A report prepared by Rodger Haines for the International Association of Refugee Law Judges confirms that the decision in *Ourbih* “liberalized the interpretation [of ‘a particular social group’], with only limited requirements beyond the persecution: a *group of common characteristics setting it apart from the rest of society*.“ The analysis in *Ourbih* “referred to German and US jurisprudence as well as Anglo-Saxon academic writing.”

During the past decade, the CCR has also been influenced by decisions from Canada and the United Kingdom in finding that former prostitutes comprise a particular social group based on a *former immutable status*, and that women who refuse to be forcibly married constitute a group based on their *common characteristics*. Neither former prostitutes nor women who refused to forcibly marry are necessarily socially visible, but they share an immutable characteristic. Thus, the French jurisprudence reflects the protected characteristics approach.

3. **Belgium**

Belgium also appears to follow the protected characteristics approach in practice. The decisions of the Permanent Refugee Appeals Commission (PRAC) “often refer to the Canadian

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132 *Id.* (citing *Ourbih*, CRR, SR, Decision No. 269875, May 15, 1998).


135 *Id.* at 45 (citing *M*, CRR, SR, Application No. 42394, October 17, 2003, which involved an applicant from the Dominican Republic who claimed that she was forced into prostitution in Haiti).

136 *Id.* at 45-46 (citing *Noreen Nazia*, CCR, SR, Application No. 444000, October 15, 2004, involving a woman from Pakistan who claimed that she had been forcibly married, and *Tas*, CCR, SR, Application No. 489014, March 4, 2005, involving a woman from Turkey who claimed that she was confined for refusing to marry).
Supreme Court’s opinion in Ward in order to stress the jurisprudential evolution regarding the scope given to ‘social group,’ quoting that ‘this evolution leads to [the conclusion] that the social group can be defined from the existence of inborn or immutable features, such as gender.”

Some PRAC decisions refer to English and French cases in interpreting the meaning of a “particular social group,” expressing “a concern to bring its interpretation of the notion of the refugee definition in line with those of other EU Members states.”

4. South Africa

South Africa has a hybrid legal system that combines Roman-Dutch civil law, English common law, and African customary law. In a reported decision, the High Court of South Africa (Transvaal Provincial Division) endorsed the three-part definition of a particular social group set forth by the Canadian Supreme Court in Ward, which, as discussed above, does not mention social perception. South Africa’s Refugee Appeal Board has also applied the protected characteristic approach embraced by Acosta, Shah and Islam, and Re GJ, all discussed above, in finding that homosexuals constitute a particular social group.

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The foregoing demonstrates an emerging consensus among countries that have addressed the issue that social visibility is not required to establish a “particular social group.” These foreign courts are clearly engaged in transnational dialogue, citing each other’s opinions (as well

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138 Id. at 25-26.
as the opinions of U.S. courts), drawing on one another’s reasoning, and reaching general agreement that a protected characteristic is sufficient to establish a particular social group.\(^{141}\)

The way that these courts have coalesced in their interpretation of a “particular social group” reflects an “evolutive interpretation” of that phrase. As judges of the European Court of Human Rights have explained with respect to the European Convention of Human Rights, “[a]n evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in the light of modern-day conditions.”\(^{142}\) Over time, the interpretation of a “particular social group” has evolved to focus on a protected characteristic.

Another way to view the evolving interpretation of a “particular social group” is as a “co-constitutive process,” which Melissa A. Waters articulates as shaped by “the twin concepts of norm export and norm convergence.”\(^{143}\) Along the lines of “norm export” that Waters describes, Acosta’s protected characteristic approach was formulated by the BIA and endorsed by U.S. courts, then picked up by courts in other countries and embedded in their own jurisprudence, as well as by the UNHCR, which adopted it in its guidelines, until it eventually became the dominant normative standard for defining a “particular social group.”\(^{144}\) This process reflects Acosta’s persuasive power and the U.S.’s prominent role in “norm export.” The foreign courts that picked up Acosta, modifying, interpreting and internalizing it, promoted “norm

\(^{141}\) See James C. Hathaway, The Rights of Refugees Under International Law 1-2 (2005) (“Senior appellate courts now routinely engage in an ongoing and quite extraordinary transnational judicial conversation about the scope of the refugee definition and have increasingly committed themselves to find common grounds.”).


\(^{144}\) See id. at 503 (“If the norm becomes sufficiently embedded in a large number of other domestic or international legal regimes, it becomes the dominant normative standard on a given issue.”).
convergence,” which Waters describes as “the tendency of domestic and international law to converge on a single, worldwide normative standard.”\textsuperscript{145} This norm convergence responded to the need for an international consensus on the meaning of a “particular social group,” while also reflecting an increased consciousness among courts of their role as participants in a transnational dialogue about the definition of a “refugee,” a dialogue actively encouraged by the International Association of Refugee Law Judges.\textsuperscript{146}

By introducing a new social visibility requirement for establishing a “particular social group” – a sudden and inexplicable departure from precedent -- the BIA undermines not only the internal consistency of U.S. asylum law, but also the transnational process of norm convergence. If courts view the Refugee Act in isolation from its international origins, they are much more likely to damage fragile, emerging international norms by giving deference to the BIA’s new rule. Consciously applying the principles of treaty interpretation and considering the views of our sister signatories represents a much better option than unconsciously wrecking havoc on the international stage. Rather than skirting challenging questions about how to weigh to the views of other parties to the Protocol, we must explore them.

\textbf{IV. CHALLENGS IN EXAMINING FOREIGN AUTHORITY IN TREATY INTERPRETATION}

Agreeing on the principle that courts ought to consider the interpretations of other states parties to an international treaty does little to alleviate the challenging legal questions that arise from that principle. As Guy Goodwin-Gill notes, the thesis that courts “ought to have some regard to relevant case law from the jurisdictions of other states party to the [Refugee]

\textsuperscript{145} Id.
\textsuperscript{146} “The [International Association of Refugee Law Judges (IARLJ)] was set up in 1995 to facilitate communication and dialogue between refugee law judges around the world in an attempt to develop consistent and coherent refugee jurisprudence.” Lambert, \textit{supra} note 134, at 7.
Convention . . . leaves many questions hanging, among them, what is ‘relevant’ case law, and to what purpose and how exactly is it to be put to use.” 147 Two additional issues that are unique to the interpretation of the Refugee Convention and Protocol involve what, if anything, U.S. courts should do with the interpretations the European Union, as it takes steps towards the creation of a Common European Asylum System, and how to treat the interpretations of UNHCR, which exercises state-like functions but obviously is not a state party. This section scratches the surface of some of these challenges.

**A. The Number and Nature of Foreign Authorities**

Of the 146 states parties to the Protocol, how many must express a point of view on the meaning of a “particular social group” in order to influence the U.S.’s interpretation? Are the interpretations of the countries discussed above sufficient? How much weight should they receive? What about states parties that have not yet had an opportunity to address the issue of social visibility? Should their silence be taken as agreement with the countries discussed above?

How one addresses these questions depends on whether one approaches the issue from the perspective of U.S. Supreme precedents or the interpretative rules in the Vienna Convention. As discussed above, the Supreme Court precedents refer generally to giving “weight” to our sister signatories’ interpretations of the treaties, without specifically requiring these views to be uniform or common to most states parties. In cases where the Supreme Court has examined the opinions of sister signatories to other treaties, such as the Warsaw Convention or the Hague Convention on the Civil Aspects of International Child Abduction, it usually considers only a handful of other countries. 148 Even if the interpretations of these countries are not uniform, the

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147 Goodwin-Gill, supra note 13, at 204.
148 The U.S. is by no means unique in this regard. The High Court of Australia, for example, Relied on the interpretations of just two countries – the United States and the United Kingdom –
Court has been persuaded where most of the foreign authority that it considered leaned in a particular direction. For example, the fact that French courts were “divided” did not deter the Court in *Abbott* from giving weight to the interpretations of other countries.\(^{149}\) Moreover, the Court has not expressed much concern about the “silent” signatories, those that have not yet had a chance to address the issue. Since the underlying principle is to promote uniform treaty interpretation, the relevant views are of countries that have already addressed the issue at hand. From this perspective, the silence of some (or even most) states parties does not pose an obstacle to examining the foreign authority that does exist.

The language of the Vienna Convention, on the other hand, carves out a more limited role for foreign authority under Article 31(3)(b), which refers to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”\(^{150}\) Richard Gardiner notes that while the word “any” indicates that not all states parties must engage in a given practice, the definite article “the” before parties suggests that all parties must be in agreement.\(^{151}\) To support this reading of the text, Gardiner relies on the International Law Commission, which reports that in drafting this provision, it “omitted the word in interpreting article 22 of the Vienna Convention on Diplomatic Relations, which protects diplomatic missions from impairments to their “dignity.” *See* Minister for Foreign Affairs and Trade v. Magno, 112 ALR 529, 37 FCR 298 (HC) at 337-37 (Aust.). Tasked with determining whether the erection of white crosses on public land near the Indonesian embassy in protest to the conduct of Indonesian authorities in East Timor was an impairment of the Indonesian mission’s “dignity,” the High Court emphasized principles of free speech over the purpose of the treaty provision, endorsing a narrow interpretation of “impairment of dignity.” The High Court noted that “[i]f the practices of the United States and the United Kingdom are insufficient to make a conclusive finding as to what ought to be the Australian interpretation of the Convention, they certainly provide influential examples of how two important democratic countries with experience in the field have interpreted it.” Thus, the High Court justified its reliance on the interpretations of only two states by highlighting their influence and prominence as democracies.

