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The Role of Foreign Authorities in U.S. Asylum Adjudication

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THE ROLE OF FOREIGN AUTHORITIES IN U.S. ASYLUM ADJUDICATION

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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. This 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," the Article demonstrates the utility of a comparative analysis even when our sister signatories' interpretations are not uniform. 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; and how courts should treat the interpretations of the United Nations High Commissioner for Refugees. 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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I. INTRODUCTION

United States asylum law binds a domestic statute, the Refugee Act of 1980, to an international treaty, the 1967 Protocol Relating to the Status of Refugees ("Protocol"). The statute directly incorporates key parts of the treaty, including the definition of a "refugee."[1] When U.S. courts adjudicate asylum cases, they usually focus on the domestic statute, applying the rules for statutory interpretation and ignoring the incorporated treaty. This method of interpretation results in a significant omission: Courts routinely fail to consider the interpretations of our sister signatories, despite the Supreme Court's position that those interpretations are entitled to considerable weight.[2] Taking into account the interpretations of other States Parties is necessary to promote uniform application of a contract among nations. By failing to engage in this comparative analysis, U.S. courts risk undermining the process of norm convergence and contributing to the fragmentation of refugee law.

This Article contends that U.S. courts should examine the interpretations of our sister signatories to the Protocol when analyzing incorporative parts of the Refugee Act by providing a specific example of how this would work in practice and proposing a framework for selecting and weighing foreign authorities.[3] Part II provides background about the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol, and their relationship to U.S. domestic law. Part III explains the

1. The definition of a "refugee" in the Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) incorporates the definition in the Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol]. The Protocol, in turn, substantively incorporates the Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

2. *See* Abbott v. Abbott, 130 S.Ct. 1983, 1993 (2010) ("the opinions of our sister signatories [should be] entitled to considerable weight" in interpreting a treaty) (quoting Air France v. Saks, 470 U.S. 392, 404 (1985); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999)).

3. This argument draws on John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655 (2010).

basic rules of treaty interpretation under both the Vienna Convention on the Law of Treaties (VCLT) and Supreme Court precedents, focusing on the role that foreign authorities play under both sources of law and examining how they relate to each other. This Part also demonstrates that while the principle of giving weight to the interpretations of our sister signatories is well established in Supreme Court precedents, confusion and disagreement persists regarding how to select and weigh foreign authorities. After explaining the role of foreign authorities in direct treaty interpretation, Part III argues that the same interpretive rules apply to an incorporative statute such as the Refugee Act and that courts usually make the same mistake of failing to consider the views of our sister signatories in this context.

In Part IV, the Article provides a comparative analysis of a current controversy related to the definition of a "refugee" that has resulted in a circuit split: whether "social visibility" (or social perception) is required to establish a "particular social group," one of the most ambiguous terms in the refugee definition.[4] The Refugee Convention provides, in relevant part, that a refugee is someone who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, *membership of a particular social group* or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[5] The U.S. statute reflects essentially the same definition.[6] By examining trends in other signatories' approaches to interpreting a "particular social group," the different ways that some contracting parties have interpreted and applied the concept of social perception, and how a social perception approach has impacted the development of refugee

4. *See infra* notes 122–123 and accompanying text.

5. Refugee Convention, *supra* note 1, art. 1, ¶ A(2); Protocol, *supra* note 1, art. I, ¶ 2.

6. INA § 101(a)(42)(A), 8 U.S.C. § 1101 (a)(42)(A) (defining a refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); *see also* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:2 (2011).

law in the countries that have adopted it, Part IV demonstrates the utility of a comparative analysis for U.S. courts even when the interpretations of our sister signatories are not uniform.

Part V addresses the gap between the principle of giving weight to our sister signatories' interpretations and the actual practice of U.S. courts by providing a framework for selecting and weighing foreign authorities. This section sets forth three conditions that should be satisfied as "ground rules" for selection, as well as several factors to consider in determining how much weight to give a particular interpretation. After setting forth this framework, Part V addresses what weight, if any, should be given to the interpretations of a regional body, the European Union (EU), which has recently taken groundbreaking steps towards creating a common asylum system, and addresses whether the interpretations of the United Nations High Commissioner for Refugees (UNHCR) should factor into the comparative analysis. The Article highlights problems with attributing the EU's interpretations to its Member States and cautions against treating UNHCR as a state party. Finally, Part V addresses concerns that giving weight to foreign authority may weaken the protection given to asylum seekers in the United States.

Incorporative statutes are rare creatures in U.S. law and surprisingly little scholarship has addressed them, although "they arguably represent the most straightforward, most democratic, and least controversial means of incorporating international law currently available."[7] This Article contributes to that small but growing body of scholarship by exploring the role that foreign authority should play in U.S. asylum adjudication.

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7. *See* Coyle, *supra* note 3, at 660–61 ("[T]he 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) ("[T]he Refugee Act is one of a small number of incorporative statutes that directly incorporate international treaty language and concepts into U.S. domestic law."). Other examples of incorporative statutes include 9 U.S.C. § 207 (2006) giving effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 25 U.S.T. 2517, 330 U.N.T.S. 3, which is commonly known as the New York Convention, and the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936), (codified at 46 U.S.C. § 30701 (2011)), which mirrors the text of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155.

Since immigration appeals constitute about one out of six cases on the federal appellate docket, with asylum and related cases comprising a substantial portion of those appeals, decisions regarding what body of interpretive rules to apply to asylum appeals can have life or death consequences for thousands of individuals.[8] In short, the issues discussed here are not merely abstract arguments about treaty interpretation. They have the most visceral of consequences for the asylum seekers involved.

II. Background on the Refugee Convention and Protocol and Their Relationship to Domestic Law

When the United Nations was created in the aftermath of World War II, it had to address the plight of millions of displaced people throughout Europe, many of whom did not wish to return to their countries of origin. In 1949, the UNHCR was established as a subsidiary organ of the General Assembly.[9] Its mandate, which has expanded over time, involves providing international protection and seeking permanent solutions for refugees.[10] In 1951, U.N. member states adopted the Convention Relating to the Status of Refugees, which forms the foundation of international refugee law.[11] The Refugee Convention was developed in an era of emerging concern for the protection of international human rights.[12] Its

8. *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication,* 59 Duke L.J. 1635, 1646 (2010) (providing the percentage of combined caseloads of the courts of appeals that are petitions for review of immigration appeals). In the Second and Ninth Circuits, immigration appeals comprise about one-third of the docket. *Id.* at 1647.

9. Refugees and Stateless Persons, G.A. Res. 319 (IV), U.N. Doc. A/RES/319(IV) (Dec. 3, 1949); Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (Dec. 14, 1950).

10. UNHCR, An Introduction to International Protection 7–8 (2005), *available at* http://www.unhcr.org/3ae6bd5a0.pdf.

11. Refugee Convention, *supra* note 1.

12. Other milestones in the development of international human rights law that occurred within a few years of the Refugee Convention include: the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; and the four Geneva Conventions on the laws of war—Geneva Convention for the

Preamble explicitly references the Universal Declaration of Human Rights and "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."[13] In defining who qualifies as a refugee and establishing minimum standards of protection, the Refugee Convention "represents a milestone in the emergence of a global will to address problems of forced displacement."[14]

Since the Refugee Convention was a response to the human rights atrocities that occurred in Europe during World War II, it was limited in its reach to individuals who became refugees as a result of events that took place before 1951, and states had the option of limiting the Convention's application to events that occurred in Europe.[15] As additional refugee crises developed around the world, however, it became clear that more widespread protection was required. The massive refugee movements that occurred during the turbulent process of decolonizing Africa in the 1960s, in particular, spurred the international community to take further action.[16] In 1967, the United Nations adopted a Protocol Relating to the Status of Refugees, which requires parties to comply with Articles 2 through 34 of the Refugee Convention and removes the temporal and geographic restrictions on the definition of a "refugee."[17] The Protocol, like the Convention, requires parties to cooperate with UNHCR and facilitate its duties of supervision.[18]

The United States ratified the Protocol in 1968 but took over a decade to conform its practices to the Protocol.[19] Before Congress passed the Refugee Act of 1980, U.S. refugee

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Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

13. Refugee Convention, *supra* note 1, pmbl.

14. UNHCR, *supra* note 10, at 9.

15. Refugee Convention, *supra* note 1, art. 1, ¶¶ A(2)–B.

16. UNHCR, *supra* note 10, at 9.

17. Protocol, *supra* note 1, art I, ¶¶ 1–3.

18. *Id.*, art II.

19. *See* ANKER, *supra* note 6, § 1.1 (discussing the history of U.S. asylum law).

determinations were largely *ad hoc*.[20] The Refugee Act of 1980 amended the Immigration and Nationality Act of 1965 ("INA") to include a definition of a "refugee" that is "virtually identical to the one prescribed by Article 1(2) of the Convention"[21] and to establish an alternative, mandatory form of relief called withholding of removal, which reflects the international norm of *non-refoulement* by prohibiting the return of an individual to a country where her life or freedom would be threatened.[22] The legislative history of the Refugee Act of 1980 explicitly states that Congress intended to conform U.S. domestic law to the nation's international obligations under the Protocol[23] and give "statutory meaning to our national commitment to human rights and humanitarian concerns."[24] The Supreme Court has confirmed Congress's intent to actualize our international obligations based on the legislative history of the Refugee Act and the adoption of a definition of "refugee" that mirrors the definition in the Protocol.[25]

After Congress enacted the Refugee Act of 1980, another decade passed before regulations created a specially trained group of asylum officers with the authority to grant asylum in

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20. *Id.*; *see also* Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

21. INS v. Cardoza-Fonseca, 480 U.S. 421, 437 (1987).

22. ANKER, *supra* note 6, § 1.3; INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2011) (defining a "refugee"); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (providing for withholding of removal); *see also* Farbenblum, *supra* note 7, at 1070–73 (describing asylum and withholding of removal as two forms of domestic relief based on the Refugee Convention).

23. H.R. REP. NO. 96-608, at 18 (1979) (describing the amendments as necessary "so that U.S. statutory law clearly reflects our legal obligations under international agreements"). The House Judicial Committee deemed it "both necessary and desirable that United States domestic law include [Article 33 of the Convention]" in the withholding of deportation provision of the statute and found it "desirable, for the sake of clarity, to conform the language of that section to the Convention." *Id.*; *see also* Farbenblum, *supra* note 7, at 1068–70 (discussing how Congress intended congruence between the Refugee Act of 1980 and the Convention).

24. S. REP. NO. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144; *see also* In re S-P-, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (quoting the same language from the congressional report).

25. *Cardoza-Fonseca*, 480 U.S. at 436–37 (finding that in enacting the Refugee Act of 1980, Congress intended "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").

individual cases.[26] Asylum officers determine eligibility in cases where the applicants are not in removal proceedings. If asylum is not granted, the case is generally referred to immigration court, where an immigration judge provides *de novo* adjudication of the asylum application in removal proceedings. There are over fifty immigration courts throughout the United States. Decisions by immigration judges are appealable to an agency called the Board of Immigration Appeals ("BIA"), which, along with the immigration courts, is part of the Executive Office for Immigration Review within the Department of Justice. Decisions by the BIA can be appealed directly to the U.S. Courts of Appeals.[27] If a federal appellate court disagrees with the BIA's interpretation, the court's interpretation becomes binding on all cases arising within its jurisdiction, but the BIA's interpretation still governs cases arising in other jurisdictions. The BIA therefore plays a crucial role in either promoting or undermining uniformity in U.S. asylum adjudication.

Recognizing that U.S. refugee law is rooted in an international treaty and incorporates key provisions of that treaty is the starting point for understanding why the interpretations of other contracting parties to the Protocol are relevant to domestic asylum cases. How the BIA and federal courts should give meaning to these international obligations when adjudicating asylum cases is the focus of this Article.

III. THE ROLE OF FOREIGN AUTHORITY IN INTERPRETING TREATIES AND INCORPORATIVE STATUTES

This Part analyzes the role of interpretations by our sister signatories under both the VCLT and U.S. Supreme Court precedents. Section A explores the potential for using foreign authority as a form of subsequent practice under Article 31 of the VCLT, as well as a supplementary means of interpretation under Article 32 of the VCLT, arguing that the latter is the more realistic approach. The discussion in Section B then shows that the principle adopted by the Supreme Court, which provides that the interpretations of our sister signatories are

26. ANKER, *supra* note 6, § 1.3.

27. The location of the immigration court that made the initial determination in the case dictates which U.S. Court of Appeals has jurisdiction over the appeal.

"entitled to considerable weight," makes comparative analysis mandatory, giving teeth to the otherwise optional use of foreign authority as a supplementary means of interpretation. Yet, despite providing strong support for this principle, Supreme Court decisions point to persistent areas of confusion and disagreement about how to select and weigh foreign authorities, which may explain the reluctance of lower courts to engage in such analysis and flags a need for further guidance. Section C contends that these same rules of treaty interpretation apply to an incorporative statute and that courts are remiss in not considering the views of other contracting parties to the Protocol when adjudicating asylum cases.

A. *The Role of Foreign Authority Under the Vienna Convention on the Law of Treaties*

The rules of treaty interpretation are set forth in Articles 31 and 32 of the VCLT.[28] Although the United States has not ratified the VCLT, it is widely accepted as customary international law and often applied as such by U.S. courts.[29] 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."[30] 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 estab-

28. Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

29. *See, e.g.*, Gonzalez v. Gutierrez, 311 F.3d 942, 949 n.15 (9th Cir. 2002) ("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"), *abrogated on other grounds by* Abbott v. Abbott, 130 S.Ct. 1983 (2010); Fujitsu Ltd. v. Fed. Express 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"); Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1296 n.40 (11th Cir. 1999) ("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.") (quoting Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638 n.9 (5th Cir. 1994))); 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 ever appealed to the Vienna Convention for an independent and controlling rule of decision.").

30. VCLT, *supra* note 28, art. 31, ¶ 1.

lishes the agreement of the parties regarding its interpretation."[31] This language indicates that examining subsequent practice is a required step in treaty interpretation. 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.[32] The International Court of Justice has confirmed the importance of subsequent practice in treaty interpretation, explaining, "it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[33] This emphasis on subsequent practice reflects how treaties are closer to contracts than to legislation, requiring mutual understanding and agreement among the signatories.[34] According to one commentator, "concordant practice of the parties is [the] *best evidence* of their correct interpretation" of a treaty.[35]

Subsequent practice may include judicial decisions or legislative acts that reflect a consistent interpretation among contracting parties.[36] As a practical matter, however, it is usually extremely difficult to demonstrate subsequent practice through such unilateral domestic action.[37] Establishing subse-

31. *Id.*, art. 31, ¶ 3(b) (emphasis added).

32. RICHARD K. GARDINER, TREATY INTERPRETATION 225 (2008).

33. Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, ¶ 49 (Dec. 13).

34. GARDINER, *supra* note 32, at 225.

35. *Id.* (emphasis added).

36. *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 204, 209–10, 218 (Guy S. Goodwin-Gill & Hélène Lambert, eds. 2010) (noting that national court decisions may indicate subsequent practice so long as they are common to or accepted by all parties); *see also* Klaus Ferdinand Gärditz, International Decisions, *Article 36: Vienna Convention on Consular Relations*, 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 Law of Treaties."); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 649–50 (1998) (describing domestic courts as important "law-declaring fora" that define and interpret the norms of international law).

37. *See* Alexander M. Feldman, Note, *Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement*, 41 N.Y.U. J. INT'L L. & POL. 655, 663–64 (2009) (explaining that subsequent practice in general has proved difficult to determine and apply). Recognizing the need to develop greater understanding about the role that subse-

quent practice involves showing "a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation."[38] While not *all* contracting parties must engage in a practice to show that it is "common" and "concordant," the actions of just a few parties normally will not suffice.[39] One of the most complex questions in analyzing subsequent practice is how to treat parties that are silent or do not react to a given practice.[40] As a general matter, silence alone is insufficient to infer a party's agreement with a practice.[41] But when a party has been made aware of a practice that calls for reaction and fails to react, agreement may be inferred.[42] Overt disagreement, on the other

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quent practice and agreement play for treaty interpretation, the International Law Commission established a Study Group on this topic in 2008 and appointed Georg Nolte, who was the Chair of the Study Group, as a Special Rapporteur in 2012. Mr. Nolte's introductory report on subsequent practice and agreement demonstrated that the jurisprudence of the ICJ and arbitral tribunals of *ad hoc* jurisdiction "does not permit a comprehensive assessment of the matter, leaves certain *lacunae*, and even raises new questions." GEORG NOLTE, INTERNATIONAL LAW COMMISSION STUDY GROUP ON TREATIES OVER TIME, INTRODUCTORY REPORT: JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE AND ARBITRAL TRIBUNALS OF *Ad Hoc* Jurisdiction Relating to Subsequent Agreements and Subsequent Practice 4 (2010), *available at* http://www.auswaertiges-amt.de/cae/servlet/contentblob/582682/publicationFile/156231/NolteTreatiesOverTime1.pdf); *see also* Rep. of the Int'l Law Comm'n, 65th Sess., May 3–June 4, July 5–Aug. 6, 2010, U.N. Doc. A/65/10, U.N. GAOR, 65th Sess., at 334 (2010) (describing the discussions of the Study Group).

38. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* 11, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11AB/R (Oct. 4, 1996).

39. *See* Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 259, WT/DS269/AB/R, WT/DS269/AB/R (Sept. 12, 2005) [hereinafter *Chicken Cuts* Appellate Body Report] (discussing the requirements for establishing a "concordant, common, and discernible pattern").

40. NOLTE, *supra* note 37, at 32.

41. *See Chicken Cuts* Appellate Body Report, *supra* note 39, ¶ 272 (expressing "misgivings about deducing, without further inquiry, agreement with a practice from a party's '*lack of reaction*'") (emphasis added); Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, ¶¶ 64–68 (Dec. 13) (holding that agreement could not be inferred from a state's failure to react to the findings of a joint commission of experts regarding a disputed matter).

42. *See, e.g.*, *Chicken Cuts* Appellate Body Report, *supra* note 39, ¶ 272 (explaining that in specific situations, "the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be un-

hand, undercuts the existence of a "concordant" and "consistent" practice.[43] It is difficult to establish subsequent practice based on domestic judicial decisions or legislative acts simply because it is unlikely that either the jurists or legislators in a substantial number of contracting parties to a major treaty have addressed a particular issue in a completely consistent way and, even if they had, it would be hard to interpret the silence of the remaining parties as evidence of agreement with that interpretation. The silent parties may not be aware of the jurisprudence or legislation in other countries and, even if aware of these public pronouncements, most likely could not be expected to react to them.[44]

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derstood as acceptance of the practice of other treaty parties," such as when a party has been made aware of the practice of other parties but does not react to it); Temple of Preah Vihear (Cambodia v. Thai.), 1962 I.C.J. 6, 23 (June 15) (holding that a state acquiesced to a map where it was "clear that the circumstances were such as called for some reaction, within a reasonable period" and the state did not raise any serious questions or disagree with the map); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 395, ¶¶ 36–39 (Nov. 26) (finding agreement based on silence combined with other evidence); Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 4, 209 ("[N]o objection was taken before the King of Spain to his proceeding with the arbitration on the ground that the Gámez-Gomilla Treaty had already expired."); Beagle Channel (Arg. v. Chile), 21 R.I.A.A. 55, ¶¶ 172–74 (Feb. 18, 1977) (holding that the silence of Argentina permitted the inference that it agreed to acts of jurisdiction by Chile over certain islands); *see also* NOLTE, *supra* note 37, at 33–36 (discussing judicial decisions that inferred agreement from silence).

43. *See* Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 7.218, WT/DS294/R (Oct. 31, 2005) (indicating that any disagreement undermines subsequent practice by reasoning that "even if it were established conclusively that all 76 Members referred to by the European Communities have adopted a practice of applying Article 2.4.2 to duty assessment, this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States" and noting that a third party to the proceedings had contested the view of the European Communities).

44. *See* NOLTE, *supra* note 37, at 33 (discussing how judicial bodies have been reluctant to accept domestic parliamentary proceedings and documents as evidence of subsequent practice because other parties to the treaty could not be expected to react to such proceedings and documents even if they were aware of them); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625, ¶ 48 (finding that although a map inscribed with a boundary line comprised part of the legislative documents transmitted to the British government, Britain's lack of reaction to the

Where domestic judicial decisions and legislation do not meet the standard required to show subsequent practice under Article 31(3)(b), however, they may still serve as a "supplementary means of interpretation" under Article 32 of the VCLT.[45] Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion," in order to confirm the meaning derived under Article 31 or to clarify the meaning when Article 31 leaves it ambiguous or leads to an unreasonable result.[46] Since Article 32 neither requires the use of supplementary means nor enumerates what means may be used, it gives substantial discretion to those interpreting the treaty.

Article 38(d) of the ICJ statute mentions two specific sources that serve as "subsidiary means for the determination of rules of law" and therefore qualify as supplementary means under Article 32 of the VCLT: "judicial decisions and the teachings of the most highly qualified publicists of the various nations."[47] Some tribunals commonly employ these interpretive tools. For example, an empirical study examining how *ad hoc* tribunals of the International Centre for Settlement of Investment Disputes (ICSID) engaged in treaty interpretation demonstrated that legal doctrine was used as an interpretive tool in 73 of 98 decisions, making it "one of the most important interpretive arguments."[48] In almost all instances, the tribunals referred to books or articles written by individual experts, frequently using the legal doctrine "to establish or define 'tests' to be used as conditions for applying rules" and to resolve substantive issues.[49] In addition, the ICSID tribunals re-

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boundary line on the map could not be deemed acquiescence to that boundary).

45. Goodwin-Gill, *supra* note 36, at 209–10.

46. VCLT, *supra* note 28, art. 32.

47. Statute of the International Court of Justice art. 38; *see also* Ole Kristian Fachald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 351 (2008) (arguing that "[l]egal doctrine is not explicitly referred to as a relevant interpretive argument in the VCLT, but it can be assumed to be covered by Article 32 as a supplemental means of interpretation" in light of Article 38 of the ICJ statute).

48. Fachald, *supra* note 47, at 352.

49. *Id.* In discussing why the ICSID tribunals treated legal doctrine as "one of the most important interpretive arguments," Fachald notes, "there is an extensive legal doctrine of a particularly high quality in the field of inter-

ferred to the judicial decisions of domestic courts in 13 of the 98 decisions, which far outnumbered references to other types of unilateral action, such as the legislative measures mentioned in three of the decisions.[50] While other tribunals may not rely on judicial decisions or scholarly writing to the same extent, the example of the ICSID tribunals confirms that domestic judicial decisions and legislation can and do influence treaty interpretation.[51]

B. *The U.S. Supreme Court's Principle That the Interpretations of Our Sister Signatories are "Entitled to Considerable Weight"*

The U.S. Supreme Court's approach to treaty interpretation generally reflects the same factors set forth in the VCLT—including the text, context, object, and purpose of the treaty—although the Court tends to address these factors in a less systematic way and often employs a broader understanding of "context."[52] Regarding the role of foreign authority in treaty interpretation, the Court has endorsed the principle that "the opinions of our sister signatories [are] entitled to considerable

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national investment law" and "relatively few experts on international investment law." *Id.* Refugee law resembles international investment law in these two ways. Moreover, some of the interpretive questions raised by refugee law, including the definition of a "particular social group" discussed in Part III, *infra*, focus on different tests that have been developed through legal doctrine, making it precisely the type of issue where legal doctrine is commonly invoked by ICSID tribunals to help interpret an international treaty.

50. *Id.* at 347–48. While Fachald discusses judicial decisions as a form of "state practice," she explains that this is not the type of state practice mentioned in Article 31(3)(b) of the VCLT and notes that it may be "better to characterize such acts as expressions of legal opinion than as expressions of practice." *Id.* at 348–49.

51. Fachald notes that the ICJ and WTO "make much less use of legal doctrine." *Id.* at 352.

52. GARDINER, *supra* note 32, at 136–38; *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 treaty interpretation); U.S. v. Stuart, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces 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 that contract in the first 50 years of its operation cannot be ignored.").

weight."[53] This principle remains uncontroversial, finding support among both liberal and conservative members of the Court, unlike the intensely debated use of foreign authorities in constitutional interpretation.[54] The role of other parties' interpretations under the Supreme Court's standard seems to fall somewhere in between "subsequent practice" and "supplementary means" under the VCLT. Since the Court does not suggest that the views of our sister signatories must be "common, concordant, and consistent" to influence treaty interpretation, its standard is less rigorous than what is required to establish subsequent practice under Article 31 of the VCLT. Yet the Supreme Court's standard does not permit as much flexibility and judicial discretion as Article 32 of the VCLT. In stating that other parties' interpretations are "entitled" to considerable weight, the Supreme Court indicates that courts *must* consider these interpretations, whereas Article 32 merely provides that courts "may" utilize supplementary means, making it optional.

Despite issuing numerous decisions confirming the principle of giving considerable weight to the interpretations of our sister signatories, the Supreme Court has not provided more specific guidance about how to select and weigh foreign authorities. Nor has the Court clarified how the interpretations of other contracting parties should fit in with interpretations based on the treaty's text, context, object, and purpose. Consequently, in cases where the Court has invoked the princi-

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53. Air France v. Saks, 470 U.S. 392, 404 (1985) (quoting Benjamins v. British European Airways, 572 F.2d 913, 919 (2d. Cir. 1978)) (relying on French decisions and writings by European legal scholars regarding Swiss and German law in unanimously holding that the term "accident" under the Warsaw Convention excludes injuries "caused by an unusual or unexpected event or happening"); *see also* Abbott v. Abbott, 130 S.Ct. 1983, 1993 (2010) (reasoning that the principle that our sister signatories' interpretations are entitled to considerable weight applies with special force where Congress has specifically stressed uniform interpretation of the Convention); El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999) (quoting the principle in *Saks* and consulting cases from the U.K. House of Lords, Canada, the New Zealand Court of Appeal, and the Singapore Court of Appeal in holding that an air carrier's liability is limited to claims arising under the Warsaw Convention, such that the passenger could not sue the airline for tort damages in state court).

54. *See, e.g.*, Olympic Airways v. Husain, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("We can, and should, look to decisions of other signatories when we interpret treaty provisions.").

ple of giving weight to our sister signatories' interpretations, the majority and dissent often disagree about the manner in which foreign authorities are chosen and applied. This section briefly discusses three Supreme Court cases that exemplify such disagreement to underscore the need for guiding principles on the use of foreign authority in treaty interpretation and to explain why lower courts often skip the important step of examining our sister signatories' views.

In *Olympic Airways*, the Court had to determine how to interpret the word "accident" under the Warsaw Convention, which governs liability for international air carriers. The majority held that a passenger's death from an asthma attack during the flight was an "accident" due to a flight attendant's unusual conduct in thrice refusing to move the passenger further away from the smoking section of the plane. In reaching this conclusion, the majority chose not to attach much weight to a few decisions by intermediate appellate courts in the United Kingdom and Australia, noting that it had rejected the reasoning of these courts in the body of its opinion, distinguishing the facts of the foreign cases, and stressing that the "courts of last resort—the House of Lords and the High Court of Australia—have yet to speak" on the issue at hand.[55]

Justice Scalia's dissent forcefully disagreed, stressing that "[w]e can, and should, look to decisions of other signatories when we interpret treaty provisions."[56] He took the majority to task for "its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us" and deemed the decisions by "appellate courts in both England and Australia . . . squarely at odds with [the] holding."[57] The dispute between the majority and dissent in *Olympic Airways* raises questions about the relevance of such factors as the *number* of foreign authorities that adopt a certain interpretation of the treaty, the *level of courts* that have addressed the issue, and the *degree of similarity* between cases when giving weight to the interpretations of our sister signatories.

The Court's decision in *Sanchez-Llamas* raises similar questions regarding how to apply the principle of giving weight to

55. *Id.* at 655 n.9 (majority opinion).
56. *Id.* at 660 (Scalia, J., dissenting) (emphasis added).
57. *Id.* at 658.

the interpretations of our sister signatories. There, the majority opinion by Chief Justice Roberts interpreted Article 36 of the Vienna Convention on Consular Relations, which requires authorities to notify detained foreign nationals of their right to contact their consulate.[58] 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."[59] 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."[60] 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 statutes implementing the Vienna Convention, but these cases did not persuade him that Sanchez-Llamas would succeed in suppressing his statements in another country.[61]

The dissent, authored by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg in part, agreed on the importance of examining the interpretations of other signatories and relied on the foreign decisions in disputing the majority's conclusion that Sanchez-Llamas would be denied suppression in all contracting states. The dissent reasoned that cases from Australia and Canada supported its position that suppression may be an appropriate remedy in some circumstances.[62] 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 systems in civil law systems allow judges simply to disregard improperly obtained evidence, discount its significance, or adjust the final sentence, rather than

58. Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

59. *Id.* at 343–44.

60. *Id.* at 344.

61. *Id.* at 344 n.3; *see generally* Melissa A. Waters, *Treaty Dialogue in* Sanchez-Llamas*: Is Chief Justice Roberts a Transnationalist, After All?*, 11 LEWIS & CLARK L. REV. 89, 89 (2007) (arguing that "[b]y engaging in dialogue with both treaty partners and the International Court of Justice, Roberts allows foreign precedent and practice to influence the Court's interpretation of the treaty provisions while at the same time using dialogue to 'educate' the ICJ on the American adversarial system").

62. *Sanchez-Llamas*, 548 U.S. at 394–95 (2006) (Breyer, J., dissenting).

formally suppressing the evidence.[63] The dissent noted that in one case from Germany the judge's denial of 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.[64]

Thus, the disagreement between the majority and dissent in *Sanchez-Llamas* did not concern whether to examine foreign precedents, but, rather, what conclusions to reach in light of those precedents.[65] As in *Olympic Airways*, the majority and dissent disputed what weight to give the decisions of a few other countries as well as the relevance of those decisions to the issue at hand. *Sanchez-Llamas* also indicates that the interpretations of the foreign authorities need not be unanimous to merit consideration and influence the Justices. Moreover, the case highlights how differences between common law and civil law systems can color perception of their judicial decisions. In pointing out that defendants may not need to file motions to suppress in civil law countries because of the different role played by the judge, Justice Breyer suggests that courts cannot consider foreign authorities in isolation from the legal systems through which decisions are made.[66] In other words, how courts weigh foreign authorities may turn, in part, on the nature of the legal systems involved.

Most recently, the Supreme Court confirmed the principle of giving "considerable weight" to our sister signatories to a treaty in *Abbott*, a case arising under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") and its implementing domestic statute, the International Child Abduction Remedies Act (ICARA).[67] The ICARA authorizes a person who seeks a child's return to file a petition in state or federal court and provides that the court "shall de-

63. *Id.* at 395–96.

64. *Id.* at 396.