\(^{150}\) Vienna Convention, *supra* note 57, art. 31(3)(b) (emphasis added).
\(^{151}\) GARDINER, *supra* note 2, at 235-36.
‘all’ [before ‘parties’] merely to avoid any possible misconception that every party must individually have engaged in the practice where is suffices that it should have accepted the practice.”\textsuperscript{152} If one embraces this technical interpretation of Article 31(3)(b), then it would be impossible to use foreign authority in asylum cases as “subsequent practice.” As Goodwin-Gill explains, since many parties to the Convention and/or Protocol “do not have either a refugee status procedure or a related body of jurisprudence, judicial decisions are unlikely ever to present a picture of uniform and consistent interpretation common to all or most of the parties.”\textsuperscript{153}

However, even a technical reading of Article 31(3)(c) does not bar the consideration of foreign authority under Article 32, which permits recourse “to supplemental means of interpretation . . . in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”\textsuperscript{154} While Article 32 mentions the preparatory work of the treaty and the circumstances of its conclusion as examples of “supplementary means of interpretations,” it leaves the door open for consideration of other material, including judicial decisions.\textsuperscript{155} Reading Articles 31 and 32 together leads to a holistic approach under the Vienna Convention that more closely approximates the principles applied by the U.S. Supreme Court.\textsuperscript{156}

\begin{footnotes}
\footnote{152}{1966} Yearbook of the ILC, vol. II, 222 para. 15; see also GARDINER, supra note 2, at 236.}
\footnote{153}{Goodwin-Gill, supra note 13, at 209 n. 18.}
\footnote{154}{Vienna Convention, supra note 57, article 32}
\footnote{155}{See Goodwin-Gill supra note 13, at 209-10.}
Both the Supreme Court’s principle of giving “weight” and the holistic application of Articles 31 and 32 of the Vienna Convention suggest that the impact of foreign authority on treaty interpretation falls somewhere along a *sliding scale*, rather than providing either a binding interpretation or being totally negligible.\(^{157}\) Since the influence of foreign authority is not an all-or-nothing phenomenon, this Article proposes a combination of conditions and factors to help guide courts in selecting and weighing these foreign decisions.

1. **Conditions for Selecting Foreign Authorities**

Scholars writing about the selection of foreign authority have focused largely on the context of constitutional interpretation, proposing criteria that often do not apply to treaty interpretation. For example, the circumstances surrounding the drafting of the foreign state’s constitution, the economic and social characteristics of the foreign state, and a shared history with the foreign state, may be relevant factors in selecting foreign authorities to aid in interpreting treaties.

\(^{157}\) *Cf.* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 652-91 (2007) (examining the role of international human rights treaties, specifically the ICCPR, in constitutional interpretation in Australia, Canada, New Zealand, and the United States and finding that the interpretive techniques fall along a spectrum, from the modest use of human rights treaties as “gilding the lily” to a more dramatic harmonization of domestic constitutional law with human rights norms); *see also* Waters, *supra* note 26, at 643-46 (arguing that “[j]udicial participation in transnational judicial dialogue on constitutional interpretation is not a straightforward always/never, for/against proposition” and urging courts to adopt “a more nuanced analysis of ‘when’ and ‘where’ – that is, in which specific context, and using which specific interpretive techniques – citation to foreign authority may be appropriate”). Waters’ discussion of a “spectrum” or “range” in the use of human rights treaties in constitutional interpretation mirrors the “sliding scale” discussed here about the weight given to foreign authority in treaty interpretation. *See also* Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Address Before South African Constitutional Court (Feb. 7, 2006) (transcript available at [http://www.concourt.gov.za/site/ginsberg.html](http://www.concourt.gov.za/site/ginsberg.html)) (quoting Judge Patricia Wald as saying, “It’s hard for me to see that the use of foreign decisional law is an up-or-down proposition. I see it rather as a pool of potential and useful information and thought that must be mined with caution and restraint.”).
constitutional interpretation, but do not make much sense in the context of interpreting an international treaty. 158 A model proposed by Eric Posner and Cass Sunstein, however, does provide an extremely useful starting point. Posner and Sunstein argue that consulting the law of foreign states makes sense under the “Condorcet Jury Theorem, which says that under certain conditions, a widespread belief, accepted by a number of independent actors, is highly likely to be correct.”159 They explain the conditions that must be met for this theorem to apply. Adopting that model, this Article proposes three conditions for selecting foreign authority in interpreting the Refugee Convention and/or Protocol: (1) the foreign state must show good faith in complying with its obligations under the treaty; (2) the foreign source must address a similar problem; and (3) the foreign source must reflect an independent judgment.160

The first condition in Posner and Sunstein’s model requires that “a foreign state’s law must reflect a judgment based on that state's private information about how some question is best answered.”161 To have any value, the judgment must be “sincere,” reflecting the results of the state’s own aggregated research.162 Applying this condition to the asylum context, this Article proposes that courts should restrict the use of foreign authority to states that show a good faith effort to comply with their obligations under the Refugee Convention and/or Protocol. If a foreign state has not shown good faith in complying with the Refugee Convention or Protocol, then its interpretation cannot be presumed to be “sincere” in the sense that it would not necessarily reflect an honest assessment of eligibility for refugee status. Instead, the decision

158 See, e.g., Andrew Friedman, Beyond Cherry-Picking: Selection Criteria for the Use of Foreign Law in Domestic Constitutional Jurisprudence, 44 Suffolk U. L. Rev. 873 (2011); Jacob Foster, The Use of Foreign Law in Constitutional Interpretation, 45 U.S.F. L. Rev. 79 (2010).
160 Id.
161 Id. at 144.
162 Id. at 147-48.
might reflect a completely unrelated motive such as a xenophobic desire to exclude “others” or a
desire to conserve economic resources by not taking in refugees. Such motives would “mudd[y]
the informational value” of the foreign state’s “vote” for a particular interpretation.\textsuperscript{163}

The second condition indicates that for a foreign state’s interpretation to be relevant, it
“must address a problem that is similar to the problem before the domestic court.”\textsuperscript{164} Posner and Sunstein explain that “[t]his similarity condition refers not only to the facts . . . but also to the
legal principles, institutions and values of the foreign state.”\textsuperscript{165} In the context of interpreting the
Refugee Convention and Protocol, different legal principles in a foreign state may indeed render
the interpretive “vote” of a particular state less helpful or even irrelevant. How states interpret a
“particular social group” once again provides some good examples. In a study of Netherlands
refugee law, for instance, Thomas Spijkerboer observes that “just which of the five persecution
grounds is related to the persecution is virtually considered \textit{immaterial}.”\textsuperscript{166} He explains that
“[o]nce the discriminatory nature of the persecution has been established, the particular rubric
under which it falls is ‘of less importance.’”\textsuperscript{167} Thus, while Netherlands may end up granting
asylum in many of the same types of cases that would be decided in the U.S. on the social group
ground, it is not applying the same legal principles. Netherlands’ “vote” to define a “particular
social group” based on either a protected characteristic or social perception means little if it does
not even consider the protected ground relevant to its analysis.

\textsuperscript{163} \textit{Id.} at 147. Accordingly, Posner and Sunstein find that it would be wise to ignore laws that
“might reflect the choices of a tiny ruling elite,” \textit{Id.} at 148. For similar reasons, one could argue
that the selected countries should be democracies, based on the idea that democracies “are more
likely to incorporate information about what is true,” but Posner and Sunstein reject this
argument as “vulnerable.” They reason that nondemocracies enact some good laws and the
recognition of a norm by a nondemocracy may show that it is especially strong. \textit{Id.} at 159-60.
\textsuperscript{164} \textit{Id.} at 144.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} Thomas Spijkerboer, \textit{Gender and Refugee Status} 115 (2000).
\textsuperscript{167} \textit{Id.}
Another example is France, which requires the persecution to be part of the social group definition. In this respect, France’s interpretation flatly contradicts that of the United States and other countries, which have explicitly rejected defining the social groups in terms of the persecution, deeming such definitions “circular.” Since France’s interpretation suggests the operation of a different legal principle (one that conflates the elements of the refugee definition), courts should exercise caution in counting its interpretive “vote.” Germany also applies different legal principles because it usually addresses the types of asylum cases that would be decided under the “particular social group” ground under its own political asylum law, which is worded differently and does not incorporate the Convention’s definition of a “refugee.” In those cases, Germany is not analyzing a Convention term, so it is not really addressing the same legal issue. If there is a material difference between the foreign state’s statute and the refugee definition set forth in the Protocol, then it would be improper for domestic courts to compare the results.¹⁶⁸

The third condition regarding independent judgment is a critical part of Posner and Sunstein’s model. They demonstrate that if a foreign law exists “because the foreign state is mimicking some other state, then the law would not count as an independent vote.”¹⁶⁹ If a foreign state is just going with the flow in adopting a particular rule, then it is not adding any new information about the value of the rule. The lack of independent judgment can result in a “cascade,” where “there is far less reason to trust the judgments of many voters, or states,

¹⁶⁸ See Rebecca R. Zubaty, Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority, 54 UCLA L. REV. 1413, 1452 (2007) (“Where the text of the constitution or statute examined by the foreign court materially differs from the U.S. provision at issue, it is disingenuous to compare the results reached by the courts and the reasoning used to reach those results without acknowledging and addressing such differences.”).
¹⁶⁹ Id. at 144-45.
because the particular judgments of many or most do not add information.” As an example, Poser and Sunstein note that if former British colonies adopt British laws just because they are British or because the former colonies don’t have the time or resources to come of with new laws, then “the existence of identical British-derived legal rules in dozens of states provides no more information about the value of the rules than it would if they existed in only one state--Britain itself.”