65. 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. *Id.* at 382–83.

66. *Id.* at 395–96.

67. Abbott v. Abbott, 130 S.Ct. 1983, 1993 (2010) (internal quotation marks omitted).

cide the case in accordance with the Convention."[68] In the text of ICARA, Congress explicitly recognized "the need for uniform international interpretation of the Convention."[69] *Abbott* stressed that the principle of giving weight to the opinions of our sister signatories "applies with special force" in this context, where "uniform international interpretation of the Convention is part of the Convention's framework."[70]

The question before the Court in *Abbott* was whether a parent's *ne exeat* right—the right to consent before the other parent takes the child out of the country—constitutes a "right of custody," as, under the Hague Convention, a child abducted in violation of "rights of custody" must be returned to the child's country of habitual residence, unless certain exceptions apply.[71] In addressing this issue, Justice Kennedy, writing for the majority, first analyzed how the Convention defines "rights of custody," emphasizing that "[t]his uniform, text-based approach ensures international consistency in interpreting the Convention" and "forecloses courts from relying on definitions of custody confined by local law usage."[72] After concluding that the *ne exeat* rights are "rights of custody" based on the text, Justice Kennedy found that this interpretation is consistent with the views of the Department of State and the interpretations of other contracting states. He examined decisions from the United Kingdom, Israel, Austria, South Africa, Germany, Australia, and Scotland, finding "broad acceptance of the rule that *ne exeat* rights are rights of custody," while noting

68. 42 U.S.C. §§ 11603(a)–(b), (d).

69. 42 U.S.C. 11601(b)(3)(B).

70. *Abbott*, 130 S.Ct. at 1993 (internal quotation marks omitted).

71. *Id.* at 1987. Mr. Abbott was a British citizen married to a U.S. citizen. Their son was born in the United States. The family moved to Chile in 2002 when the son was around seven years old, and the parents separated soon after. The Chilean courts awarded both Mr. and Mrs. Abbott *ne exeat* rights so that neither parent could take the son out of the country without the other parent's consent. In August 2005, the mother took the son out of Chile without his father's consent and brought him to Texas, where she filed for divorce and sought modification of his father's rights. Mr. Abbott brought suit in federal court in Texas seeking return of his son under the Hague Convention and ICARA. The District Court and Fifth Circuit Court of Appeals held that the father's *ne exeat* right did not constitute a right of custody under the Convention and that the remedy of return therefore was not authorized. *Id.* at 1988. The Supreme Court reviewed that determination.

72. *Id.* at 1991.

that a more restrictive interpretation by the Canadian Supreme Court was not on point and that French courts were "divided."[73] Moreover, "scholars agree[d] that there is an emerging international consensus that *ne exeat* rights are rights of custody, even if that view was not generally formulated when the Convention was drafted in 1980."[74] Finally, Justice Kennedy found that providing a return remedy for violations of *ne exeat* rights is consistent with the Convention's object and purpose.[75]

The dissent, penned by Justice Stevens and joined, in an unusual combination, by Justices Thomas and Breyer, rejected the majority's interpretation of the Convention's text, reasoning that this interpretation conflates rights of custody with rights of access.[76] The dissent also indicated that it was not necessary to consider the views of the Department of State or our sister signatories where "the clear import of the treaty language controls the decision," citing Article 32 of the VCLT and a prior Supreme Court case as support for this assertion.[77] The case relied on by the dissent, 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.*"[78] 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 VCLT. As discussed above, 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 and purpose, or context of the treaty.[79] The dissent in *Abbott* therefore suggests confusion or

73. *Id.* at 1993–94.

74. *Id.* at 1994.

75. *Id.* at 1995.

76. *Id.* at 2005–06 (Stevens, J., dissenting).

77. *Id.* at 2007 & n.11 (internal quotation marks omitted). Article 32 of the Vienna Convention on the Law of Treaties provides that "[r]ecourse may be had to supplementary means of interpretation . . . when the interpretation . . . (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable." VCLT, *supra* note 28, art. 32.

78. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (emphasis added) (internal quotation marks omitted).

79. VCLT, *supra* note 28, art. 32.

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.[80]

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."[81] Justice Stevens reasoned that a "*handful* of foreign decisions . . . provide insufficient reason to depart from [his] understanding of the meaning of the Convention, an understanding shared by many U.S. Courts of Appeals."[82] He also "fail[ed] to see the international consensus . . . among [the] varied decisions from foreign courts," finding them, "at best, in equipoise."[83] 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 Cana-

80. Such confusion may be related to the inconsistent decisions issued by international tribunals regarding the relevance of subsequent practice when the text of a treaty is unambiguous. For example, some decisions by the Permanent Court of International Justice suggest that subsequent practice plays no role in interpretation when the text is clear, while others have indicated that subsequent practice can actually modify an unambiguous treaty term. *Compare* Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Braz.), 1929 P.C.I.J. (ser. A) No. 21, at 119 (July 12) (holding that the way the treaty had been executed could not influence its interpretation if "there is no ambiguity" in the treaty provision), *with* Payment of Various Serbian Loans Issued in France (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No. 20, at 38–39 (July 12) (considering the possibility that subsequent practice may have led to a termination of a treaty by way of operation of the principle of estoppel). Based on his extensive review of decisions by the ICJ and other international tribunals, Georg Nolte argues that "it would go too far to say that the meaning of more or less 'clear' terms is largely immune from being called into question by the subsequent conduct of the parties." NOLTE, *supra* note 37, at 16.

81. Abbott v. Abbott, 130 S.Ct. 1983, 2008 (2010) (Stevens, J., dissenting).

82. *Id.* at 2008–09 (emphasis added).

83. *Id.* at 2009.

dian cases simply not being "on point," the dissent found insufficient uniformity to change its own perspective.

Olympic Airways, Sanchez-Llamas, and *Abbott* all show that the principle of giving weight to the interpretations of our sister signatories is well established, but confusion remains about how to implement this principle. The disagreement between the majority and dissenting opinions goes beyond the types of disputes that ordinarily arise when judges construe domestic cases in ways that support their own views of the case, showing a lack of consensus around how to select and weigh foreign authorities in analyzing the interpretations of other contracting parties.

In the absence of more specific guidance from the Supreme Court beyond the general principle of "giving weight," it is not surprising that lower courts often fail to consider the interpretations of our sister signatories altogether when interpreting an international treaty.[84] Professor Michael Van Alstine calculates that "[o]f the nearly 1400 appellate treaty cases in the first decade of the twenty-first century, only 12 even mentioned the views of the courts of 'sister signatories.'"[85] For example, he notes that although the States Parties to the U.N.

84. For examples of cases where appellate courts *have* considered the views of our sister signatories, see Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc., 634 F.3d 1023, 1028 & n.5 (9th Cir. 2011) (noting that the "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"); Forestal Guarani S.A. v. Daros Int'l, Inc., 613 F.3d 395, 399 (3d Cir. 2010) (turning to foreign authority in analyzing a novel issue arising under the United Nations Convention on the International Sale of Goods (CISG), only to find that "[c]ourts in foreign jurisdictions and commentators alike [were] divided over how to proceed in such a scenario"); In re B. Del C.S.B., 559 F.3d 999, 1011–12 (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 United States for purposes of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction); Furnes v. Reeves, 362 F.3d 702, 717–18 (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 reasoning and conclusions are in harmony with the majority of the courts of our sister signatories that have addressed this treaty issue").

85. Michael P. Van Alstine, *Stare Decisis and Foreign Affairs,* 61 DUKE L.J. 941, 1022 (2012).

Convention on Contracts for the International Sale of Goods (CISG), which is a self-executing treaty, have issued over 1200 decisions interpreting the treaty, most of which are readily available online in English, U.S. courts interpreting the CISG have generally failed to cite or even acknowledge this body of relevant case law.[86]

Since U.S. courts frequently fail to analyze the views of our sister signatories even when directly interpreting an international treaty such as the CISG, it is hardly surprising that they also fail to engage in this analysis when interpreting an incorporative domestic statute, such as the Refugee Act of 1980. Indeed, incorporative statutes have generated confusion in many countries. 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."[87] Section C shows that the Supreme Court and appellate courts have implicitly recognized that the rules of treaty interpretation also apply to incorporative statues, including in asylum cases, although they often omit the step of examining the views of our sister signatories in this context.

C. *Applying the Rules of Treaty Interpretation to an Incorporative Statute Such as the Refugee Act*

Scholars have already persuasively argued that courts should construe an incorporative statute according to the general rules of treaty interpretation, although they have not fo-

86. Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1938–40 (2005). Van Alstine notes that the Fourth Circuit lamented that "[c]ase law interpreting the [CISG] is rather sparse," despite the plethora of foreign decisions. *Id.* at 1939 (quoting Schimitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 Fed App'x 687, 691 (4th Cir. 2002)). Similarly, the Seventh Circuit ignored over ninety foreign opinions on article 74 of the CISG, basing its interpretation instead on Illinois state law, which created conflict between the views of the United States and some of our sister signatories. *See* Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 387–89 (7th Cir. 2002) (relying on Illinois law).

87. GARDINER, *supra* note 32, at 127.

cused specifically on the role of foreign authority in this analysis.[88] Other contracting parties to the Refugee Protocol have explicitly applied this principle in interpreting domestic statutes that incorporate the Protocol's key provision. For example, in a case that required the High Court of Australia to interpret the term "refugee," Chief Justice Brennan reasoned:

> If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislation intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.[89]

The U.S. Supreme Court has not been so explicit about applying the rules of treaty interpretation to an incorporative statute, but it has implicitly followed this principle, at least with respect to considering the text, context, and object and purpose of a treaty. Yet it rarely applies this principle when it comes to considering the interpretations of our sister signatories. For example, in *INS 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," which appears in the definition of a "refugee."[90] 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 *non-refoulement* principle set forth in the statute.[91] By examining

88. *See, e.g.*, Coyle, *supra* note 3, at 680 (arguing that courts should construe an incorporative statute as conforming to the incorporated treaty, applying the canons of treaty interpretation); Goodwin-Gill, *supra* note 36, at 204–06 (arguing that the rules of treaty interpretation should be applied to refugee laws derived from the Refugee Convention and Protocol).

89. *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–31. Chief Justice Brennan went on to advocate a holistic, rather than rigid, approach to treaty interpretation. *Id.* at 231.

90. INS v. Cardoza-Fonseca, 480 U.S. 421, 437–40 (1987).

91. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 177–87 (1993). INA § 243(h)(1), 8 U.S.C. § 1253(h)(1), as it appeared before April 1, 1997, provided that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's

the text and *travaux préparatoires* (drafting history) of the Refugee Convention, 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, although both of these decisions were issued after the Court articulated the principle that the interpretations of our sister signatories are entitled to considerable weight.[92] Moreover, under Article 31(3)(b) of the VCLT, subsequent practice that establishes the agreement 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 guise of a domestic statute, 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.[93] 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."[94] 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.

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life or freedom would be threatened in such country . . . ." The analogous provision now appears at INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

92. That language gained prominence in Air France v. Saks, 470 U.S. 393, 404 (1985).

93. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 536–37 (1995).

94. *Id.* at 537 (internal quotation marks omitted).

Justice Stevens also looked beneath the domestic veneer of the INA in his concurring opinion in *Negusie v. Holder*, which addressed whether a statutory provision that bars people who persecuted others from qualifying as "refugees" permits an exception for individuals who acted under coercion or duress.[95] Applying the principles of treaty interpretation to the statutory persecutor bar, he found that a coercion exception should exist based on the plain language of the Refugee Convention. He explained that the persecutor bar reflects Article 1(F) of the Refugee Convention, which excludes from the *non-refoulement* obligation only those who have "committed a crime against peace, a war crime, or a crime against humanity."[96] Reasoning that "[w]e do not normally convict individuals of *crimes* when their actions are coerced or otherwise involuntary," he concluded that the persecutor bar does not apply to individuals who acted under duress.[97] Justice Stevens then opined 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.[98] He stressed that "[*w*]*hen we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language.*"[99]

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95. Negusie v. Holder, 555 U.S. 511, 536–37 (2009) (Stevens, J., concurring in part and dissenting in part). The so-called "persecutor bar" provides that "[t]he term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2011); *see also id.* § 1158(b)(2)(A)(i) (barring noncitizens who engaged in persecution from asylum); *id.* § 1231(b)(3)(B)(i) (barring noncitizens who engaged in persecution from withholding of removal).

96. *Negusie*, 555 U.S. at 536 (quoting Refugee Convention, *supra* note 1, art. 1(F)(*a*)).

97. *Id.*

98. *Id.* at 537.

99. *Id.* (emphasis added). The majority opinion remanded the case to the BIA to interpret the statutory bar free from a mistaken legal premise, but, unlike Justice Stevens, the majority did not address whether the BIA should apply the principles of treaty interpretation in construing the statute. *Id.* at 524–25 (majority opinion).

The U.S. Courts of Appeals have also, at times, drawn on principles of treaty interpretation when construing parts of the INA that incorporate the Protocol. 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."[100] 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.'"[101] For example, the Ninth Circuit has relied on the drafting language of the Convention and the UNHCR Handbook in finding that the "particular social group" ground for refugee status need not be narrowly defined.[102] Similarly, in rejecting a narrow interpretation of the statutory firm resettlement bar, which derives from international law and prohibits an individual who has firmly resettled in another country from obtaining asylum in the United States, the Ninth Circuit reasoned that "[t]he international obligation our nation agreed to share when we enacted the Refugee Convention into law knows no such limits."[103]

While these appellate cases provide support for applying the rules of treaty interpretation to the Refugee Act, like the Supreme Court's decisions in *Cardoza-Fonseca* and *Sale*, they fail to analyze the interpretations of other contracting parties under either the VCLT or the Supreme Court's principle of giving "considerable weight" to the interpretation of our sister signatories. In very rare cases, the U.S. Courts of Appeals *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.[104]

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100. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575–76 (9th Cir. 1986).

101. *Id.* at 1576.

102. Perdomo v. Holder, 611 F.3d 662, 668 n.7 (9th Cir. 2010).

103. Ali v. Ashcroft, 394 F.3d 780, 790 (9th Cir. 2005)

104. *See, e.g.*, Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 n.6 (9th Cir. 2000) (citing Canada (Att'y Gen.) v. Ward [1993] S.C.R. 689) (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,

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.[105] The court did not, however, provide any additional explanation of whether or how these foreign authorities affected its analysis. By mentioning state 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 principles of treaty interpretation, but stops short of fully embracing them.[106]

Just as Justice Stevens' opinion in *Negusie* highlights the importance of other contracting parties' interpretations, the concurring opinion of Judge Reinhardt on the Ninth Circuit in *Delgado v. Holder* reaffirms the importance of applying *all* of the principles of treaty interpretation to the Refugee Act.[107] *Delgado* involved the meaning of a "particularly serious crime," which is not defined by the INA but constitutes a bar to asylum

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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.*

105. Castellano-Chacon v. INS, 341 F.3d 533, 547–49 & n. 8 (6th Cir. 2003) (holding that a "particular social group" is composed of individuals sharing a common, immutable characteristic and that "tattooed youth" do not constitute such a group). The court contrasted the Supreme Court of Canada's decision in Ward v. Canada (Minister of Emp't & Immigration), [1993] 2 S.C.R. 689, ¶ 78, which emphasizes innate or immutable characteristics, with the High Court of Australia's decisions in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 264 and *Minister for Immigration and Multicultural Affairs v Applicant Z* (2001) 116 FCR 36, ¶ 11, which focus on external perceptions. *Castellano-Chacon*, 341 F.3d at 547 n.8.