Applying this reasoning to the asylum context, courts should be cautious about the interpretations of EU Member States that may have simply copied the EU’s official interpretation (e.g. the definition of “particular social group” set forth in the Qualification Directive) without exercising any independent judgment. While some states may have deliberated over the interpretations in the Directive, others may have assumed a passive role and just accepted the outcome of deliberations by others. Moreover, states may have adopted the Directive as a whole in the spirit of cooperation and harmonization, even though they disagreed with specific parts of it. In this respect, the interpretations of the EU and its Member States raise issues that parallel the ones Posner and Sunstein discuss regarding the interpretation of the European Court of Human Rights and parties to the European Convention. They note that “[m]any parties to the convention become parties in order to obtain the benefits of cooperation with other European countries . . . despite their doubts about particular rules or norms rather than because of them.” Domestic courts should therefore be especially cautious of the “cascade effect” when mere membership in a regional or international body compels a particular interpretation.

170 Id. at 160; see also Ganesh Sitaraman, The Use and Abuse of Foreign Law in Constitutional Interpretation, 32 HARV. J. L. & POL’Y 653, 684-85 (2009) (discussing problems with cascades).
171 Id. at 160.
172 Id. at 165 (emphasis added).
Likewise, courts should be cautious about states that go along with UNHCR’s interpretations without evaluating them on their own. While many states might adopt UNHCR’s interpretations only after going through a deliberate process, rendering their interpretations at least partially independent, other states may blindly endorse UNHCR’s interpretations, either because they are enormously deferential to UNHCR or because they have largely abdicated refugee status determination to UNHCR and have no interest in analyzing issues on their own. Interpretation issues specific to the role of the EU and UNHCR are discussed further in subparts B and C below.

2. Factors to Consider in Giving Weight to Foreign Authorities

In addition to incorporating the conditions set forth by Posner and Sunstein for selecting foreign authorities, this Article builds on their theory and the work of other scholars in proposing certain factors for domestic courts to consider in deciding how much weight to give to foreign authority. The Article proposes four factors for courts to consider when giving weight: (1) whether the foreign state is “specially affected” by asylum applications; (2) whether the foreign state has a well-developed body of asylum jurisprudence; (3) the persuasiveness of the foreign decisions; and (4) the precedential value of the foreign decision. These factors should be examined as a whole in determining how much weight to give a foreign authority.

a. Specially Affected States

While the law of treaties is premised on a legal equality of states that renders vast differences among them invisible, certain treaties affect some states far more than others.173 The

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173 CATHERINE BRÖLMANN, THE INSTITUTIONAL VEIL IN PUBLIC INTERNATIONAL LAW 3 (2007) ("The law of treaties . . . proceeds from the legal equality of actors. . . . This allows for the application of objective, ‘externa’ criteria, while divergent institutional characteristics and factual circumstances are rendered invisible to the general legal order. This is how in international law Lichtenstein and the United States are construed as being equal").
Refugee Convention and Protocol fall into this category. While these treaties have 145 and 146 states parties respectively, not every state is equally affected by asylum-seekers. The states that are “specially affected” (i.e. those that receive a large number of asylum applications) have the greatest amount of aggregate information, in the sense that they see the greatest number and variety of cases and are consequently exposed to the most fact patterns. Exposure to these concrete cases provides important context for interpreting challenges terms such as “membership in a particular social group.” Looking at “specially affected” states therefore helps give effect to the first condition that Posner and Sunstein describe, which emphasizes the conditions of the foreign state’s judgment, including the information that provides the basis for the foreign state decision.

For the past few years, South Africa has been, by far, the top destination for asylum-seekers, receiving 180,600 new asylum applications in 2010, about one-fifth of the 850,200 claims submitted worldwide.\textsuperscript{174} The country with the second highest number of asylum applications is the United States, which received about 54,300 new asylum applications in 2010, followed by France (48,100 claims), Germany (41,300 claims), Sweden (31,800 claims), Ecuador (31,400 claims), Malaysia (25,600 claims), the United Kingdom (22,600 claims), Canada (22,500 claims) and Belgium (21,800 claims).\textsuperscript{175} Malaysia is not a party to the Protocol,


\textsuperscript{175} \textit{Id.} at 42-43. It should be noted that the states with the greatest number of asylum applications differs dramatically from the states hosting the greatest number of refugees, since statistics for individual asylum applications do not reflect mass inflows of refugees or groups that have received refugee status on a prima facie basis. The vast majority (80%) of the world’s refugees are in the Global South, often in countries neighboring their own. Over 38% of the world’s refugees are in the Asia and Pacific region, about 20% are in Sub-Saharan Africa, 18% are in the
but the other nine countries are states parties. These top ten countries combined account for one-third of all asylum applications. Among industrialized nations, the top five countries (the United States, France, Germany, Sweden, and the United Kingdom) received 54% of asylum claims. The United States, France and Germany alone received 40% of these applications. These statistics show that asylum applications are highly concentrated in a limited number of countries.

While it may seem odd to pay particular attention to the interpretations of specially affected countries given the sovereign equality of states in international law, there is legal support for this position. The International Court of Justice, for instance, has recognized the importance of “specially affected States” in determining when a practice may become a rule of customary international law. Daniel H. Joyner specifically argues that the “specially affected States” rule derived from the ICJ’s decisions also applies to Article 31 of the Vienna Convention, permitting the agreements and practice of only some states to influence the interpretation of a

Middle East and North Africa, 15% are in Europe, and only 8% are in the Americas. See United Nations High Commissioner for Refugees, UNHCR Global Trends 2010 at 11. United Nations High Commissioner for Refugees, First Half of 2011: Asylum Levels and Trends in Industrialized Countries at 8. The top ten countries for asylum applications among UNHCR survey of 44 industrialized nations also include, in descending order from six to ten: Belgium, Canada, Italy, Switzerland, and Austria. Id. at 11. UNHCR, First Half of 2011: Asylum Levels and Trends in Industrialized Countries 8. See North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. Rep. 3, 42-43, paras 73-74 (Feb.20) (finding that a treaty provision did not have to exist for a long time in order to become a customary rule if endorsed by States whose interests are “specially affected,” which, in this case, included States with access or claims to the Continental Shelf, as long as the treaty reflected widespread and representative State practice); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 535-36 (July 8) (Weeramantry, J, dissenting) (recognizing that “[i]f the nuclear States are the States most affected, their contrary view is an important factor to be taken into account, even though numerically they constitute a small proportion (around 2.7 per cent) of the United Nations membership of 185 States,” but finding that States against which nuclear weapons may be used are also among the States most concerned)
treaty.  Other scholars similarly contend that “it is not simply a question of how many States participate in the practice, but also which States.” The notion that not all States have equal weight also finds support in the Restatement on Foreign Relations, which notes, “there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.” The Restatement further provides that “[f]ailure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law,” thereby confirming that some States are more important than others in evaluating State practice.

Giving more weight to the interpretations of “specially affected” states may be criticized as a thinly veiled attempt to favor the interpretations of powerful Western nations. Many scholars have noted how powerful, Western countries have much greater influence than developing countries on the creation of customary international law through “state practice.”

179 DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION (2009); see also Herman Meijers, How Is International Law Made?, 9 NETH. Y.B. INT’L L. 3, 5 (1978) (arguing that only the practice of “relevant” States is necessary to develop a customary rule); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 32-33 (2d ed. 1997) (arguing that weight should be given based on “the size of the State, the volume of its international relations, and, in general, the contribution that it makes to the development of international law”).


182 Id.

Some even criticize the role of powerful nations in creating international law as an imperialistic threat to the rights of developing countries.\textsuperscript{184} Since richer countries have more developed courts, published opinions that are written or translated into English, and the resources to make these opinions available online, they generally play a more influential role in shaping rules based on state practice.\textsuperscript{185} While these concerns are valid, the overlap between “specially affected states” and powerful states is not complete in the asylum context. As noted above, South Africa, which is neither a Western nation nor one that is categorized as “industrialized,” receives the greatest number of asylum application. Similarly, Ecuador, with the sixth highest number of asylum applications, is a developing nation in the Global South. Examining specially affected parties in the asylum context therefore opens the door to engage more deeply with the laws and interpretations of less powerful countries, rather than simply reinforcing the views of those that already dominate the international stage.

b. A Well-Developed Body of Refugee Law

The second factor relevant to deciding how much weight to give a foreign authority is whether the foreign state has a well-developed body of refugee law. This factor builds on the second and third conditions articulated by Posner and Sunstein. A country with a well-

\textsuperscript{184} See, e.g., Ernesto Hernández-López, \textit{Boumediene v. Bush and Guantanamo, Cuba: Does the “Empire Strike Back”?}, 62 SMU L. REV. 117, 139 (2009) (arguing that international law developed from “contexts of empire, colonization, and protectorates,” and that the norms of international law developed from state practices that “are often out outgrowth of European states, or more powerful states, expanding their influence worldwide”); Melissa Robbins, Comment, \textit{Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement}, 35 CAL. W. INT’L L.J. 274, 297-301 (2005) (arguing that giving more weight to the practice of powerful States will lead to the disappearance of developing countries’ rights).