106. *See Castellano-Chacon*, 341 F.3d at 548 (refraining "from incorporating into [the Court's] definition of a 'particular social group' the UNHCR's guidance," but noting that BIA decisions may be becoming increasingly consistent with the UNHCR guidance).

107. *See* Delgado v. Holder, 648 F.3d 1095, 1109 n.2 (9th Cir. 2011) (en banc) (Reinhardt, J., concurring in part and concurring in the judgment) (stressing that a plain text reading would find conviction of a serious crime not to be a complete bar to relief absent an additional finding that an alien is dangerous, and that this interpretation is more in line with the intent of the statute and other countries' interpretations of the Refugee Convention).

and withholding of removal.[108] The statute simply provides that an individual is ineligible for these forms of relief if he or she, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."[109] The majority recognized that the particularly serious crime bar reflects Article 33 of the Refugee Convention, which has been incorporated into the Protocol and provides that the benefit of *non-refoulement* "may not . . . be claimed by a refugee . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[110] The majority remanded the case to the BIA to clarify whether Delgado's three DUI convictions individually or cumulatively constituted a "particularly serious crime," explaining that the court could not conduct meaningful review without understanding the BIA's reasoning.[111] While the majority said nothing about applying the principles of treaty interpretation in construing the term "particularly serious crime," Judge Reinhardt noted 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 *has been adopted by other countries in interpreting identical provisions of their refugee laws.*"[112]

These cases provide 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 principle of giving weight to the interpretations of our sister signatories as part of this analysis. Engaging in a comparative analysis is not only required by Supreme Court precedents, but also has practical utility. The following section uses a specific example involving the definition of a "particular social group" to demonstrate how examining the views of our sister signatories can provide valuable insights to U.S. courts.

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108. *See* 8 U.S.C. § 1158(b)(2)(A)(ii) (2011); *id.* § 1231(b)(3)(B)(ii).

109. *Id.* § 1158(b)(2)(A)(ii); *accord id.* § 1231(b)(3)(B)(ii).

110. *Delgado*, 648 F.3d at 1100–01 (majority opinion) (quoting Refugee Convention, *supra* note 1, art. 33, ¶ 2).

111. *Id.* at 1107–08.

112. *Id.* at 1109 n.2 (Reinhardt, J., concurring in part and concurring in the judgment) (emphasis added).

IV. A Comparative Analysis of Approaches to Interpreting "Membership in a Particular Social Group"

An important question currently being litigated in the U.S. Courts of Appeals concerns the definition of a "particular social group," which is one of the most ambiguous terms in the definition of a "refugee." As noted above, a "refugee" is an individual who has a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in "*a particular social group*."[113] How to interpret the "particular social group" ground for asylum has been the subject of much jurisprudence and scholarly debate, both in the United States and abroad, yet U.S. courts have rarely considered our sister signatories' interpretations of this term.[114]

In a groundbreaking decision called *Matter of Acosta*, the BIA 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."[115] The BIA reached this definition through the *ejusdem generis* doctrine, which provides that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[116] Since the other protected grounds—race, religion, nationality, and political opinion—describe persecution aimed at an immutable characteristic, one that cannot be changed or that an individual should not have to change, the BIA interpreted "membership in a particular social group" in the same way.[117] Applying *Acosta*'s definition, the BIA and appellate courts have recognized numerous particular social

113. *See* Refugee Convention, *supra* note 1, art. 1, ¶ 2 (defining "refugee"); INA 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

114. 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, 1093 n.6 (9th Cir. 2000) and Castellano-Chacon v. INS, 341 F.3d 533, 547–48 & n. 8 (6th Cir. 2003), noted above.

115. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

116. *Id.*

117. *Id.*

groups, such as groups based on clan membership, ancestry, sexual orientation, gender, former occupation, and family.[118]

In 2006, however, the BIA presented "social visibility" as an additional factor that should be considered in determining whether a given group constitutes a "particular social group" and a couple years later presented "social visibility" as a requirement, not just a factor.[119] The BIA purported to rely on the UNHCR guidelines in taking this step, but actually misapplied them.[120] While the UNHCR guidelines clearly provide that a "particular social group" may be based on either an immutable characteristic (often called a "protected characteristic") *or* social perception, the BIA has imposed both as requirements.[121] The new social visibility requirement has resulted in a circuit split, with the Seventh and Third Circuits rejecting

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118. *See, e.g., id.* ("The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."); In re H-, 21 I. & N. Dec. 337 (B.I.A. 1996) (finding that Marehan clan members in Somalia are a particular social group ("PSG")); In re V-T-S-, 21 I. & N. Dec. 792 (B.I.A. 1997) (finding that Filipinos of Chinese ancestry are a PSG); In re Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990) (finding that homosexuals in Cuba are a PSG); In re Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (defining "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice" as a PSG); In re Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988) (accepting former members of the Salvadoran national police as a PSG).

119. The BIA introduced the concept of social visibility as a factor in In re C-A-, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006) ("[W]e have considered as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a social group."), *aff'd sub nom.* Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006). The BIA then turned social visibility from a factor into a requirement in In re A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74–75 (B.I.A. 2007) (discussing the "requisite social visibility"), *aff'd sub nom.* Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).

120. *See* In re C-A-, 23 I. & N. Dec. at 956–57 (citing the UNHCR guidelines); In re *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74–75 (referring to the same).

121. 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 ¶¶ 11, 13 (2002) [hereinafter UNHCR GUIDELINES], *available at* http://www.unhcr.org/3d58de2da.html.

the concept as impossibly vague and unjustified,[122] while several other circuits have deferred to it or implicitly accepted it without much analysis.[123] The Ninth Circuit, which previously

122. *See* Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009) (finding that the social visibility criterion "makes no sense" and reasoning that the Board "has found groups to be 'particular social groups' without reference to social visibility . . . as well as, in this and other cases, refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases"); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) ("Often it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even whether it understands the difference"); Valdiviezo-Galdamez v. U.S. Att'y Gen., 663 F.3d 582, 604 (3d Cir. 2011) (stating that the court was "hard-pressed to understand how the 'social visibility' requirement was satisfied in prior cases using the *Acosta* standard"); *see also id.* at 616 (Hardiman, J., concurring) ("[T]he BIA's analysis comes undone when it states in conclusory fashion that all of the groups recognized as 'particular social groups' in earlier cases would meet the 'particularity' and 'social visibility' requirements.").

123. *See, e.g.*, Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010) ("The social visibility criterion does not signal an abandonment of the common and immutable characteristic requirement. Rather, it represents an elaboration of how that requirement operates."); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007) (finding the BIA's social visibility requirement "consistent with [the Second Circuit's] reasoning that a 'particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general"); Al-Ghorbani v. Holder, 585 F.3d 980, 994–97 (6th Cir. 2009) (implicitly accepting the social visibility requirement and finding membership in a PSG based both on familial ties and on opposition to a particular Yemeni social norm); Constanza v. Holder, 647 F.3d 749, 753–54 (8th Cir. 2011) (rejecting persons resistant to gang membership as a PSG and stating that "a social group requires sufficient particularity and visibility such that the group is perceived as a cohesive group by society"); Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012) (internal quotation marks omitted) (holding that "young males from El Salvador who have been subjected to recruitment by MS–13 and who have rejected or resisted membership in the gang based on personal opposition to the gang" do not comprise a PSG because the group "is not sufficiently narrowed to cover a discrete class of persons who would be perceived as a group by the rest of society"); Santos-Lemus v. Mukasey, 542 F.3d 738, 744–46 (9th Cir. 2008) (internal quotation marks omitted) (finding that the group defined as "young [men] in El Salvador resisting gang violence" lacked visibility, reasoning that the harassment the petitioner endured was part of general unrest and that few people knew of his anti-gang stance); Rivera Barrientos v. Holder, 658 F.3d 1222, 1233 (10th Cir. 2011) (deferring to the BIA's social visibility requirement but noting that if visibility were interpreted in the literal sense, the court "might also find it problematic"); Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1196–99 (11th Cir. 2006) (defer-

accepted the social visibility requirement, recently reconsidered the issue *en banc* and complicated the circuit split by finding that the BIA's social visibility requirement does not require "on-sight" visibility and remanding for the BIA to clarify *whose* perspectives are most indicative of society's perceptions.[124] In 2012, prior to the Ninth Circuit's *en banc* decision, the Supreme Court denied certiorari in an Eighth Circuit case that upheld social visibility.[125]

The BIA is currently reevaluating its social visibility requirement. In a case remanded to the BIA by the Third Circuit, *Valdiviezo-Galdamez*,[126] the Department of Homeland Security (DHS) recognized that "social visibility" should not require literal visibility and proposed replacing "social visibility" with a "social distinction" requirement.[127] However, since DHS defined social distinction to mean that the group "must be perceived by the society in question as distinct," the proposed term still requires subjective social perception of the group.[128] In addition to addressing these issues, the BIA must now also

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ring to the BIA and reasoning that "the social visibility of informants is different in kind from the particular social groups that have been afforded protection under the INA").

124. *See* Henriquez-Rivas v. Holder, 707 F.3d 1081, 1087–89 (9th Cir. 2013) (en banc). The court reasoned that "a requirement of 'on-sight' visibility would be inconsistent with previous BIA decisions and likely impermissible under the statute." *Id.* at 1087. According to the Ninth Circuit, the relevant question is "whether the social groups are '*understood* by others to constitute social groups.'" *Id.* at 1088 (quoting *In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006)). Moreover, in requesting clarification from the BIA regarding "*whose* perspectives are most indicative of society's perception of a particular social group," the court stressed that "[d]ifferent audiences will be more or less likely to consider a collection of individuals as a social group depending on their own history, course of interactions with the group, and the overall context." *Id.* at 1089 (emphasis added). The court proceeded to offer its own opinion that "the perception of the persecutors may matter the most," *id.*, clarifying that this is meant "only to suggest that evidence of perceptions in society as a whole is not the exclusive means of demonstrating social visibility." *Id.* at 1090.

125. Gaitan v. Holder, 671 F.3d 678 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 526 (2012).

126. *See* Valdiviezo-Galdamez v. Att'y Gen. of the U.S., 663 F.3d 582, 589, 612 (3d Cir. 2011). Oral arguments before the BIA took place in December 2012.

127. Brief of Department of Homeland Security at 7–12, *In re* Valdiviezo-Galdamez, No. A097-447-286 (B.I.A. 2012) (on file with author).

128. *Id.* at 8.

grapple with the Ninth Circuit's question about whose perspective matters.

Given these complicated and divisive developments in our understanding of a "particular social group," it behooves U.S. courts to examine how our sister signatories have interpreted this term and to explore whether they require some form of social perception. Moving towards a common understanding of a "particular social group" is critical to ensuring consistent implementation of the Protocol. The discussion of foreign authorities below shows that interpretations of "particular social group" are by no means uniform, but important themes and lessons do emerge that would inform the analysis of U.S. courts. Since this Article cannot possibly examine the interpretations of even a majority of the 146 parties to the Protocol, the focus remains on countries that are specially affected by asylum applications, as well as other countries that have specifically addressed this issue and whose interpretations were accessible.[129]

A. *Common Law Countries*

Common law countries other than the United States—including Canada, the United Kingdom, Ireland, Australia, and New Zealand—do not require social visibility or social perception to establish a particular social group (PSG). The jurispru-

129. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, UNHCR STATISTICAL YEARBOOK 2010 42–43 (providing data for a handful of countries). 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. *Id.* at 42. 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). *Id.* at 42–43. Malaysia is not a party to the Protocol, but the other nine countries are states parties. 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. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES: FIRST HALF 2011 at 8–11. The remaining countries, in descending order from six to ten include Belgium, Canada, Italy, Switzerland, and Austria. *Id.* at 11.

dence of each of these countries is discussed further below. This section also includes South Africa, which has a hybrid legal system but draws heavily on common law approaches to defining a PSG.

1. *Canada*

In *Ward v. Canada,* the Supreme Court of Canada approached defining a PSG by emphasizing that "[u]nderlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination."[130] In finding that *Acosta* proposed "a good working rule," the Court explained that *Acosta*'s definition "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."[131] The court then set forth three possible categories for a PSG:

> (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 not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.[132]

The court explained that the first category would include individuals persecuted on account of characteristics such as gender, linguistic background, and sexual orientation, while the second category would include groups such as human rights activists. The third group "is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person."[133] Each of these categories focuses on a characteristic that is unchangeable or fundamental to human dignity. Groups that are excluded are not those lacking social perception, but those "defined by a characteristic which is change-

130. Canada (Att'y-Gen.) v. Ward, [1993] 2 S.C.R. 689, 733.

131. *Id.* at 739.

132. *Id.*

133. *Id.*

able or from which disassociation is possible, so long as neither option requires renunciation of basic human rights."[134]

In December 1991, Canada's Immigration and Refugee Board issued a position paper concerning particular social groups that provides additional insight.[135] 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.[136] If no such characteristic exists, the adjudicator may still find a social group based on external perceptions of the group.[137] The Board clearly viewed these two standards as *alternatives.*[138] 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.[139] In *Shah and Islam,* which held, in a seminal analysis of gender-related asylum claims, that "women in Pakistan" constitute a particular social group, the Lords not only endorsed *Acosta,* but rejected additional requirements outside of the protected characteristic framework. Specifically, Lord Steyn reasoned that it was "not

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134. *Id.* at 737–38 (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 161 (1991)). The particular social group at issue in Ward was defined as "members and former members" of the Irish National Liberation Association (INLA). *Id.* at 744. After determining that Ward's fear was not based on his status as a *former* member of the INLA and redefining the group as "INLA members," the Court concluded that this group did not fall within any of the three categories to be considered a "particular social group." *Id.* at 744–45.

135. IMMIGRATION AND REFUGEE BOARD OF CANADA, MEMBERSHIP IN A PARTICULAR SOCIAL GROUP AS A BASIS FOR A WELL-FOUNDED FEAR OF PERSECUTION – Framework of Analysis (1991), *available at* http://www.unhcr.org/refworld/docid/3ae6b32510.html; *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).

136. Fullerton, *supra* note 135, at 540.

137. *Id.* at 541.

138. *Id.*

139. *See Islam v. Sec'y of State for the Home Dep't,* [1999] 2 A.C. 629 (H.L.) 640–41 (Lord Steyn) (U.K.) (consolidated with *Regina v. Immigration Appeal Tribunal* ex parte *Shah*) (citing In re Acosta, 19 I. & N. Dec. 211, 211 (B.I.A. 1985)).

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 [*Acosta*]."[140] 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.[141] 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.[142] 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.[143] 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;[144]

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140. *Id.* at 643.

141. *Id.* at 651 (Lord Hoffmann).

142. *See* K v. Sec'y of State for the Home Dep't, [2006] W.L.R. 733 (H.L.), [2006] UKHL 46 (U.K.).

143. *See* Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, art. 10(1)(d), 2004 O.J. (L 304) 12 (EU) (emphasis added) [hereinafter Qualification Directive].

144. *Id.* (emphasis and roman numerals added). This Directive was recast in December 2011, but the relevant language quoted here remained the same. *See* Council Directive 2011/95/EU, art. 10(1)(d), 2011 O.J. (L 337) 9 (EU).

The implementing regulation uses the same language except that it replaces "*in particular*" with the words "*for example.*"[145] While the conjunction "and" between the two tests may suggest cumulative requirements, the modifying phrases "*in particular*" and "*for example*" indicate that the protected characteristic and social perception approaches represent *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 the combined appeals of *Fornah and K*, where the Lords held that "uninitiated, intact women" in Sierra Leone (i.e., women who had not undergone female genital mutilation) and members of a family could constitute particular social groups.[146] 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.*"[147] 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.*"[148] 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."[149] Similarly, Lord Hope of Craighead found that "*it would be a mistake to insist that [social] recognition is always necessary.*"[150] Lord Brown of Eaton-Under-Heywood agreed, entirely accepting UNHCR's definition and concluding that the Qualification Directive "will . . . have to be

145. The Refugee or Persons in Need of International Protection (Qualification) Regulations, 2006, S.I. 2006/2525, art. 6, ¶ 1(d), *available at* http://www.unhcr.org/refworld/docid/47a7081c0.html.

146. K. v. Sec'y of State for the Home Dep't, [2006] W.L.R. at 767–68, ¶¶ 74–75. Fornah (the applicant in the conjoined appeal) was a Sierra Leonean woman who feared FGM if sent home. *Id*, ¶¶ 4–5. K was an Iranian woman who feared persecution as a member of her husband's family because the Iranian regime had persecuted him and then turned on her. *Id.*, ¶ 2.

147. *Id.*, ¶ 16 (Lord Bingham) (emphasis added).

148. *Id.* (emphasis added).

149. *Id.*, ¶ 15 (emphasis added).

150. *Id.*, ¶ 46 (Lord Hope) (emphasis added).

interpreted consistently with this definition."[151] Thus, the House of Lords has squarely rejected any additional requirement of social recognition and visibility. While lower tribunals responsible for asylum determinations do sometimes still impose social perception as an additional requirement, the House of Lords' interpretation represents the view of the highest court.[152]

3. *Ireland*

In interpreting Ireland's 1996 Refugee Act, "the Irish courts have consistently drawn upon, and accepted as persuasive, leading cases on the concept of a particular social group, from the USA, Canada, and the UK."[153] Specifically, the Irish courts have followed the protected characteristic approach set forth in *Acosta, Ward,* and *Shah and Islam,* discussed above.[154] The regulations adopted by Ireland in 2006 to implement the European Union Qualification Directive specifically provide:

> A group shall be considered a particular social group where, in particular: (i) members of that group share an innate characteristic, or a common background that can't 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, *or* (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. . .[155]

In this respect, Ireland's interpretation of a "particular social group" and the Qualification Directive is consistent with that

151. *Id.*, ¶ 118 (Lord Brown).

152. *See, e.g.*, SB v. Sec'y of State for the Home Dep't, [2008] UKAIT 00002, ¶ 69 (applying protected characteristic and social perception as dual requirements). The UKBA asylum instructions also interpret both approaches as cumulative. HANA CHEIKH ALI, CHRISTEL QUERTON & ELODIE SOULARD, GENDER-RELATED ASYLUM CLAIMS IN EUROPE: A COMPARATIVE ANALYSIS OF LAW, POLICIES AND PRACTICE FOCUSING ON WOMEN IN NINE EU MEMBER STATES 63–64 (2012), available at http://www.unhcr.org/refworld/pdf id/4fc74d342.pdf.

153. Siobhán Mullally, *Speaking across Borders: The Limits and Potential of Transnational Dialogue on Refugee Law in Ireland, in* THE LIMITS OF TRANSNATIONAL LAW, *supra* note 36, at 150, 164.

154. *Id.* at 164 n.70.

155. European Communities (Eligibility for Protection) Regulations, 2006, S.I. 2006/518, art. 10, ¶ 1(d) (Ir.) (emphasis added).

of the United Kingdom, presenting the protected characteristic and social perception approaches as alternatives, rather than dual requirements.

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*, which held that Chinese parents with one child who do not accept the reproductive limitations placed upon them or who are forcibly sterilized do not constitute a "particular social group," the High Court of Australia defined this term based on the ordinary meaning of the words, referring primarily to an English dictionary.[156] Justice Dawson, who elaborated on this approach, stressed that the phrase "should be given a broad interpretation to encompass all those who fall fairly within its language and should be construed in light of the context in which it appears."[157] Yet he still rejected the proposed social group, reasoning, in part, that "[it] is not an accurate response to say that the government itself perceives such persons to be a group."[158]

Justice McHugh's opinion in *Applicant A* focused even more on the "external perceptions of the group," but even he was not concerned with literal visibility.[159] In fact, he specifically noted that a particular social group could exist even "though the distinguishing features of the group do not have a public face," as long as the public was "aware of the characteristics or attributes that . . . unite and identify the group."[160] Justice McHugh confirmed *Acosta*'s idea that the members of a particular social group must share "some characteristic, attribute, activity, belief, interest or goal that unites them," but also

156. *Applicant A v Minister of Immigration & Ethnic Affairs* [1997] HCA 4, 190 CLR 225, 241 & n.57 (Dawson J.) (Austl.); *see also* MICHELLE FOSTER, THE 'GROUND WITH THE LEAST CLARITY': A COMPARATIVE STUDY OF JURISPRUDENTIAL DEVELOPMENTS RELATING TO 'MEMBERSHIP OF A PARTICULAR SOCIAL GROUP' 9 (UNHCR Legal and Protection Policy Series, 2012) (discussing the decision in *Applicant A*).

157. *Applicant A*, 190 CLR at 241.

158. *Id.* at 243.

159. *Id.* at 264 (McHugh J).

160. *Id.* at 265.

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.*"[161] 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."[162]

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 may be relevant to the analysis.[163] The High Court explained that Justice McHugh's opinion in *Applicant A* merely expounded on the idea that a particular social group must be distinguished from society at large, and that "[*o*]*ne way* in which this may be determined is by examining whether the society in question perceives there to be such a group."[164] Other evidence relevant to distinguishing the group could be "cultural, social, religious, and legal factors" that reflect the position of group members in the society.[165] The High Court remanded the case for the lower court to address whether "young able-bodied men" in Afghanistan constitute a particular social group under this clarified legal standard.[166]

In reaching this decision, the High Court recognized 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."[167] "Those communities do not recognize or perceive the existence of the particular social group, but it cannot be said that the particular social

161. *Id.* at 264 (emphasis added).

162. *Minister for Immigration & Multicultural Affairs v Zamora* (1998) 85 FCR 458, 464 (Austl.) (emphasis added).

163. *Applicant S v Minister for Immigration and Multicultural Affairs*, [2004] HCA 25, ¶16 (Gleeson CJ, Gummow & Kirby JJ) (emphasis added).

164. *Id.* ¶ 27 (emphasis added).

165. *Id.* ¶ 30 (quoting *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1, 28 ¶ 83 (Austl.)); *see also* FOSTER, *supra* note 156, at 10–11 (discussing *Applicant S*).

166. *Applicant S*, [2004] HCA at 25, ¶¶ 50–51.

167. *Id.* ¶ 34.

group does not exist."[168] Consequently, the Court stressed that the factors that distinguish a group from the rest of society may be "ascertained objectively from a third-party perspective."[169] For example, a decision-maker may determine that a group is distinct based on "country information," rather than trying to ascertain the subjective perceptions of people within that country.[170] Justice McHugh's opinion in *Applicant S* confirms, "it is not necessary that a 'particular social group' be *recognized* as a group that is set apart from the rest of society."[171] Indeed, he found that "[t]o require evidence of recognition or perception *by* the society . . . is to *impose a condition that the Convention does not require.*"[172] Thus, the High Court of Australia, which spawned the idea of social perception, has since rejected it as a *requirement.*

5. *New Zealand*

New Zealand's Refugee Status Appeals Authority ("RSAA") has firmly adopted *Acosta*'s protected characteristic approach.[173] The RSAA embraced "[t]he *Acosta* ejusdem generis interpretation of 'particular social group'" because it "firmly weds the social group category to the principle of the avoidance of civil and political discrimination."[174] In a case called *Re GJ* that applied the protected characteristic approach to find that homosexuals in Iran comprise a particular social group, the RSAA also rejected social perception as an alternative formulation, reasoning 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 a particular social group."[175] Thus, both Australia and New Zealand view the social perception approach as per-

168. *Id.*
169. *Id.*
170. *Id.* ¶ 35.
171. *Id.* ¶ 61 (McHugh J) (emphasis added).
172. *Id.* ¶ 68 (second emphasis added).
173. *Refugee Appeal No. 1312/93, Re GJ* 27–28 (N.Z. Refugee Status Appeals Authority, Aug. 30, 1995), *available at* http://www.refugee.org.nz/rsaa/text/docs/1312-93.htm.
174. *Refugee Appeal No. 71427/99* ¶ 104 (N.Z. Refugee Status Appeals Authority, Aug. 16, 2000) (citing *Refugee Appeal No. 1312/93,* at 56–57), *available at* http://www.refugee.org.nz/Casesearch/Fulltext/71427-99.htm.
175. *Refugee Appeal No. 1312/93,* at 60.

mitting a broad category of groups to qualify, but Australia regards this flexibility as a positive development whereas New Zealand does not. In practice, however, the social perception approach often operates as a restrictive measure that can disqualify groups with a protective characteristic, as discussed further in Parts B and C below.

6. *South Africa*

South Africa has a hybrid legal system that combines aspects of English common law, Dutch civil law, and African customary law, but its interpretation of "particular social group" appears to draw heavily from common law countries. 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.[176] South Africa's Refugee Appeal Board has also applied the protected characteristic approach embraced by *Acosta*, *Shah and Islam*, and *Re GJ*, discussed above, in finding that homosexuals constitute a particular social group.[177]

B. *Civil Law Countries*

While civil law countries have not historically engaged in as much interpretation of the meaning of a "particular social group" as common law countries, legislation and judicial decisions in European countries have increasingly addressed the definition of this term since the introduction of the Qualification Directive. Legislation or practice in Hungary,[178] Italy,[179]

176. *See Fang v. Refugee Appeal Board* 2007 (2) SA 447 (T) at 460 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZAGPHC/2006/101.pdf.

177. *See U v. Refugee Status Determination Officer* (S. Afr. Refugee Appeal Board, Dec. 1, 2002), *available at* http://www.refugeecaselaw.org/redirect pdf.aspx?caseid=1032.

178. GENDER-RELATED ASYLUM CLAIMS IN EUROPE, *supra* note 152, at 70 (stating that Hungary is an "example of good practice as [its] national legislation clearly provides for an alternative approach to the two PSG limbs"); *see also* FOSTER, *supra* note 156, at 17 n.98 (quoting the Hungarian legislation, Act LXXX of 2007 on Asylum, § 64, ¶1, which uses the conjunction "or" between the two criteria).

179. GENDER-RELATED ASYLUM CLAIMS IN EUROPE, *supra* note 152, at 70.

Luxembourg,[180] Romania,[181] Sweden,[182] Austria,[183] and Portugal[184] requires *only one of the criteria* from article 10 of the Qualification Directive to establish a particular social group. The Netherlands has also indicated that either criterion is sufficient.[185] Likewise, Greece indicates that *one* of the criteria is sufficient.[186] Switzerland appears to follow the protected characteristic approach, as "[t]he concept of a social group is based on the existence of common internal characteristics that constitute a reason for illegal persecution."[187] At least ten civil law countries therefore do not require social perception to establish a particular social group. According to the European Council on Refugees and Exile (ECRE), a pan-European alliance of nongovernmental organizations that assist refugees, this interpretation is "in keeping with the majority view of international law."[188]

Among the civil law countries that require both a protected characteristic and social perception, France is a leading authority and Germany has recently moved in this direction,

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180. EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE), THE IMPACT OF THE EU QUALIFICATION DIRECTIVE ON INTERNATIONAL PROTECTION 155–56 (2008) [hereinafter ECRE STUDY], *available at* http://cmr.jur.ru.nl/cmr/docs/ECRE_QD_study_full.pdf.

181. *Id.* at 156. The Romanian legislation incorporates the exact language of article 10(1)(d), which is interpreted in practice as setting forth two alternative approaches. GENDER-RELATED ASYLUM CLAIMS IN EUROPE, *supra* note 152, at 61.

182. ECRE STUDY, *supra* note 180, at 156; *see also* GENDER-RELATED ASYLUM CLAIMS IN EUROPE, *supra* note 152, at 62 (stating that Sweden considers the approaches as alternatives).

183. ECRE STUDY, *supra* note 180, at 20 (stating that Austria applies the approaches as alternatives in jurisprudence). Legislation in Austria refers to the Qualification Directive without specifically mentioning the definition of a particular social group. FOSTER, *supra* note 156, at 17 n.99. In response to the ECRE survey, Austria explained that its jurisprudence had required only one criterion and it was unclear whether or not this interpretation would change. ECRE STUDY, *supra* note 180, at 155.

184. ECRE STUDY, *supra* note 180, at 20 (stating that Portugal applies the approaches as alternatives in jurisprudence).

185. *Id.* at 156. Legislation in the Netherlands simply mirrors the Qualification Directive without specifically addressing the definition of a PSG. *See* FOSTER, *supra* note 156, at 17 n.99.

186. ECRE STUDY, *supra* note 180, at 155.

187. Klaus Hullmann, *Switzerland, in* WHO IS A REFUGEE? A COMPARATIVE CASE LAW STUDY 111, 156 (Jean-Yves Carlier et al. eds., 1997).

188. ECRE STUDY, *supra* note 180, at 20.

although their decisions reflect inconsistencies in applying this approach, as discussed further below. Norway and Finland have also enacted legislation requiring a particular social group to have a protected characteristic *and* be perceived by society, but Norway confusingly indicates that either criterion is sufficient in its response to the ECRE survey.[189] Authorities in Malta state that both criteria must be satisfied, but the legislation provides that "a particular social group might include a group based on a common characteristic or sexual orientation," without specifically mentioning social perception.[190] Other countries, such as Belgium and possibly Spain, purport to require both criteria but in practice apply a flexible approach where either criterion will suffice.[191]

While the ECRE study suggests that Slovakia, Poland, Slovenia, and Czech Republic also require both criteria to be met, a closer examination of three of these countries calls this categorization into question.[192] In Poland, "various decisions [of] both the Office for Aliens and the Refugee Board were not consistent in the interpretation of the particular social group concept."[193] 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. Similarly, "the core inquiry [about whether to apply] the 'protected characteristics' or 'social perception' approach, is completely untouched in Czech Republic," which has not yet adopted any guidelines on "membership of a particular social group."[194]

189. FOSTER, *supra* note 156, at 18–19 & n.101 (citing the Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Act), § 30(d)); *id.* at 18 n.100 (citing the Finnish Aliens Act, 301/2004, amendments up to 1152/2010 included, § 87b (323/200), ¶ 3); *see also* ECRE STUDY, *supra* note 180, at 155–56.

190. GENDER-RELATED ASYLUM CLAIMS IN EUROPE, *supra* note 152, at 61.

191. *See* ECRE STUDY, *supra* note 180, at 155 (indicating that Belgium's approach is "flexible" in practice); *see also* FOSTER, *supra* note 156, at 34 & n.201 (suggesting that Spain appears to assume that the Qualification Directive requires the satisfaction of both criteria, but "it is not clear that this has or will result in a more restrictive approach in practice"); *id.* at 35–36 (stating that Belgium applies the test flexibly).

192. *See* ECRE STUDY, *supra* note 180, at 155–56.

193. *Id.* at 149–50; *see also id.* at 20 (noting Polish decisions are inconsistent).

194. David Kosar, *Persecution on the Grounds of Membership of a Particular Social Group* 94 (2004), *available at* http://aa.ecn.cz/img_upload/f76c21488a048c95bc0a5f12deece153/2004_refugee_law.pdf.