developed body of refugee law is more likely to apply the same legal principles as the United States and avoid odd interpretations like France’s conflation of persecution with the protected ground. Moreover, the decisions of a foreign state with well-developed refugee jurisprudence are more likely to reflect independent judgment since the jurisprudence as a whole shows sound legal analysis with detailed explanations of how the courts arrived at their outcomes. Taking into consideration the state’s body of refugee law would also limit the influence of countries that have no functional refugee determination system, which is appropriate since an informed, independent judgment represents one of the conditions for using foreign authority.\textsuperscript{186}

While one might imagine that the category of “specially affected states” captures those that have the most well developed case law on asylum issues, this is not the case. For example, France and Germany are among the top five countries for asylum applications, but do not have well developed bodies of case law on asylum. Australia and New Zealand, on the other hand, have a highly sophisticated body of jurisprudence but receive a relatively small volume of asylum applications, with only 3,760 and 2,307 asylum cases pending respectively in 2010, around one-tenth the volume of the top ten countries listed above but have developed a highly

\textsuperscript{186} In this respect, the decision about where to look for foreign authority somewhat mirrors the analysis in forum selection, where courts review the “adequacy” of a foreign forum in determining whether or not to transfer a case abroad. Just as “the recognition of a minimum standard of international justice” governs issues of forum selection, U.S. courts could choose to give weight to countries that have a minimum level of procedure and substantive law on asylum issues. Annie-Marie Slaughter, \textit{A Global Community of Courts}, 44 HARV. INT’L L. J. 191, 211 (2003). While this consideration, too, could trigger accusations of political favoritism, Slaughter has pointed out that “contrary to appearances . . . adequate forum determinations do not turn on first world versus third world status.” \textit{Id.} at 211-12. She finds that decisions in that context actually turn on whether “a foreign legal system violates a minimum standard of transnational justice, such as through overt bias, systemic corruption, or denial of basic due process.” \textit{Id.} at 213.
sophisticated body of jurisprudence.\textsuperscript{187} The United States, Canada, and the United Kingdom would fall into both categories, receiving a high number of applications and having a rich body of jurisprudence.

c. **Persuasiveness of the Foreign Decision**

The third factor involves the persuasiveness of the foreign decision. This factor focuses on the substantive content of a specific decision, rather than general characteristics of the foreign state. Although the language of Article 31(b)(2) of the Vienna Convention underscores the importance of widespread agreement, just counting the number of states that endorse a given interpretation does not provide a completely satisfying method of analysis. The depth of the reasoning is obviously important.\textsuperscript{188} Assessing the reasons behind an interpretive trend or consensus is necessary to understand whether the interpretation is consistent with the text, object and purpose of the treaty, which are other critical parts of the analysis.

For example, the “protected characteristic” requirement for a “particular social group,” derived through the *ejusdem generis* principle, is closely connected to the text, object and purpose of the treaty, whereas the social visibility requirement is not.\textsuperscript{189} Where there are two different interpretations, one backed by strong, persuasive legal reasoning, and the other not, then courts should give more weight to the interpretation supported by sound legal analysis. The

\textsuperscript{187} UNHCR Statistical Yearbook 2010. One of the ways that Australia has reduced the number of individuals seeking asylum under its laws is by “excising” 4,891 places from its territory for the purpose of refugee status determination. In those places, the ordinary safeguards associated with the “onshore” domestic asylum system did not apply. See Michelle Foster, *A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s ‘Excised’ Territory*, 23 INT’L J. OF REFUGEE L. 583 (2011).

\textsuperscript{188} Cf. Zubaty, *supra* note 168, at 1441-47 (discussing the depth of reasoning as a relevant factor in using foreign law for purposes of constitutional interpretation).

two different tests for establishing a particular social group represent outcomes, but domestic courts should not blindly follow one outcome or another without understanding the process that led to that outcome. Giving weight to persuasive decisions also reinforces the condition requiring independent judgment, since the mere fact of consensus “could be the result of international arm-twisting, legitimacy-seeking or a simple tendency to fall into patterns by imitating the behavior of other states (‘acculturation’).”

d. Precedential Value of the Foreign Decision

Finally, the precedential value of a foreign decision is important. In discussing the use of foreign law in constitutional interpretation, Rebecca Zubaty argues that “where the reasoning of a judicial opinion is not a source of law in its own country, its reliability for the purposes of the reason-barrowing approach is thus called into question.” In the context of treaty interpretation, the issue isn’t just about reason-barrowing but about whether a decision really reflects the interpretation of that state party. If a decision has no precedential value, then it may reflect the interpretation of a certain judge in a given case, but there is nothing to say that another judge deciding a similar case the next day won’t decide differently, which says nothing about how the state party interprets the issue. Thus, either the judicial decision must be binding or there must be a sufficient number of decisions to show that the state party endorses that interpretation.

The majority in Olympic Airways implicitly recognized this principle in noting

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190 Vlad F. Perju, The Puzzling Parameters of the Foreign Law Debate, 2007 UTAH L. REV. 167, 180 (2007); see also Daniel Farber, The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History, 95 CAL. L. REV. 1335, 1362 (2007) (“Foreign law is also entitled to more weight when it is persuasively justified; and to less weight when it seems to reflect another country's peculiarities.”).
191 Zubaty, supra note 168, at 1447.
192 Rebecca Zubaty notes that the decisions of civil law courts “acquire de facto precedential weight where subsequent judges adhere to a particular judicial interpretation of a statute or a code over a period of many years.” Id. at 1447-48.
that the foreign authorities on which Justice Scalia relied were immediate appellate courts, rather than the highest courts in those countries. This Article does not argue that courts should only consider the interpretations of the highest courts, but that the higher the court and the greater the precedential value, the more weight the decision should carry. Returning to the example of how to interpret the definition of a “particular social group,” decisions from the highest courts in Canada, the United Kingdom, and Australia should carry more weight than decisions by refugee boards in some other countries.

B. The Interpretation of a Regional Body, such as the European Union

The EU is currently taking groundbreaking steps towards the creation of a Common European Asylum System (CEAS), which invites questions about whether the EU’s interpretation of the Refugee Convention and Protocol should count as “subsequent practice” or otherwise inform the interpretation of states parties. Should U.S. courts “give weight” to the interpretations of the EU, which is not a state party itself but is comprised of 27 states parties? Can the interpretations of the EU be attributed to its Member States, or must each Member State’s views be considered individually? These are critical issues for treaty interpretation, especially since the EU’s Member States received a total of 239,600 asylum applications in 2010, over a quarter of the applications submitted worldwide.\(^{193}\)

A starting point for addressing these questions is to understand what steps the EU has taken to interpret the Refugee Convention and Protocol at a supranational level. In 2004, the EU Council adopted the Minimum Qualification Directive, the first regional, legally binding instrument that provides interpretive guidance on eligibility for refugee status and subsidiary

\(^{193}\) UNHCR, First Half of 2011: Asylum Levels and Trends in Industrialized Countries 8. Europe as a whole, a continent with 38 countries, received 373,700 asylum claims, about 44% of the total number submitted worldwide and 73% of the claims submitted to industrialized nations, followed by Africa. Id.; see also UNHCR Statistical Yearbook 2010 at 42.
For example, the Directive explicates the meaning of “persecution” and each of the five protected grounds: race, religion, nationality, political opinions, and “membership in a protected social group.” The Directive also addresses issues such as persecution by non-state actors, internal relocation, exclusion from refugee status, and the cessation of refugee status. Under Article 38 of the Directive, Member States were required to conform their national laws and regulations to the minimum standards in the Directive by October 10, 2006. Member States could provide more favorable standards than the minimum if they so desired, as long as these standards remained compatible with the Directive.

Examining how Member States responded to this Directive is helpful in analyzing whether the interpretations of the EU should be attributed to them, as it reveals a yawning gap between agreement and practice. All EU Member States agreed to be bound by the Minimum Qualification Directive, indicating that they accepted its interpretations. Their practice, however, remains far removed from the harmonized ideal. When UNHCR studied the implementation of the Directive by five states in 2007, it discovered various levels of legislative transposition as well as various responses from the courts. Germany and Sweden, for example, had only partially transposed the Directive into national laws, and Greece had not transposed it at all. France had transposed the Directive back in 2003, before it was formally adopted, so it was missing some of the provisions from the final version.

195 Minimum Standards Qualification Directive, supra note 80, at art.9-10.
196 Minimum Standards Qualification Directive, supra note 80, at art. 6, art. 8, art. 11, art. 12.
198 Id.
Moreover, “some courts, on some specific issues, persisted with an interpretation based on established national practice incompatible with the Directive.”\textsuperscript{199} The study noted that “[i]n Greece and Sweden, court decisions occasionally referred to the Directive but there was no evident uniform approach by the authorities as to which articles of the Directive, if any, should be applied directly.”\textsuperscript{200} While Swedish court decisions commonly referred to the Directive, the Migration Board “did not refer to it at all,” and the Migration Court of Appeals “referred to it in general terms in some cases.”\textsuperscript{201} Similarly, German courts applied the Directive in some cases but not others.\textsuperscript{202}

A subsequent study in 2008 by the European Council on Refugees and Exile (ECRE) confirmed this incomplete and inconsistent application of the Directive on an even broader scale. Based on its survey of twenty EU countries, the ECRE found it “difficult to assess the general impact of the directive on the law and practice of the Member States, due to divergent approaches to transposition and a relative lack of case law.”\textsuperscript{203} Complicating matters, “[m]any provisions were not transposed literally, and some are mistranslated in national laws.”\textsuperscript{204} Rather than creating a new uniform, practice among Member States, the application of the directive “largely reflects pre-existing practice, with a few notable exceptions.”\textsuperscript{205} In fact, the study’s “overarching conclusion” was that “considerable scope remains for future harmonisation.”\textsuperscript{206}

\begin{flushright}
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{202} Id. at 37.
\textsuperscript{203} ECRE Study, supra note 115, at 4.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 6.
\textsuperscript{206} Id. at 7.
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The interpretation of the Qualification Directive itself is also contested, with the meaning of “particular social group” providing a good example. As discussed above, the House of Lords interpreted art. 10(1)(d) of the Directive to be consistent with the UNHCR Guidelines, providing two alternative ways to establish a particular social group. The ECRE, however, critiques the Directive for “allow[ing] Member States to define ‘particular social group’ restrictively, as requiring that applicants both share an innate characteristic that cannot be changed and be perceived as a distinct group by the surrounding society.” The ECRE observed that “fortunately, many states interpret their obligations more broadly, requiring the fulfillment of only one of these criteria,” and encouraged all states to “use the flexibility afforded by the words ‘in particular’ in article 10(1)(d) to grant protection based on either an innate characteristic or social perception, rather than requiring both.” The contested interpretation of “particular social group,” as defined by the Directive, shows that the national courts will continue to play an important role in interpreting and applying EU laws.

As Helene Lambert observes, based on a study of nine EU countries, “the success of the harmonization, as a tool for international protection in the EU, substantially depends on the development of common judicial understanding, principles and norms concerning refugee matters.”

In light of these studies, courts cannot assume that the EU’s interpretation reflects the actual interpretation or practice of its Member States, even if those Member States have agreed to comply with the EU’s interpretation. While Member States are “bound by an important asylum acquis, . . . large discrepancies between asylum decisions (even within similar caseloads)
still exist.”\textsuperscript{211} Even after the adoption of the Minimum Qualification Directive, “the chances of an individual asylum-seeker to find protection in the EU can vary nearly seventy-fold, depending on where he or she applies.”\textsuperscript{212} This discrepancy is, in part, because the Qualification Directive sets a \textit{minimum floor}, but states are free to offer more favorable standards.\textsuperscript{213} Looking \textit{only} at the Qualification Directive therefore obscures the more favorable norms in many states and could hide patterns of providing greater protection that would be relevant to treaty interpretation. The Qualification Directive also provides only \textit{general} guidance, leaving many specific interpretive issues to be resolved by the courts.

Compounding matters, the EU’s own interpretations remain in flux. The EU amended the Minimum Standards Qualification Directive in December 2011, and Member States must now incorporate the amended version into their national laws by December 21, 2013.\textsuperscript{214} Three Member States have opted out of the amended Directive: the United Kingdom, Ireland, and Denmark.\textsuperscript{215} By not opting out, the other Member States have agreed to comply with the

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  \item \textsuperscript{211} 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 [hereinafter Policy Plan on Asylum], § 4, COM (2008) 360 final (June 17, 2008).
  \item \textsuperscript{213} Id. at 219.
  \item \textsuperscript{214} European Council of Refugees and Exiles, Qualification Directive: Latest Developments, available at \url{http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html}.
\end{itemize}
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Qualification Directive. Given Member States’ responses to the initial Directive, however, it seems unlikely that the amended version will lead to genuine harmonization before courts have an opportunity to address a myriad of issues and begin to take each other’s views seriously.

Besides being cautious about generalizing from the EU’s interpretation to the interpretations of its Member States, U.S. courts should be wary that some of the EU’s interpretations have been criticized as conflicting with the Refugee Convention and Protocol. For example, Maria O’Sullivan argues that Article 7 of the Qualification Directive conflicts with the Convention by allowing a broad array of non-state actors, including temporary/transitional entities or multinational troops, to provide protection from persecution or serious harm. In addition, “ECRE and UNHCR have taken the position that some of the directive’s provisions do not reflect the 1951 Refugee Convention, and have urged states to adopt higher standards.”

If the EU’s interpretations are attributed to its Member States, any errors would be magnified,

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216 Agreement may be implied from the absence of action, such as the decision not to opt out. The European Court of Human Rights, for example, has construed the absence of derogations under article 15 of the European Convention on Human Rights as demonstrating understanding and agreement among NATO states that they could not be held responsible for military action that occurred outside of their jurisdictions. See Bankovic & Others v. Belgium & Others, Application No. 52207/99, Decision on Admissibility, 12 December 2001 (addressing whether the individual states that participated in NATO’s military action in Serbia could be held responsible for violating the European Convention on Human Rights); see also GARDINER, supra note 2, at 234 (“The ECtHR has viewed consistent absence of action, where measures might have been expected, as practice indicative of interpretative agreement.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES, §102 cmt. (c) (1987) (“Inaction may constitute state practice”).

217 Lambert, supra note 134, at 14 (finding that “a general belief exists among judges that other EU countries’ practice is not worth referring to”) (emphasis added). According to Lambert, “the role of transnational jurisprudence (and therefore of national courts and tribunals as decision-makers) is in fact essential to the establishment of a truly ‘common’ European asylum system.” Id. at 9.


219 ECRE Study, supra note 115, at 4
having a dangerous cascade-like effect on treaty interpretation worldwide as other countries give weight to the EU’s erroneous interpretation.

The trend towards greater exclusionism in Europe, driven, in part, by xenophobia, should also be noted by courts when examining the interpretations of our sister signatories in the EU. Recognition of increasing exclusionism among some of the EU’s Member States was actually one of the catalysts behind creating a Common European Asylum System. The European Commission’s Policy Plan on Asylum specifically noted border control mechanisms that “lack the necessary mechanisms to identify potential asylum seekers.” Ironically, however, various components of the Common European Asylum System are now actually creating a zone of exclusion.

In sum, the EU’s movement towards a Common European Asylum System signals the potential for expedited norm convergence, which could be both beneficial and dangerous for treaty interpretation. If the EU eventually speaks with one voice on asylum issues, and that voice reflects the actual interpretation and practice of its member states, ascertaining the views of a number of our sister signatories will become much easier, especially with respect to civil law countries where the legal reasoning is often sparse and difficult to decipher. By promoting norm convergence and propelling treaty interpretation in a particular direction, the EU has the potential to help lift standards across the board, promote interpretations that are more protective of refugee

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221 Policy Plan on Asylum, supra note 211, at § 2.1.2.1.
223 See Lambert, supra note 134, at 16 (stating “it is now strongly believed that the communitarization of asylum/refugee law is forcing change more rapidly”).
rights and consistent with international human rights principles, and enhance equality in the asylum process.\textsuperscript{224} However, the EU also has the potential to drive interpretation in the opposite direction, lowering standards (as has already happened in some areas as a result of the Minimum Qualification Directive), narrowing the scope of protection, and excluding ever-greater numbers of people from international protection.\textsuperscript{225} At this point, U.S. courts cannot attribute the interpretations of the EU to its member states, but they should watch for areas of greater convergence over time and remain mindful of whether those development represent a progression or regression of current standards for international protection.

\textbf{C. The Interpretation of UNHCR}

While one might assume that “subsequent practice” under Article 31(3)(b) of the Vienna Convention refers to the practice of the parties, the language is actually quite vague, simply referencing “\textit{any subsequent practice} in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”\textsuperscript{226} As Gardiner notes, “[t]his does not say \textit{whose practice} is to be taken into account.”\textsuperscript{227} He explains:

A reasonable expectation is that relevant practice will usually be that of those on whom the obligation of performance falls, but obviously this depends on the nature of the obligation and treaty provision in issue. Hence where states by treaty entrust performance of activities to an organization, how those activities are conducted can constitute practice under the treaty . . . \textsuperscript{228}

\textsuperscript{224} The EU specifies that not only the Geneva Convention, but also “the evolving jurisprudence of the European Court of Human Rights (EChtHR) and the full respect of the Charter of Fundamental Rights and Freedoms will be a constant reference for this [asylum policy] strategy.” Policy Plan on Asylum, \textit{supra} note 211, at § 2.
\textsuperscript{225} See ECRE Study, \textit{supra} note 115, at 5 (“In [some] areas, \textit{implementation appears to have lowered standards, mostly around the definition of a particular social group, or insufficient safeguards against refoulement}.”).
\textsuperscript{226} Vienna Convention, \textit{supra} note 57, at art. 31(3)(c) (emphasis added).
\textsuperscript{227} GARDINER, \textit{supra} note 2, at 246 (emphasis added).
\textsuperscript{228} \textit{Id.}
This explanation invites the question of whether UNHCR’s interpretations may constitute “subsequent practice.” In many countries that are parties to the Convention and/or Protocol, the obligation of performing refugee status determination falls on UNHCR, rather than on the state. States have entrusted UNHCR to perform this function, either through Memoranda of Understanding or simply based on the provisions of the Convention and Protocol requiring them to cooperate with UNHCR and facilitate its duty of supervising the applications of the treaty.229

In this situation, where states parties have effectively delegated their job of interpreting the Convention and/or Protocol to UNHCR, one could argue that Article 31 permits the interpretation of UNHCR to constitute “subsequent practice” as long as it reflects the agreement of the parties.230 One could further argue that such agreement should be presumed based on the obligation to cooperate with UNHCR. The advantage of this argument would be the ability to give UNHCR’s interpretations more weight in the course of treaty interpretation. However, there are also serious concerns with treating UNHCR as a de facto state, even if only for the

229See Refugee Convention, supra note 1, at art. 35; Protocol, supra note 1, at art. II; see also Alice Farmer, Refugee Responses, State-Like Behavior, and Accountability for Human Rights Violations: A Case Study of Sexual Violence in Guinea’s Refugee Camps, 9 YALE HUM. RTS. & DEV. L.J. 44, 76-77 (2006) (“UNHCR has signed certain memoranda of understanding with the host government [Guinea] that allow it to take on certain state-like functions in running the camps. The transfer of power from the government to UNHCR Supports the state-like character of UNHCR’s operations. . . . In both its supervisory and direct-service provision roles, UNHCR takes on many functions normally attributed to a government.”).