Thus, of the European civil law countries mentioned above that purport to require both a protected characteristic and social perception, two (France and Germany) are inconsistent in their practice, at least one (Belgium) shows flexibility in practice, and at least three others (Poland, Slovenia, and Czech Republic) have not yet developed much, if any, practice in interpreting the PSG ground.[195]

The discussion below examines decisions from Germany, France, and Belgium in greater detail, showing how the interpretation of a "particular social group" has evolved in these countries and how the approaches are inconsistently or flexibly applied in practice.

1. *Germany*

Prior to the issuance of the EU Qualification Directive in 2004, German jurisprudence on the particular social group ground of the Refugee Convention was "sparse" with "no established interpretation."[196] Older decisions indicate that the German courts focused on external perceptions in some cases and immutable characteristics in others, even when examining the very same issue, without any attempt to synthesize these different approaches.[197] For example, one case from 1983 focused on popular perception and the perspective of an objective observer in determining that a homosexual from Iran be-

195. Bulgaria is another country that is impossible to categorize at this point in time, as it has enacted legislation that simply refers to the Qualification Directive, without having ever interpreted the meaning of a "particular social group." *See* ECRE STUDY, *supra* note 180, at 156 (noting the lack of a definition); FOSTER, *supra* note 156, at 17 n.99 (quoting the Bulgarian legislation as stating that "'[r]ace, religion, nationality, particular social group or political opinion or belief' are terms pursuant to the Convention on the status of refugees of 1951 and to Art. 10, par. 1 of the [Qualification Directive]").

196. Paul Tiedemann, *Protection against Persecution Because of "Membership of a Particular Social Group" in German Law*, *in* THE CHANGING NATURE OF PERSECUTION 340, 341, 345 (Int'l Assoc. of Refugee L. Judges 4th Conference, 2000), *available at* http://www.iarlj.org/general/images/stories/WorldConferences/4-2000-bern.pdf.

197. *See* Fullerton, *supra* note 135, at 531–35 (reviewing German judicial decisions).

longed to a PSG based on his sexual orientation.[198] Yet two subsequent decisions in 1988 and 1993 focused on whether the asylum seeker's homosexuality was an immutable characteristic.[199]

While these decisions suggest the absence of a clear analytical approach for determining whether a group constitutes a "particular social group," scholars suggest that "the jurisprudence *usually* concentrated on the 'unchangeable characteristic.'"[200] In fact, Germany has repeatedly applied the principle that a "particular social group" may be based on gender to groups that are often not socially visible, such as in cases involving female genital mutilation, forced marriage, honor crimes, and homosexuality.[201] Moreover, Judge Tiedemann has explained that "the right of asylum will *always* be granted in accordance with article 16a GG [of the 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)."[202]

Since the introduction of the Qualification Directive, however, Germany has indicated that it requires both a protected characteristic and social perception to establish a partic-

198. *Id.* at 534 (citing Verwaltungsgericht Wiesbaden [VG] [Wiesbaden Administrative Court] Judgment of Apr. 26, 1983, No. IV/I E 06244/81 (Ger.)).

199. In 1988, the Federal Administrative Court held that "homosexuality can be considered as an attribute that could be ground[s] for asylum, *if it is an irreversible personal characteristic.*" *See Cases and Comments, IJRL/004*, 1 INT'L J. REFUGEE L. 110 (1989) (providing an English summary of the court's decision); *see also* Tiedemann, *supra* note 196, at 343 (discussing the same case). Similarly, in 1993, the High Administrative Court ruled that "homosexuality as a ground for asylum is relevant only in cases of non-reversibility." HÉLÈNE LAMBERT, SEEKING ASYLUM: COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES 82–83 (1995) (internal quotations omitted); *see also Refugee Appeal No. 1312/93, Re GJ* 41 (N.Z. Refugee Status Appeals Authority, Aug. 30, 1995), *available at* http://www.refugee.org.nz/rsaa/text/docs/1312-93.htm (discussing the German cases mentioned here).

200. *See* Foster, *supra* note 156, at 24 & n.132 (emphasis added) (citing E. Hollman, Presentation: Die Qualifikationsrichtline (Nov. 25, 2005).

201. ECRE STUDY, *supra* note 180, at 148–49. Comparatively, 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. *See* Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009).

202. *See* Tiedemann, *supra* note 196, at 343.

ular social group.[203] The application instructions published by the Federal Ministry of the Interior provide that a particular social group must have "a distinct identity within the society of the country of origin," such as "where a group gets discriminated by the surrounding society."[204] This language is somewhat ambiguous as to whether Germany requires subjective social perception or simply an objective determination that the group is set apart from the rest of society, like Australia. By indicating that evidence of discrimination would show a "distinct identity," the instructions seem to suggest that the determination is objective and can be based on country conditions reports.

A study that analyzed eighty German decisions found that "the majority" of decisions interpreted Article 10(1)(d) of the Qualification Directive as requiring both a protected characteristic and social perception.[205] Thus, while the trend may be towards dual requirements, inconsistent approaches still exist in practice. Moreover, among courts that have required both criteria, their reasoning appears inconsistent. For example, a decision by the Wiesbaden Administrative Court explained that the language of the Qualification Directive—specifically the phrase "in particular"—allows for other ways to establish a particular social group, but satisfying only one of the two criteria would not "express a similar intensity of description" and is therefore insufficient.[206] A decision by the Higher Administrative Court of Schleswig-Holstein, on the other hand, found that the *UNHCR Guidelines* require group members to be per-

203. *See* ECRE STUDY, *supra* note 180, at 148 (stating that the Federal Ministry of Interior has interpreted Art. 10(1)(d) of the Minimum Qualification Directive to require both criteria, according to guidelines issued on Oct. 13, 2006); *see also* FOSTER, *supra* note 156, at 24–25 (noting that Germany has required both criteria since the adoption of the Qualification Directive).

204. *See* FOSTER, *supra* note 156, at 25 (citing Hinweise des Bundesinnenministeriums zur Anwendung der Richtlinie 2004/83/EG des Rates vom 29 April 2004 über Mindestnormen für die Annerkennung und den Status von Drittstaatsangehörigen oder Staatenlosen als Flüchtlinge oder als Personen, die anderweitig internationalen Schutz benötigen, und über den Inhalt des zu gewährenden Schutzes, [Remarks by the Interior Ministry on the Application of Council Directive 2004/83/EG] Oct. 13, 2006).

205. *Id.* at 25.

206. *See id.* at 26 (citing Verwaltungsgericht [VG] Wiesbaden [Wiesbaden Administrative Court] Mar. 14, 2011, 3 K 1465/09.WI.A).

ceived as different, misreading these Guidelines in the same manner as the BIA.[207]

The Higher Administrative Court's decision also seems to interpret social perception as requiring society as a whole to literally see the characteristic that defines the group. In that case, the court found that family members could not constitute a particular social group because "a family is not . . . clearly distinguishable from the rest of society."[208] The court went on to explain that in some situations, family membership may be "actually visible," such as when the members belong to "a regional tribal group that has a special significance and acts as identification."[209] The case before the court, however, involved an Iraqi man who feared being killed by the relatives of two slain men as a vendetta against his family.[210] Reasoning that the applicant "will be perceived only by [the relatives of the slain men], not by other citizens . . . as 'distinctive' in Iraq" and that "[t]he distinction . . . arises . . . only through the act of persecution," the court concluded that he was not eligible for asylum.[211]

This German decision not only suggests that social perception requires literal visibility, but also indicates that it is insufficient for the feared persecutors to perceive the group members as distinct. Rather, society *as a whole* must perceive the group members as being different. This interpretation by the German court indicates that the questions raised by the Ninth Circuit regarding whether the BIA's test requires literal visibility and what constitutes the relevant community for the analysis are indeed important issues that require clarification and could have a critical impact on the outcome of a case.[212] In sum, German legislation now requires both a protected

207. *See* FOSTER, *supra* note 156, at 26–27 & n.140) (citing Oberverwaltungsgericht [OVG] Schleswig-Holstein [Schleswig-Holstein Higher Administrative Court] Jan. 27, 2006, 1 L B 22/05).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *See* Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013) (en banc) ("Neither we nor the BIA has clearly specified whose perspectives are most indicative of society's perception of a particular social group: the Petitioner herself? Her social circle? Her native country as a whole? The United States? The global community?"). This *en banc* decision adopts the questions raised earlier by Judge Bea and Judge Ripple in their concurring

characteristic and social perception, but inconsistencies remain in practice. Moreover, at least some courts seem to interpret social perception as requiring the group members' defining characteristic to be literally visible to the society as a whole.

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.[213] A 1997 case called *Ourbih*, involving an Algerian transsexual, presented a more analytic definition of a "particular social group." There, the Conseil d'Etat, which is the highest administrative court, rejected the CRR's decision to deny asylum, reasoning that the CRR 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.*"[214] The analysis in *Ourbih* "referred to German and US jurisprudence as well as Anglo-Saxon academic writing."[215]

On its face, the definition in *Ourbih* appears to combine both the protected characteristic and social perception approach. When the case was returned to the CRR for reconsideration, however, the CRR 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 to persecution that was tolerated by the authori-

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opinion in Henriquez-Rivas v. Holder, 449 F. App'x 626, 630 (9th Cir. 2011), *rev'd*, 707 F.3d 1081 (9th Cir. 2013) (en banc) (Bea, J., concurring).

213. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group'*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 263, 280 (Erica Feller, Volker Türk & Frances Nicholson eds., 2003) ("The French jurisprudence does not include detailed analyses of membership of a particular social group.").

214. *Id.* at 281 (translating and quoting Conseil d'Etat (CE) decision No. 171858, Jun. 23, 1997 (Fr.), *available at* http://www.unhcr.org/refworld/docid/3ae6b67c14.html).

215. Hélène Lambert & Janine Silga, *Transnational Refugee Law in the French Courts: Deliberate or Compelled Change in Judicial Attitudes?*, *in* THE LIMITS OF TRANSNATIONAL LAW, *supra* note 33, at 35, 46.

ties in Algeria."[216] A report prepared by Rodger Haines for the International Association of Refugee Law Judges explained 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.*"[217] These interpretations of *Ourbih* create ambiguity about whether the decision actually required subjective social perception or simply some type of distinction (being "set apart") that could be objectively established.

In 1999, however, the CRR applied *Ourbih* to a seminal case on sexual orientation called *Djellal* and found that refugee protection is limited to "persons who claim their homosexuality *and manifest it in their external behaviour.*"[218] This interpretation appears to require literal visibility, which even the Department of Homeland Security has rejected in the United States. Various scholars have confirmed that French jurisprudence requires outward manifestation of the characteristic that defines the social group.[219] In other words, the decision in *Dejllal* indicates that it is not enough for a gay asylum-seeker in France to show that his society of origin recognizes homosexuals as a group, but he must also somehow *act gay* to establish membership in a particular social group.

During the past decade, however, the CRR has also been influenced by decisions from Canada and the United King-

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216. *Id.* (citing Commission des Recours des Réfugiés, Sections Réunies (CRR) (SR) decision No. 269875, May 15, 1998 (Fr.)).

217. RODGER HAINES, INTERIM REPORT ON MEMBERSHIP OF A PARTICULAR SOCIAL GROUP app. 1 (2008) (emphasis added), *available at* http://www.refugee.org.nz/Reference/larljpaper.htm.

218. FOSTER, *supra* note 156, at 11 (emphasis added) (citations omitted).

219. *See, e.g., id.* at 11 (interpreting *Djellal* as requiring "not only that the characteristic be identifiable, and define the group in the eyes of the relevant society, but that those members of the group seeking protection manifest such attributes in their external behaviour"); Jean Yves Carlier, *Droit d'Asile et des Réfugiés: De la Protection aux Droits*, 332 RECUEIL DES COURS 9, 213 (2008) (concluding that French jurisprudence requires "an affirmative stance of protest and social transgression on the part of the claimant, without which he/she will not be perceived as a member of a social group by society" (author's translation)); DENIS ALLAND & CATHERINE TEITGEN-COLLY, TRAITÉ DU DROIT DE L'ASILE 427–28 (2002) (describing France's "exterior requirement"); Roger Errera, *The Concept of Membership of a Particular Social Group, in* Common Values in International Law 133, 145–49 (Pierre-Marie Dupuy et al. eds., 2006) (discussing French law requiring the relevant common characteristics to be seen by "society at large").

dom in finding that former prostitutes comprise a particular social group based on a former immutable status,[220] and that women who refuse to be forcibly married constitute a group based on their common characteristics.[221] Neither former prostitutes nor women who resist forced marriages have characteristics that are socially visible (certainly not literally visible), but they do share immutable characteristics. These cases suggest that French jurisprudence has not emphasized social perception in all situations.

Yet more recent decisions have drawn on concepts of social perception or social recognition to restrict prior interpretations in gender-related claims. For example, although France recognized that women or parents who refuse female genital mutilation (FGM) constitute a particular social group in 2001, it limited this interpretation in 2009, "ruling that only individuals who expressed their opposition to FGM, and consequently transgressed social norms, could be identified as members of a PSG."[222] Similarly, although the CRR recognized women who refused to be forcibly married as a particular social group in 2004 and 2005, the Conseil d'Etat ruled in 2009 that a woman facing forced marriage in the rural parts of Eastern Turkey did not belong to a particular social group because it was a "private conflict," which suggests the absence of a public face.[223] These decisions indicate that France has not applied the social perception test consistently over time.

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220. *See* Lambert & Silga, *supra* note 215, at 45 (citing Commission des Recours des Réfugiés, Sections Réunies (CRR) (SR) decision No. 423904, Oct. 17, 2003 (Fr.) (involving an applicant from the Dominican Republic who claimed that she was forced into prostitution in Haiti)).

221. *Id.* at 45–46 (citing Commission des Recours des Réfugiés, Sections Réunies (CRR) (SR) decision No. 444000, Oct. 15, 2004 (Fr.) (involving a woman from Pakistan who claimed that she had been forcibly married)) (citing also Commission des Recours des Réfugiés, Sections Réunies (CRR) (SR) decision No. 489014, Mar. 4, 2005 (Fr.) (involving a woman from Turkey who claimed that she was confined for refusing to marry)). In these cases, the CCR noted that the women had transgressed social mores by refusing to marry, which may imply some type of social recognition.

222. GENDER RELATED ASYLUM CLAIMS IN EUROPE, *supra* note 152, at 66 & n.233 (citing Commission des Recours des Réfugiés, Sections Réunies (CRR) (SR) decision No. 361050, Dec. 7, 2001 (Fr.) (holding that parents who oppose having their daughters subjected to FGM can comprise a PSG)).

223. *Id.* at 67; *cf.* cases cited *supra* note 221.

3. *Belgium*

Belgium purports to require both a protected characteristic and social perception, but has openly acknowledged that it is flexible in practice about what approach is used. In 1992, the Refugee Appeals Board explained that a "particular social group" is

> a group characterized either by innate and unalterable characteristics, or by anterior characteristics that cannot be changed by the members (their history and former experiences). [It may also be] a voluntarily composed group provided that the purpose of the group is so fundamental to their human dignity that one cannot demand that it be renounced.[224]

Applying this definition, which closely tracks *Acosta,* the Board recognized groups such as Romanian intellectuals, Iranians with "progressive" or "western" attitudes, former civil servants of President Doe in Liberia, and groups based on family ties, all of which may lack social visibility.[225] In 1998, however, the Refugee Appeals Board incorporated the social perception approach into its analysis, stating that a particular social group is "a group of people sharing common characteristics that identify them as a distinctive unit amongst the entire society, and that is seen as such, due to its characteristics, by the rest of the population and the authorities."[226]

Yet Belgian jurisprudence continued to allow a particular social group to be based on either a protected characteristic or social perception.[227] Belgian decisions

> often refer to the Canadian Supreme Court's opinion in *Ward v. Canada* in order to stress the jurisprudential evolution regarding the scope given to "social group," quoting that "this evolution leads to [the

224. *See* Dirk Vanheule, *Belgium, in* WHO IS A REFUGEE? A COMPARATIVE CASE LAW STUDY, *supra* note 187, at 57, 100–01 (quoting V.B.C (2 ch.), Apr. 8, 1992, EO24).

225. *Id.* at 101.

226. Kosar, *supra* note 194, at 56 (quoting in translation Commision Permanente de Recours des Réfugiés [CPR] [Refugee Appeals Board] Oct. 21, 1998, F754).

227. *See* ECRE STUDY, *supra* note 180, at 155 (noting that while Belgian law ostensibly requires the satisfaction of both criteria, the test is applied flexibly by courts).

> conclusion] that the social group can be defined from the existence of inborn or immutable features, such as gender."[228]

Some Belgian decisions refer to both 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."[229]

The Belgian legislation that implements the European Qualification Directive provides that "a group *must* be considered to form a particular social group where *in particular*" members of that group share a protected characteristic and are perceived as distinct by society.[230] The words "must" and "in particular" suggest that a PSG undoubtedly exists where these two criteria are satisfied, but that a PSG may also be established in other cases. Even if the legislation is interpreted as imposing dual requirements, however, an analysis of cases decided by the Conseil du Contentieux des Etrangers (Belgian Council for Aliens Law Litigation) since 2007 confirms that the Council "exhibits quite a flexible approach, with no discussion of the perception of a particular group in society," resulting in "an effective implementation of the protected characteristics test with the social perception test merely assumed to have been met rather than presenting an additional hurdle for applicants to satisfy."[231] A recent study of gender-related asylum claims in Europe likewise found that in Belgium, "both limbs can be considered cumulatively or independently."[232]

C. *The Utility of a Comparative Approach*

The interpretations of our sister signatories, discussed above, do not provide an answer to the question of how to define a "particular social group," but do provide useful information that can help guide U.S. courts. One trend that

228. Jean-Yves Carlier and Dirk Vanheule, *Where is the Reference? On the Limited Role of Transnational Dialogue in Belgian Refugee Law*, *in* THE LIMITS OF TRANSNATIONAL LAW, *supra* note 33, at 17, 26 (emphasis added) (citation omitted).

229. *Id.* at 25–26.

230. FOSTER *supra* note 156, at 18 (emphasis added) (citation omitted).

231. *Id.* at 36.

232. GENDER-RELATED ASYLUM CLAIMS IN EUROPE, *supra* note 152, at 60.

emerges is that none of the other common law countries *require* social perception to establish a particular social group. With the exception of Australia, they all follow the protected characteristic approach. Yet even Australia does not apply social perception as a requirement. Another important point is that countries that purport to require both a protected characteristic and social perception often apply inconsistent or flexible approaches in practice (e.g., Germany, France, Belgium) or simply have not had much—or any—practical experience applying the PSG criterion.

The comparative analysis above also highlights how a social perception approach may lead to interpretations that are inconsistent with well-established U.S. precedents. The cases from Germany and France discussed above indicate three specific areas where this has occurred: cases where the PSG is based on family, homosexuality, and female genital mutilation.[233] Specifically, the social perception approach has led Germany to conclude that a family is not a particular social group unless its members bear visible markers of their family identity, but the BIA and U.S. courts have long held that family members can comprise a PSG, although opinions have started to diverge based on the social visibility test as well.[234]

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233. *See* Fatma Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender,* 27 YALE L. & POL'Y REV. 47, 79–102 (2008) (discussing how a social perception approach has the power to undermine claims based on sexual orientation, family membership, domestic violence, and human trafficking).

234. *See, e.g.*, In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (finding that the shared characteristic that defines a PSG could be based on "kinship ties"); In re H-, 21 I. & N. Dec. 337 342–43 (B.I.A. 1996) (indicating that even distant relatives – members of a clan or subclan – can constitute a social group); Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004) ("We join our sister circuits in holding that 'family' constitutes a 'particular social group . . . ."'); Lin v. Ashcroft, 377 F.3d 1014, 1028 (9th Cir. 2004) ("Like our sister circuits, we recognize that a family is a social group."); Iliev v. INS., 127 F.3d 638, 642 & n.4 (7th Cir. 1997) ("Our case law has suggested, with some certainty, that a family constitutes a cognizable 'particular social group . . . ."'); Fatin v. INS., 12 F.3d 1233, 1238–40 (3d Cir. 1993) (accepting that "kinship ties" qualify as a particular social group); Gebremichael v. INS., 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."). Since the BIA introduced the social visibility requirement, opinions have diverged about whether a family satisfies that

Moreover, France has found that homosexuals do not constitute a particular social group unless there is some outward manifestation of their sexual orientation, whereas the BIA and U.S. courts have recognized that *all* homosexuals in certain countries comprise a PSG.[235] France has also recently found that women who refuse FGM do not constitute a PSG unless they transgress social norms by expressing their opposition to the practice, which contradicts the opinions of several U.S. circuit courts explicitly rejecting the notion that opposition should be part of the definition of the social group in cases related to FGM.[236] The decisions of other circuit courts find-

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requirement. *Compare* Crespin-Valladares v. Holder, 632 F.3d 117, 126 (4th Cir. 2011) ("[W]e can conceive of few groups more readily identifiable than the family."), *with* Constanza v. Holder, 647 F.3d 749, 754 (8th Cir. 2011) ("Constanza's family lacks the visibility and particularity required to constitute a social group.").

235. *See, e.g.*, In re Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (recognizing "homosexuals" as a PSG in a case involving a gay man from Cuba); Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that "*all* alien homosexuals are members of a 'particular social group'"); Kadri v. Mukasey, 543 F.3d 16, 21 (1st Cir. 2008) ("Sexual orientation . . . is the basis for inclusion in a particular social group"); Nabulwala v. Gonzales, 481 F.3d 1115, 1117 (8th Cir. 2007) ("The IJ [Immigration Judge] explicitly (and the BIA implicitly) recognized that homosexuals may be a member of a 'particular social group . . . .'"); Eke v. Mukasey, 512 F.3d 372, 382 (7th Cir. 2008) (clarifying that the IJ had recognized homosexuals in Nigeria as a PSG but concluded that Eke had failed to establish his membership in that group because of problems with his credibility); Neri-Garcia v. Holder, 696 F.3d 1003, 1007 (10th Cir. 2012) (noting that "the IJ found Neri-Garcia to be a member of the particular social group of homosexual males from Mexico"); Ayala v. U.S. Att'y Gen., 605 F.3d 941, 947 (11th Cir. 2010) ("The [BIA] agreed with the immigration judge that 'homosexuals make up a particular social group . . . .'").

236. In its initial published decision addressing FGM, the BIA defined the PSG as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." In re Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996). Since then, several appellate courts have criticized the BIA's inclusion of opposition to FGM in its definition of the social group. *See, e.g.*, Niang v. Gonzales, 422 F.3d 1187, 1200 (10th Cir. 2005) ("[O]pposition is not a necessary component of a social group otherwise defined by gender and tribal membership."); Mohammed v. Gonzales, 400 F.3d 785, 796–97 & n.16 (9th Cir. 2005) (stating "[w]e believe that opposition is not required in order to meet the 'on account of' prong in female genital mutilation cases" and broadly defining the social group as "young girls in the Benadiri clan" or alternatively "Somali[ ] females"); Bah v. Mukasey, 529 F.3d 99, 113 n.20 (2d Cir. 2008) ("[U]nless the BIA reasonably explains why opposition to the practice is a necessary prerequisite, we

ing a PSG where there was no evidence of overt opposition to FGM also contradict France's interpretation.[237]

By showing how the social perception approach has influenced the jurisprudence in other countries, a comparative analysis serves as a harbinger of how that interpretation may shape the development of case law in the United States. Appellate courts that question whether the BIA's social visibility requirement will really lead to outcomes that contradict holdings in prior cases should be especially wary of the inconsistencies noted above regarding PSGs based on family, homosexuality, and FGM. Indeed, since introducing the social visibility requirement, the BIA has already begun to disavow family membership as the basis for a PSG in numerous unpublished decisions, although "kinship ties" was given as a prototypical example of a PSG in *Acosta*.[238]

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tend to agree with the Ninth Circuit's observation that 'the shared characteristic that motivates the persecution is not opposition, but the fact that the victims are female in a culture that mutilates the genitalia of its females.'") (quoting *Mohammed*, 400 F.3d at 797 n.16); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (holding that "all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM").

237. *See, e.g.*, Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004) (finding that a minor girl who feared being subjected to FGM in Ethiopia qualified as a refugee, without any mention of whether or not the child or her mother had voiced *public* opposition to the practice); Balogun v. Ashcroft, 374 F.3d 492, 499 (7th Cir. 2004) (noting that the agency did not dispute that the petitioner belonged to a PSG in a case involving a Nigerian woman whose family kept pressuring her to undergo FGM and who responded to the stress by locking herself in her house before coming to the United States, where the record did not suggest she publicly opposed the practice); Abankwah v. INS, 185 F.3d 18, 21 (2d Cir. 1999) (noting that "the BIA did not dispute that Abankwah's fear of genital mutilation was on account of her membership in a cognizable social group" in a case involving a Ghanaian woman from the Nkhumssa tribe, where the facts did not indicate that she had ever publicly opposed FGM); Kourouma v. Holder, 588 F.3d 234, 244 (4th Cir. 2009) (vacating an adverse credibility determination and finding prima facie eligibility for asylum in a case involving a partially circumcised woman who fled Guinea after her husband demanded that she be recircumcised, where there was no mention of whether or not she publicly opposed the practice).

238. *See, e.g.*, *In re F-N-*, at *2 (B.I.A. Apr. 16, 2010) (holding that the two "purported social groups [young Salvadoran boys resisting gang recruitment and their families] lack the necessary particularity and social visibility"); *In re G-M-*, No. A88-558-110, at *2 (B.I.A. Mar. 24, 2010) (stating that while the BIA agrees "that family may constitute a particular social group . . . respondents have failed to demonstrate that their family has any recognized level of

A third lesson that emerges from the above analysis is that "social perception" is not a clear concept and has been interpreted differently by various countries and various courts within a given country. Disagreement and confusion persists about whether social perception should be defined subjectively (France and possibly Germany) or objectively (Australia); the scope of the relevant community that must perceive the group; whether social perception requires literal visibility, as indicated by some German and French decisions, or whether more abstract recognition of the group is permissible; whether social perception differs from distinction in the sense of being "set apart" from the rest of society; whether specific evidence must be submitted to demonstrate social perception or if such perception can be presumed, as in Belgium; and what types of evidence would satisfy this test.[239]

Some U.S. courts have already noted these areas of confusion in discussing the BIA's social visibility requirement.[240] The comparative analysis not only magnifies these contested and confusing aspects of the analysis, but also suggests that the confusion may be inherent to the social perception approach itself, rather than due simply to shortcomings in the BIA's ex-

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social visibility"); *In re R-N-*, at *2 (B.I.A. Jan. 28, 2008) (holding "respondent has not shown that Mexican society, or any substantial segment of it, perceives his immediate family to constitute a discrete 'social group' in any sense, so as to satisfy the 'social visibility' criteria elucidated in this Board's precedents"); *see also* In re S-E-G-, 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (holding, where the applicant was the sister of a boy recruited for a gang, that alleged group of family members of those who have been recruited and resist gangs is too amorphous because it could include uncles, cousins, etc.).

239. *See* FOSTER, *supra* note 156, at 10, 12, 33, 37–38 (discussing the different evidentiary requirements that Australia, France, and the United States impose to prove social perception); *see also In re S-E-G-*, 24 I. & N. Dec. at 587 (finding "little in the background evidence of record to indicate that" the proposed social group was " 'perceived as a group' by society"); Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010) (dismissing the appeal in part because the applicant had "failed to provide even a scintilla of evidence" to show social visibility).

240. *See, e.g.*, Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009) ("Often it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even whether it understands the difference."); *See* Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013) (en banc) (remanding for the BIA to clarify whose perspectives are most relevant: "the Petitioner herself? Her social circle? Her native country as a whole? The United States? The global community?").

planations and reasoning. This observation is consistent with the conclusions reached by various scholars. For example, Michelle Foster has concluded that the social perception approach is inherently more subjective and less precise than the protected characteristic approach, as exemplified by the inconsistent decisions that have resulted from applications of social perception in Australia.[241] I have also argued elsewhere that social perception is a subjective process that is inherently difficult to assess because it depends on complex emotional and cognitive interactions and changes with context.[242] As discussed further in Part V below, whether or not a given interpretation of a treaty term can be consistently applied should be a factor that courts consider in deciding whether or not to adopt that interpretation.

Finally, engaging in comparative analysis is instructive because it illustrates the degree to which the processes of "norm export" and "norm convergence" have occurred.[243] Examining the interpretations of our sister signatories shows how *Acosta*'s protected characteristic approach was formulated by the BIA and endorsed by U.S. courts, then picked up by numerous foreign courts and embedded in their own jurisprudence.[244] This process of norm export reflects *Acosta*'s persuasive power. The foreign courts that adopted *Acosta* (modifying, interpreting, and internalizing it) promoted "norm convergence," which is "the tendency of domestic and international law to converge on a single, worldwide normative standard."[245] Such norm convergence responded to the need for an international consensus on the meaning of a "particular social group," while also reflecting an increased consciousness

241. *See* FOSTER, *supra* note 156, at 34, 37 n.216 (finding that the social perception test is "inherently less precise and more open to subjectivity than the more objective protected characteristics approach"; and describing inconsistent Australian decisions on whether "failed asylum seekers" constitute a particular social group).

242. *See* Marouf, *supra* note 233, at 72–75.

243. *See* Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 502–03 (2005) (discussing "the twin concepts of norm export and norm convergence" as "the heart of [a] co-constitutive process").

244. *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.").

245. *Id.*

among courts of their role as participants in a transnational dialogue about the definition of a "refugee."[246] The above analysis shows that all contracting parties to the Protocol have not yet converged on a single definition of "particular social group," but a significant amount of norm convergence around *Acosta* has already occurred. In deciding whether or not to accept social visibility as a requirement, U.S. courts should consider the degree of norm convergence and the impact that departing from *Acosta* would have on the ultimate goal of uniform treaty interpretation.

V. How To Give Weight to the Interpretations of Our Sister Signatories

Agreeing on the principle that courts should consider the interpretations of other parties to an international treaty does little to alleviate the challenging questions that arise from that principle. The Supreme Court has never offered any concrete guidance on how, practically, to apply this principle.[247] Nor has this issue received serious attention from scholars.[248] 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] 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."[249] Part A of this section proposes a framework with specific conditions and factors for selecting and weighing foreign authorities. Part B and C address two additional issues that are unique to the interpretation of the Refugee Convention and Protocol, which 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-

246. "The [International Association of Refugee Law Judges] 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." Hélène Lambert, *Transnational Law, Judges and Refugees in the European Union*, *in* The Limits of Transnational Law, *supra* note 33, at 1, 7.