230This reading of Article 31(3)(c) comports with decisions of the ICJ, which has recognized that the “output of an international organization has the potential to constitute subsequent practice for the purposes of the Vienna rules.” GARDINER, supra note 2, at 248 (discussing Legality of the Use by a State of Nuclear Weapons in Armed Conflict, [1996] ICJ Reports 66 (July 8)). Since UNHCR is technically a subsidiary body of the General Assembly, rather than an international organization, it is also worth noting that the ICJ has “recognized that interpretation may evolve through the political organs of the U.N.” Id. at 249 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Reports 136 at 149-50, paras 27-28).
purpose of treaty interpretation. This section first explains UNHCR’s role in refugee status
determination (RSD) and then analyzes both sides of this argument.

UNHCR performs RSD in countries that are not parties to the Convention or Protocol, as
well as in states parties where: (1) asylum determination procedures have not yet been
established; (2) the national determination process is “manifestly inadequate”; or (3) the national
determinations are based on an “erroneous interpretation” of the Convention.231 In 2010,
UNHCR bore sole responsibility for RSD in 46 countries, receiving a total of 96,800
applications, and shared responsibility with states in 21 countries, jointly accepting 6,200
applications.232 Thus, UNHCR processes about twice as many applications as the United States.
UNHCR’s top ten offices for new asylum claims include five countries that are parties to the
Convention and Protocol: Kenya (with 19,300 new asylum claims lodged in 2010), Turkey
(9,200 claims), Yemen (3,700 claims), Cameroon (3,300 claims), and Egypt (2,600 claims).233

In these five countries, as well as other in other states parties where UNHCR has a strong
presence, UNHCR has assumed many of the functions traditionally performed by the state.234
Yemen, for example, had absolutely no governmental office to handle refugee affairs until 2010,
when it finally established a Bureau of Refugees, and it still lacks any national refugee

232 UNHCR, *UNHCR Statistical Yearbook 2010* at 41.
233 UNHCR, *Global Trends 2010* at 26. The other five countries that are not party to the
Convention or Protocol are Malaysia (25,600 claims), India (4,000 claims), Indonesia (3,900
claims), Syria (3,200 claims), and Jordan (2,900 claims). Id.
& POL. 869, 873 (2005) (stating that UNHCR performs “state-like functions”). As Pallis notes,
various scholars have stressed UNHCR’s state-like role in attempting to hold it accountable
under international human rights law. See, e.g., Ralph Wilde, *Quis Custodiet Ipsos Custodes?:
Why and How UNHCR Governance of ‘Development’ Refugee Camps Should be Subject to
International Human Rights Law*, 1 Yale Hum. RTS. & DEV. L.J. 107, 119 (1998); G.
Verdirame, *The Accountability of the United Nations for Violations of Human Rights*
72 (2007).

With respect to Cameroon, UNHCR reports that “[t]he non-implementation of the 2005 Refugee Act compels UNHCR to assume responsibility for all registration, refugee status determination (RSD) and documentation activities in the urban context.”\footnote{UNHCR, 2012 \textit{UNHCR Country Operations Profile – Cameroon}, available at \url{http://www.unhcr.org/cgi-bin/texis/vtx/page?page=4a03e1926}.} UNHCR plans to “focus on building the capacity of government partners to take on RSD responsibilities in a gradual manner.”\footnote{Id.} In Turkey, the transfer of responsibility is further along, but authorities “have almost routinely been adopting UNHCR’s decisions.”\footnote{Maja Smrkolj, \textit{International Institutions and Individualized Decision-Making: An Example of UNHCR’s Refugee Status Determination}, 9 \textit{GERMAN L.J.} 1779, 1778 (2008).} Moreover, UNHCR has taken on traditionally governmental functions by being “intensively engaged” in drafting Turkey’s first-ever asylum law, which should be adopted in 2012.\footnote{UNHCR, 2012 \textit{UNHCR Country Operations Profile—Turkey}, available at \url{http://www.unhcr.org/pages/49e48e0fa7f.html}.}

Similarly, one of UNHCR’s main objectives in Kenya is the development of a national refugee policy, as well as revised refugee legislation.\footnote{UNHCR, 2012 \textit{UNHCR Country Operations Profile – Kenya}, available at \url{http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483a16}.} UNHCR has also “assumed the adjudicatory role” in RSD in Kenya, “[r]ather than acting as an advocate for the asylum-seeker

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\item\footnote{UNHCR, 2012 \textit{Country Operations Profile – Yemen}, available at \url{http://www.unhcr.org/pages/49e486ba6.html}.}
\item\footnote{UNHCR, 2012 \textit{UNHCR Country Operations Profile – Cameroon}, available at \url{http://www.unhcr.org/cgi-bin/texis/vtx/page?page=4a03e1926}.}
\item\footnote{Id.}
\item\footnote{Maja Smrkolj, \textit{International Institutions and Individualized Decision-Making: An Example of UNHCR’s Refugee Status Determination}, 9 \textit{GERMAN L.J.} 1779, 1778 (2008).}
\item\footnote{UNHCR, 2012 \textit{UNHCR Country Operations Profile—Turkey}, available at \url{http://www.unhcr.org/pages/49e48e0fa7f.html}.}
\item\footnote{UNHCR, 2012 \textit{UNHCR Country Operations Profile – Kenya}, available at \url{http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483a16}.}
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and monitoring a national administration process for determining asylum status.”

Moreover, UNHCR and its partner NGOs take “full responsibility” for managing refugee camps in Kenya, with UNHCR “assum[ing] de facto sovereignty over them.” In short, the Kenyan government has “completely relinquished responsibility” and “handed over control over refugee matters to UNHCR and to foreign humanitarian organizations.”

Since these states, and many others like them, have delegated the responsibility of interpreting and applying international standards to UNHCR, one could argue that UNHCR’s interpretation should “stand in” for the interpretation of the state. In some cases, this transfer of responsibility may take the form of “a tacit quid pro quo” between UNHCR and certain governments, whereby the government accedes to the refugee convention and, in return, UNHCR agrees to bear the cost of identifying eligible refugees. The state-like quality of UNHCR, however, comes not only from its assumption of key responsibilities in RSD, but also its “care and maintenance” model, which “create[s] a widespread perception that the

243 Id. (emphasis added).
244 Id. at 18-19 (2005) (emphasis added); see also Volker Turk & Elizabeth Eyster, Strengthening Accountability in UNHCR, 22 INT’L J. REF. L. 159, 164 (2010) (“In some situations, particularly in Africa, the Middle East and certain parts of Asia, the capacity of the authorities to protect and care for refugees and other populations of concern is often weak or even nonexistent. As a result, UNHCR often ends up in a state substitution role, albeit with inadequate means and no control over areas of state power and governance.”); Amy Slaughter and Jeff Crisp, A surrogate State? The Role of UNHCR in Protracted Refugee Situations, New Issues in Refugee Research, EPAU Working Papers, Research Paper no. 168 at 2 (2009) (“the notion of ‘state responsibility’ (that is, the principle that governments have primary responsibility for the welfare of refugees on their territory) has become weak in its application, while UNHCR and its humanitarian partners have assumed a progressively wider range of long-term refugee responsibilities, even in countries which are signatories to the 1951 Refugee Convention and which are members of the organization’s governing body, the Executive Committee”).
245 Pallis, supra note 234, at 877; see also VERDIRAME AND HARRALL-BOND, supra note 242 113 (“Governments . . . resented what they perceived, at some level, to be a usurpation of power, but were also relieved not to have to deal with the ‘problem.’”).
organization [is] a surrogate state, complete with its own territory (refugee camps), citizens (refugees), public services (education, health care, water, sanitation, and so forth) and even ideology (community participation, gender equality).”^246

Assuming, for the moment, that UNHCR’s interpretation may constitute “subsequent practice,” one would still have to show that it establishes the agreement of the states parties. Such agreement could be inferred from Article 35 of the Convention or Article II of the Protocol, which create a “nexus between UNHCR’s role and the obligations of states.”^247 As mentioned in Part I above, Article 35 of the Convention provides that states parties “undertake to co-operate” with UNHCR “in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”^248 Article II of the Protocol imposes the same obligation. UNHCR relies on these provisions, as well as on its founding Statute, as legal justification for giving interpretative guidance to governments. Unlike treaties that require the consent of states parties prior to intervention by an international organization, Article 35 of the Convention and Article II of the Protocol have been construed as allowing UNHCR to perform its functions, including refugee status determination, without an invitation from the state.^249 Thus, simply by ratifying the Convention and/or Protocol, countries arguably agree to follow UNHCR’s interpretations.^250

^246 Turk & Eyster, supra note 244, at 165.
^248 Refugee Convention, supra note 1, at art. 35.
^250 See Id. at 613, 627 (“[A]s part of States Parties’ duty to cooperate with UNHCR and to accept its supervisory role under Article 35 of the 1951 Convention and article II of the 1967 Protocol, they have to take into account Executive Committee Conclusions, the UNHCR Handbook,
Another argument one could make is that UNHCR’s interpretations reflect state practice. Due to its presence on the ground in so many countries, UNHCR can directly observe decision-making, as well as access statistics and other information that provide a more complete picture of state practice than could reasonably be obtained by reviewing decisions from individual countries one at a time. Some scholars therefore take the perspective that “the [UNHCR] Handbook records the practice of states parties to the Convention.”

Certain courts have also endorsed this perspective. For example, in interpreting the provision of the Qualification Directive pertaining to the cessation of refugee status, the European Court of Justice did not examine state practice on a state-by-state basis, but instead commented that “state practice has been aptly summed up by the UNHCR.” The House of Lords also endorsed this approach in relying on the UNHCR Handbook to provide guidance on the issue of persecution by non-State actors. The Lords reasoned that “[w]hile the Handbook is not by any means itself a source of law, many signatory States have accepted the guidance which on their behalf the UNHCR was asked to provide, and in those circumstances it constitutes, in

UNHCR guidelines, and other UNHCR positions on matters of law (for example amicus curiae and similar submissions to courts ...), when applying the 1951 Convention and its Protocol.”).  

251 GARDINER, supra note 2, at 249 n. 138; see also Arthur C. Helton, Refugee Protection Under International Law, C399 ALI-ABA 59 91989) (stating that “soft law” sources such as the UNHCR Handbook can be “evidence of state practice”).  

252 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/98, Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi and Dler Jamal v. Bundesrepublik Deutschland. The ECJ’s assertion may not, however, be accurate, as various scholars have pointed out conflicts between UNHCR’s interpretation of the cessation clauses and the interpretations of other states. See Marissa Elizabeth Cwik, Forced to Flee and Forced to Repatriate? How the Cessation Clause of Article 1C(5) and (6) of the 1951 Refugee Convention Operates in International Law and Practice, 44 VAND. J. TRANSNAT’L L. 711, 726-27 (2011) (discussing differences among UNHCR’s interpretation of the cessation clauses and the interpretation of the High Court of Australia, Germany and the ECJ).
our judgment, *good evidence of what has come to be international practice* within Art. 31(3)(b) of the Vienna Convention.\(^{253}\)

Lower courts, however, have not always followed this rationale. In one case, the U.K. Immigration Appeals Tribunal noted that the UNHCR Handbook “*is not necessarily a guide to state practice*, because it may not relate to state practice in any particular paragraph but more to UNHCR’s exhortations.”\(^{254}\) This point is well taken, as not all of UNHCR’s guidelines reflect actual state practice; some are clearly intended to mold state practice in a particular direction.

The Federal Administrative Court of Germany has likewise found that various statements from the UNHCR, including its guidelines addressing the cessation of refugee status, “*provide no indication of an existence of uniform national practices.*”\(^{255}\) The Court noted that, “[t]o the extent that they point out that the framework for substantive analysis takes account of ‘State practice’ . . . there is no indication of the actual existence of a uniform state practice.”\(^{256}\) In rejecting the argument that the Conclusions of UNHCR’s Executive Committee reflect state practice, the Court stressed that “only 68 (and thus less than half) of the Member States of the Geneva Refugee Convention belong to the Executive Committee.”\(^{257}\) The Court further observed that the Conclusions “*did not even reflect the state practice of the states that are members of the Executive Committee [as] shown by the fact that Germany belongs to the

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\(^{253}\) R v. Secretary of State for the Home Department, ex parte Adan [2001] 2 AC 477, 500 (emphasis added).


\(^{256}\) *Id.* at 567.

\(^{257}\) *Id.*
committee, yet according to the UNHCR Germany has never conformed to its requirements in practice.”

James Hathaway and other refugee scholars have also accused UNHCR of institutional overreaching, making assertions allegedly based on state practice when the existence of such practice is far from clear. For example, Hathaway notes that while UNHCR has urged a broad interpretation of the Convention’s provisions related to cessation of refugee status, claiming that this interpretation “reflects a general humanitarian principle that is now well-grounded in State Practice,” in the same document UNHCR concedes a paucity of relevant state practice, acknowledging that “declarations [of cessation due to changed conditions] are infrequent.”

While Hathaway agrees that the interpretations of UNHCR deserve “a measure of deference” and that the Handbook “has had immense influence on state practice,” he also provides examples of cases where UNHCR’s interpretation conflicts with the interpretations of courts and where the latter may be more persuasive. For example, Hathaway observes that courts in the United Kingdom, the United States and Canada have all challenged UNHCR’s interpretation of the exclusion of persons who have committed serious nonpolitical crimes under Article 1(F) of the Convention. He finds it doubtful that UNHCR’s interpretation “will survive in state practice” given the “logically compelling” judicial trend to the contrary.

Concerns raised by other scholars about UNHCR also weigh against giving weight to its interpretations in the same way that courts should give weight to the interpretations of a state

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258 Id.
261 Id. at 313.
262 Id.
party. One such concern is that UNHCR frequently does not follow its own standards.\textsuperscript{263} UNHCR has violated both the procedural and substantive rights of refugees, especially in developing countries. With respect to procedural rights, Michael Kagan and others have critiqued UNHCR for failing to provide an explanation of its decisions during RSD, denying refugees access to information about their case, and lacking an effective and independent mechanism of appeal.\textsuperscript{264} Thus, “UNHCR’s RSD procedures lack many of the safeguards that are normally expected in government-run procedures, and hence create a risk of errant decisions that could leave \textit{bona fide} refugees unprotected.”\textsuperscript{265}

The substantive critiques are even more stinging. Guglielmo Verdirame and Barbara Harrell-Bond write that “[i]n Africa and throughout countries in the ‘developing world’... unlike Europe and North America, UNHCR’s work was never protection driven.”\textsuperscript{266} They contend that “the most harmful consequence of the diminution of protection in its institutional ethos and its procedures was that UNHCR staff and programmes had become \textit{almost impervious to arguments based on the law}. “\textsuperscript{267} If UNHCR itself doesn’t make law-based determinations in

\begin{itemize}
\item \textsuperscript{265} Id. at 48. UNHCR has attempted to address some of these problems by issuing procedural standards for RSD. See UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate (September 2005), 1-2, available at: http://www.unhcr.org/publ/PUBL/4316f0c02.html.
\item \textsuperscript{266} Verdirame and Harrell-Bond, supra note 242, at 289.
\item \textsuperscript{267} Id. at 290; see also id. at 291 (noting that UNHCR’s practice does not comport to the “plethora of documents (handbooks, guidelines, and so on)” that it produces).
\end{itemize}
practice, this undercuts the authority of its formal legal interpretations, as set forth in its guidelines and other interpretive materials.

UNHCR’s failure to follow its own standards received international attention in *D and others v. Turkey*, where the European Court of Human Rights rejected UNHCR’s reasons for denying protection. The case involved a woman from Iran who had been sentenced to flogging for the offense of fornication.\(^ {268}\) The punishment had been repeatedly postponed, due to her medical condition, but the authorities eventually decided “that the lashing would take place in two sessions, with 50 blows per session,” rather than 100 lashes at once.\(^ {269}\) Before the punishment could take place, the woman fled to Turkey with her husband and applied for asylum. In denying her application, UNHCR reasoned that, under Iran’s Penal Code, the punishment would be reduced due to her medical condition, and would be “no more than ‘symbolic’ in nature.”\(^ {270}\) Turkey agreed with UNHCR’s decision and ordered the couple deported.

The European Court of Human Rights rejected UNHCR’s analysis. First, the Court found that UNHCR’s reasoning “[did] not rest on any guarantee obtained from the Iranian authorities.” Second, there was no evidence in the file showing that the applicant suffered from the sort of fatal illness required by the Iranian Penal Code to avoid severe corporal punishment.\(^ {271}\) Most importantly, the Court stressed that “even one blow . . . does not reduce the

\(^{268}\) *D and Others v. Turkey*, App. No. 24245/03, ¶12 (Eur. Ct. H.R. June 6, 2006), available at http://www.RSDWatch.org (unofficial translation). The couple was married, but the woman’s family opposed her marriage to a Sunni Muslim and had the marriage nullified for violating Shi’ite Sharia Law. Although the woman’s father subsequently consented to her being married under Shi’ite custom, the authorities still wanted to administer the punishment of 100 lashes each for having sex before marriage.

\(^{269}\) *Id.* at para 50.

\(^{270}\) *Id.* at para. 51.

\(^{271}\) *Id.* at para. 51.
nature of the penalty in question to ‘symbolic’ nor does it change its qualification as ‘inhumane.’”\textsuperscript{272} Emphasizing how the punishment would violate “the \textit{dignity and integrity both physical and psychic} of the person,” the Court found that deportation to Iran would violate Article 3 of the European Convention on Human Rights, which prohibits inhuman and degrading treatment.\textsuperscript{273} The Court’s decision not only cut down UNHCR’s callous analysis, but also “highlight[s] the fact that states are themselves responsible for observing their treaty obligations, regardless of whether or not they rely on other actors.”\textsuperscript{274}

Some of the substantive critiques go even further than UNHCR’s failure to provide sound legal decisions, implicating the organization in serious human rights violations. For example, UNHCR has been criticized for repatriating refugees to dangerous situations, such as returning the Rohingyas, a Burmese Muslims minority, to Burma after they fled to Bangladesh.\textsuperscript{275} UNHCR has also failed to protect refugees from sexual violence in its camps. Despite emphasizing the importance of protecting vulnerable groups, especially women, and promoting gender-inclusive interpretations of the Refugee Convention, UNHCR’s operation of refugee camps in Guinea “systematically disadvantaged women and left them vulnerable to sexual violence.”\textsuperscript{276} Alice Farmer observes that “UNHCR has yet to establish a general oversight

\textsuperscript{272} Id. at para. 51.
\textsuperscript{273} Id. at para. 51 (emphasis added).
\textsuperscript{274} Marjoleine Zieck, \textit{UNHCR and Turkey, and Beyond: Of Parallel Tracks and Symptomatic Cracks}, 22 \textsc{Int’l J. Refugee L.} 593, 605 (2010).
mechanism to provide accountability for the behavior of its staff and volunteers in the field in Guinea or elsewhere in the region."

These types of violations, both procedural and substantive, suggest that UNHCR cannot fulfill the functions expected of a state, including “[e]nforcement, access to justice and accountability.” UNHCR’s lack of accountability under international law, as a non-state actor, is, in fact, one of the biggest reasons not to treat it like a *de facto* state. While commentators have proposed various avenues for trying to hold UNHCR accountable, cobbling together creative paths towards greater oversight of its actions and increased human rights obligations, there remains, in practice, little or no accountability.

Moreover, UNHCR itself has resisted being saddled with state-like obligations. UNHCR has repeatedly emphasized that the primary responsibility for refugees lies with the

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277 *Id.* at 67.

278 *Id.* at 73 (arguing that in Guinea, “[e]ach member of the trio of aid providers - the government, NGOs, and UNHCR - performs vital state-like functions. *And yet no member of the trio functions fully as a state*”) (emphasis added).


280 Turk & Eyster, *supra* note 244, at 163 (arguing that “the main responsibility for safeguarding the rights of refugees lies with states, not least because of the fundamental responsibility of states to guarantee the human rights of everyone (including non-citizens) subject to their jurisdiction and within their territory”).
state and that it only exercises authority on a transitional basis.\textsuperscript{281} Citing its own limited resources and lack of legal authority, UNHCR maintains that it cannot, and should not, be seen as a substitute for the state. UNHCR perceives its relationship with the Government as one of “active cooperation” and “ensuring that Governments take the necessary action.”\textsuperscript{282} This position is a wise one, as one of the most compelling argument against treating UNHCR as a \textit{de facto} state is that this posture would weaken both UNHCR’s and governments’ abilities to “promote respect for refugee law.”\textsuperscript{283} As UNHCR’s role becomes more prominent, the notion of state responsibility withers.\textsuperscript{284} Giving UNHCR too much authority can therefore indirectly undermine the Convention and Protocol’s goal of promoting \textit{state} responsibility for the protection of refugees.

Currently, the role of UNHCR’s interpretations in U.S. asylum adjudications remains unclear. While U.S. courts do frequently consult UNHCR’s \textit{Handbook} in asylum cases, they have otherwise “displayed no coherency in their use of UNHCR views published elsewhere, relying on its advisory opinions or amicus briefs as an aid to treaty interpretation in some cases

\begin{footnotes}
\textsuperscript{281} \textit{See}, e.g., UNHCR, Note on International Protection, A/AC.96/930 (7 July 2000), at para. 2. (‘While the main responsibility for safeguarding the rights of refugees lies with States, UNHCR's statutory role is to assist governments to take the necessary measures, starting with asylum and ending with the realization of durable solutions.’); UNHCR Note on International Protection, A/AC.96/830, (7 September 1994), at para. 13 (“Since sovereign States have the primary responsibility for respecting and ensuring the fundamental rights of everyone within their territory and subject to their jurisdiction, effective protection of refugees requires action by the Government of the country of asylum on their behalf.”)
\textsuperscript{283} \textit{VERDIRARME \& HARRELL-BOND}, supra note 242, at 113 (arguing that “by assuming responsibility for status determination UNHCR weakened its ability to promote respect for refugee law”).
\textsuperscript{284} Turk and Eyster, \textit{supra} note 244, at 164 (“the notion of state responsibility was weakened further, while UNHCR assumed (and was perceived to assume) an increasingly important and even preeminent role”).
\end{footnotes}
and simply ignoring its views in others.”\textsuperscript{285} Courts would do well to clarify the role of UNHCR and to consider its views with greater consistency as they approach asylum cases from the more rigorous angle of interpreting an international treaty. Courts should exercise great caution, however, before giving UNHCR’s views the same weight as state practice. As discussed above, UNHCR’s interpretations sometimes reflect states practice and sometimes don’t, and there is often a gap between UNHCR’s legal interpretations and its own actions on the ground. These gaps make it difficult to bridge “subsequent practice” with “the agreement of the parties.” Moreover, allowing UNHCR’s interpretations to “stand in” for the interpretations of the state creates a slippery slope towards affirming states’ abdication of responsibilities to UNHCR and risks giving weight to practices that may conflict with the procedural and substantive norms expected of states, especially since UNHCR is rarely held accountable for its decisions.

CONCLUSION

While the U.S. Supreme Court requires adjudicators to give weight to the views of our sister signatories when interpreting an international treaty, this principle has failed to take hold in the area of refugee law. One reason for this failure is the nature of an incorporative statute, which veils the underlying treaty. Across Europe, where states’ international obligations towards refugees have likewise been transposed into national laws, the same pattern emerges, with judges “rarely use[ing] each other’s decisions within the EU.”\textsuperscript{286} This Article urges U.S. judges to pierce the veil of an incorporative statute and treat the Refugee Protocol like any other treaty that triggers the principle of giving weight to the interpretations of our sister signatories. In so doing,

\textsuperscript{285} Farbenblum, \textit{supra} note 7, at 1077.  
\textsuperscript{286} Lambert, \textit{supra} note 134, at 8 (emphasis added).
U.S. courts can promote a more harmonized understanding of what it means to be a refugee and encourage transnational solutions to a transnational problem.

The United States is one of the largest recipients of refugees in the world, with one of the most developed and influential bodies of case law on asylum. As such, it has the potential to play a powerful role in promoting uniformity among states parties to the Protocol and give effect to Congress’s goals of complying with our international obligations. Active participation in the dialogue among nations regarding the interpretation of the Refugee Convention and Protocol is, however, essential to achieving this goal. Certainly, dialogue has its costs. Language barriers, difficulty accessing foreign decisions, lack of familiarity with other legal systems, and time constraints all pose practical challenges to transnational dialogue.\textsuperscript{287} A cultural mindset about the utility of foreign authority may also create an “exaggerated sense of the barriers to dialogue,” despite clear guidance from the Supreme Court.\textsuperscript{288} This Article has also stressed the new, unique challenge posed for treaty interpretation by the EU’s recent steps towards a regional asylum system, as well as the longstanding issue (still unresolved among U.S. courts) about the role and relevance of UNHCR’s interpretations. The greatest cost, however, would come from allowing these challenges to silence a conversation about the meaning of the Refugee Convention that has been percolating for the past sixty years.

Such silence would impede the development of evolving norms, resulting in a stale Convention, leaving millions vulnerable who might otherwise have been protected. Such silence would also reflect an abdication of the U.S.’s role in shaping refugee standards worldwide. If U.S. courts do not cite the decisions of our sister signatories, they will soon stop citing us, since judges generally refer to precedents from countries with which they have “reciprocal

\textsuperscript{287} Lambert, \textit{supra} note 134, at 12.  
\textsuperscript{288} \textit{Id.} at 13.
relations.” In the long term, this will mean that U.S. jurisprudence will be less influential and play a much smaller role in shaping the interpretations of other countries. Rather than exporting our norms, we will bury them within. Indeed, the international influence of the U.S. Supreme Court has already diminished due to its general reluctance to engage foreign authority in other areas.

There is no sound reason for this loss when refugee law has the potential to be the centerpiece of transnational dialogue in the realm of treaty interpretation, due to its “fundamentally judicialized” nature. In the U.S., asylum cases make up a huge percentage of the dockets in several circuits, so high-ranking judges on the U.S. Courts of Appeal have abundant opportunities to consider foreign authority on refugee issues. The more familiar this process becomes as part of judicial review, the easier it will be, as foreign decisions will become better known among the judiciary and comparative research will not have to be done from scratch for each case.

Considering foreign authority would not only foster greater conformity among states parties, promoting more efficient norm convergence, but it would also improve the analysis in

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289 Id. at 15.
290 See Adam Liptak, Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa, N.Y. Times, Apr. 12, 2009, at A14 (noting Justice Ginsburg’s view that “the failure to engage foreign decisions [has] resulted in diminished influence for the U.S. Supreme Court”); Claire L-Heureux-Dubé, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, 34 TULSA L.J. 15, 37 (1998) (the former Justice of the Canadian Supreme Court opines that “the failure of the United States Supreme Court to take part in the international dialogue among the courts of the world, particularly on human rights issues, is contributing to a growing isolation and diminished influence. . . . [T]his tendency to look inward may well make the judgments of U.S. courts increasingly less relevant internationally.”).
291 James C. Hathaway, A Forum for the Transnational Development of Refugee Law: The IARLS’s Advanced Refugee Law Workshop, 15 INT’L J. REFUGEE L. at 418 (2003); see also Lambert at 4 (asserting that refugee law “has evolved mostly under the influence of judges” and arguing that it “provides tremendous opportunity in terms of seeking a greater transnational judicial role”).
asylum decisions and help give effect to Congress’s goal of promoting human rights and humanitarian concerns. Courts should therefore close the gap between the principles of treaty interpretation and their practice in asylum cases by giving weight to the views of our sister signatories to the Protocol.