247. Van Alstine, *supra* note 86, at 1936–37.

248. *Id.* at 1937 ("Other than passing references there is no scholarly analysis at all of the Supreme Court's barren statement on the relevance of prior foreign court precedents.").

249. Goodwin-Gill, *supra* note 36, at 204.

like functions but obviously is not a state party. Part D then considers and addresses concerns regarding the potential negative impact that a comparative analysis may have on U.S. jurisprudence.

A. *A Framework for Selecting and Weighing Foreign Authority*

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 United States' 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? 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.[250] Since the influence of foreign authority is not an all-

250. *Cf.* Edward Lee, *The New Canon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 29 (2005). (advocating *"a sliding scale* for using foreign law as primary and persuasive authority to decide a domestic statutory claim"); 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); Waters, *Getting Beyond the Crossfire Phenomenon*, *supra* note 104, 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 contexts, 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 id.*; *see also* Ruth Bader Ginsburg, Assoc. J., U.S. Supreme Court, Address before South African Constitutional Court (Feb. 7, 2006) (quoting Judge Patricia Wald), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-07b-06.html ("It's hard for me to see that the

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 constitutional interpretation, but do not make much sense in the context of interpreting an international treaty.[251] A model proposed by Eric Posner and Cass Sunstein, however, does provide a useful starting point. Posner and Sunstein argue that consulting the law of foreign states makes sense under the Condorcet Jury Theorem, which provides that, under certain conditions, a widespread belief, accepted by a number of independent actors, is highly likely to be correct.[252] Three specific conditions discussed by Posner and Sunstein are adapted and applied here to the context of refugee law.

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."[253] In other words, the foreign law must be based on information acquired through research or local knowledge, rather than a political dynamic that has nothing to do with the issue at hand.[254] Posner and Sunstein alternatively describe this condition as requiring the state to be "sincere,"

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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.").

251. *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: Lessons from South Africa*, 45 U.S.F. L. REV. 79 (2010).

252. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136 (2006).

253. *Id.* at 144.

254. *Id.* at 148.

rather than "strategic," not in the psychological sense, but in the sense of basing its judgment on real knowledge rather than unrelated factors, such as the influence of an interest group that does not care about the facts.[255] For the foreign authority to be useful, it should also be based on information that is not directly observable by U.S. decision-makers.

In the asylum context, this would mean that the foreign state's interpretation of the Protocol should stem from the local knowledge provided by actual asylum cases that have been decided by that state's government, or legislation based on experience with those cases. Since U.S. courts do not observe those cases directly, the foreign state's interpretation provides meaningful information. In order for this criterion to be met, then, the country should engage in sincere asylum adjudication, not just be a passive member of the Protocol. Countries that are parties to the Protocol but where UNHCR performs the role of refugee status determination would be excluded under this condition. UNHCR has taken over responsibility in states where asylum determination procedures have not yet been established, the national determination process is "manifestly inadequate," or the national determinations are based on an "erroneous interpretation" of the Convention.[256] These states would lack the private information necessary for their interpretations, if any exist, to be useful to U.S. courts.

The second condition requires 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."[257] 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."[258] In the context of interpreting the Refugee Convention and Protocol, different legal principles in a foreign state may indeed render the inter-

255. *Id.* at 147–48.

256. UNHCR, REFUGEE STATUS DETERMINATION: IDENTIFYING WHO IS A REFUGEE 11 (2005), *available at* http://www.unhcr.org/refworld/pdfid/43141f5d4.pdf. 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. Thus, UNHCR processes about twice as many applications annually as the United States. UNHCR STATISTICAL YEARBOOK 2010, *supra* note 129, at 41–42.

257. Posner & Sunstein, *The Law of Other States*, *supra* note 252, at 144.

258. *Id.*

pretive "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 Dutch refugee law, for instance, Thomas Spijkerboer observes that "just which of the five persecution grounds is related to the (feared) persecution is virtually considered *immaterial*."[259] 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.'"[260] Thus, while the Netherlands may end up granting asylum in many of the same types of cases that would be decided in the United States on the social group ground, it is not applying the same legal principles. The Netherlands' decision 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.

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 many 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 considering its interpretation. 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.[261]

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259. THOMAS SPIJKERBOER, GENDER AND REFUGEE STATUS 115 (2000) (emphasis added).

260. *Id.* (citation omitted).

261. *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

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 mimicked some other state, then the law would not count as an independent vote."[262] 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, because the particular judgments of many or most do not add information."[263] As an example, Posner and Sunstein note that if former British colonies adopt British laws just because they do not have the time or resources to come up 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."[264]

Applying this reasoning to the asylum context, courts should be cautious about the interpretations of EU Member States that may have simply copied the minimum standard set forth in the EU's 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 became parties in order to obtain the benefits of cooperation with other European countries . . . *despite their doubts about particular*

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results reached by the courts and the reasoning used to reach those results without acknowledging and addressing such differences.").

262. Posner & Sunstein, *supra* note 252, at 144–45.

263. *Id.* at 160; *see also* Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J. L. & PUB. POL'Y 653, 684–85 (2009) (discussing the problems posed by cascades).

264. Posner & Sunstein, *supra* note 252, at 160.

rules or norms rather than because of them."[265] Domestic courts should therefore be especially cautious of the "cascade effect" when mere membership in a regional or international body compels a particular interpretation, rather than reflecting an independent judgment by the foreign state.

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 the issues on their own.

In sum, the proposed "ground rules" for considering a foreign state's interpretation of the Refugee Protocol are as follows: (1) the foreign state must sincerely engage in asylum adjudication, so that its interpretation is based on local knowledge and actual information; (2) the foreign state must address a question similar to the one before the domestic court and share a common general understanding of the concept involved; and (3) the foreign state must exercise independent judgment in its interpretation, rather than blindly copying another state or a regional or international authority.

2. *Factors to Consider in Giving Weight to Foreign Authorities*

While these ground rules provide initial steps in determining whether to consider a certain foreign authority, they do not assist domestic courts in deciding how much weight to give that authority. Building on the work of other scholars who have considered the role of foreign authorities in different contexts, this section proposes six 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 law, through jurisprudence or legislation; (3) the persuasiveness of the foreign state's interpretation; (4) the precedential value of the foreign authority; (5) whether a given interpretation can be consist-

265. *Id.* at 165–66 (emphasis added).

ently applied; and (6) whether the interpretation reflects the human rights principles underlying the treaty. 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.[266] The 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. As noted in Part IV above, one-third of all asylum applications are concentrated in just ten countries: South Africa, the United States, France, Germany, Sweden, Ecuador, Malaysia, the United Kingdom, Canada, and Belgium.[267] These specially affected states 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 challenging 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.

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.[268] Daniel H. Joyner specifically

266. 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, 'external' 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 . . . .").

267. *See* statistics cited *supra* note 129.

268. *See* North Sea Continental Shelf Cases (F.R. Ger. v. Den.; F.R. Ger. v. Neth.), 1969 I.C.J. 3, ¶¶ 73-74 (Feb. 20) (finding that a treaty provision did

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 treaty.[269] Other scholars similarly contend that "it is not simply a question of how many States participate in the practice, but also which States."[270] 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."[271]

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 cre-

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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) (dissenting opinion of Judge Weeramantry) (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 percent) 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).

269. DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 35 (2009); *see also* H. Meijers, *How Is International Law Made?: The Stages of Growth of International Law and the Use of Its Customary Rules*, 9 NETH. Y.B. INT'L L. 3, 5–7 (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) (quoting R.R. Baxter, *Treaties and Customs*, 129 RECUEIL DES COURS 27, 66 (1970)) (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").

270. *Introduction*, *in* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxv, xxxvii (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

271. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. *b* (1987) (emphasis added). 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 . . . ." *Id.* (emphasis added).

ation of customary international law through "state practice."[272] Some even criticize the role of powerful nations in creating international law as an imperialistic threat to the rights of developing countries.[273] 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.[274] 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 industrialized, receives the greatest number of asylum applications. Examining specially affected parties in the asylum context therefore opens the door to engage more

272. *See, e.g.*, George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 555 (2005) (quoting Oscar Schachter, *New Custom: Power, Opinio Juris, and Contrary Practice*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531, 536–37 (Jerzy Makarczyk ed., 1996) ("[T]he great body of customary international law was made by remarkably few States."); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 150–51 (2005) ("[P]owerful states dominate the question of state practice"); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 537 (1993) ("[W]hen authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent, or most interested among them."); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1848 (2009) ("[Courts] rely on salient instances of state practice (usually the practices of powerful Western nations) . . . because there are too many states and too many potential instances of state consent (or nonconsent) to examine individually.").

273. *See, e.g.*, Ernesto Hernández-López, Boumediene v. Bush *and Guantánamo, 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 an outgrowth of European states, or more powerful states, expanding their influence worldwide"); Melissa Robbins, Comment, *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).

274. *See* Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 143–44 (1995) (discussing the impact of state resources and wealth on a state's ability to shape the formation of customary international law).

deeply with the laws and interpretations of less powerful countries, rather than simply reinforcing the views of those that already dominate the international stage. Ecuador, with the sixth highest number of asylum applications, is also a developing nation—one of the poorest in South America—but widespread discrimination and procedural shortcomings in its asylum and refugee determination process caution against giving weight to its interpretations, at least at the present time, under the first condition discussed above.[275]

b. *A Well-Developed Body of Asylum Law, Through Jurisprudence or Detailed Legislation*

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 asylum law, which can be shaped either by jurisprudence or detailed legislation. This factor builds on the second and third conditions articulated by Posner and Sunstein. A country with a well-developed body of asylum 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 interpretations of foreign states with well-developed asylum laws are

275. *See* Adina Appelbaum, *Challenges to Refugee Protection in Ecuador: Reflections from World Refugee Day*, GEORGETOWN PUBLIC POLICY REVIEW (June 26, 2012, 1:31 PM), http://gppreview.com/2012/06/26/challenges-to-refugee-protection-in-ecuador-reflections-from-world-refugee-day/ ("Widespread discrimination and xenophobia against refugees shape decision makers' perspectives and frequently influence them to seek loopholes to legal protective mechanisms."). Nearly 99% of the refugees and asylum-seekers in Ecuador are of Columbian origin and they frequently face discrimination. *Id.* During the Universal Periodic Review process in May 2012, U.N. members praised Ecuador for its implementation of an Enhanced Registration Process (ERP) for refugees, but that process has since been suspended, and the status of tens of thousands of refugees may be revoked. *Id.* Changes in the application process, including "accelerated procedures" that compromise due process, have also resulted in nearly 30% of applicants being declared inadmissible, resulting in a drop in the refugee recognition rates from 74% in 2009 to 24% in 2011. *Id.* In addition, although Ecuador used to provide a more expansive definition of a "refugee" than did the Convention pursuant to the 1984 Cartagena Declaration on Refugees, that definition was restricted under a new decree called Decreto 1182, making it harder for those fleeing mass violence to qualify. *Id.* Moreover, "[t]he Ecuadorian government has recently drastically reduced the recognition of gender-based violence as grounds for seeking refugee status . . . ." *Id.*

more likely to reflect independent judgments. Taking into consideration the state's body of asylum 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.[276] For common law countries, the asylum jurisprudence should show sound legal analysis with detailed explanations of how the courts arrived at their outcomes. Civil law countries would not be excluded under this factor if the judicial decisions explain the courts' reasoning or if the countries have detailed legislation that specifically addresses the issue facing the U.S. court.

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, Australia and New Zealand have a highly sophisticated body of jurisprudence but receive a relatively small volume of asylum applications.[277] France and Germany have a high volume of applications but the jurisprudence is relatively much

276. 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. *See* Annie-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 211 (2003) (stating that decisions of the adequacy of foreign forums in U.S. courts involve determinations of "a minimum standard of international justice"). While this consideration, too, could trigger accusations of political favoritism, Slaughter points out that "[c]ontrary to appearances . . . adequate forum determinations do not depend on first world versus third world status." *Id.* at 212. 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 . . . ." *Id.* at 213.

277. Australia and New Zealand had only 3,760 and 216 asylum cases pending respectively at the end of 2010. *See* UNHCR STATISTICAL YEARBOOK 2010, *supra* note 129, at 86 tbl.9. 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 & Jason Pobjoy, *A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia's 'Excised' Territory*, 23 INT'L J. REFUGEE L. 583 (2011) (discussing Australia's attempt to create "zones of exception" within Australian territory wherein

less developed. 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 State's Interpretation*

The third factor involves the persuasiveness of the foreign state's interpretation. This factor focuses on the substantive content of a specific interpretation, 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 satisfying method of analysis. The depth of the reasoning is obviously important.[278] 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 aspects of interpretation. These reasons may be found in a judicial decision or in the legislative history of a foreign statute.

Where two different interpretations exist, one backed by strong, persuasive legal reasoning and the other not, courts should give more weight to the interpretation supported by sound legal analysis. The 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* foreign authorities also reinforces the condition requiring independent judgment, since the mere fact of consensus "could be the result of international arm-twisting, legitimacy-seeking or simply a tendency to fall into patterns by imitating the behavior of other states ('acculturation')."[279]

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the protections of the onshore domestic refugee system were limited or inapplicable).

278. *Cf.* Zubaty, *supra* note 261, at 1441–47 (discussing the depth of reasoning as a relevant factor in using foreign law for purposes of constitutional interpretation).

279. Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167, 180; *see also* Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335, 1362 (2007) ("Foreign law is also entitled to more weight when it is

d. *Precedential Value of the Foreign Authority*

The precedential value of a foreign authority is also important. In discussing the use of foreign law in constitutional interpretation, Rebecca Zubaty argues that "[w]here the reasoning of a judicial opinion is not a source of law in its own country, its reliability for the purposes of the reason-borrowing approach is thus called into question."[280] In the context of treaty interpretation, the issue is not just about reason borrowing 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 addressing a similar case the next day would not 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.[281]

The majority in *Olympic Airways* implicitly recognized this principle in noting 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.

If the foreign authority is a civil law country where the doctrine of "stare decisis" does not apply, U.S. courts should pay attention to *trends* in judicial interpretations, as the doctrine of *jurisprudence constante* provides that the persuasive force of an interpretation increases as that interpretation be-

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persuasively justified; and to less weight when it seems to reflect another country's peculiarities.").

280. Zubaty, *supra* note 261, at 1447.

281. *See id.* at 1447–48 ("Rulings acquire de facto precedential weight where subsequent judges adhere to a particular judicial interpretation of a statue or a code over a period of many years.").

comes more consistent.[282] Moreover, if a relevant interpretation is set forth in legislation, that legislation would normally carry the same weight as a precedent by the highest court of a common law country, assuming that it is implemented as written. If however, there is evidence that the actual practice differs from the law on the books, as in the case of Belgium's interpretation of a "particular social group" (depending on how one interprets Belgium's legislation), then U.S. courts should focus on the country's actual practice. Similarly, if a relevant legislative provision is inconsistently applied, such inconsistencies should reduce the weight given to that legislative provision because it does not present a comprehensive view of state practice.

e. *Whether a Given Interpretation Can Be Consistently Applied*

The last point noted above actually gives rise to a separate factor. Since one of the primarily goals in treaty interpretation is to promote a uniform understanding and application of the treaty, courts trying to decide between competing interpretations of a treaty's term should consider whether courts *can* consistently apply a given interpretation. The different approaches to defining a "particular social group" provide a good example of how one interpretation of a treaty term (the protected characteristic approach) may lend itself to more objective and consistent application than another interpretation (the social perception approach). Evidence of inconsistent application of a certain interpretation within a country or between countries should flag a potential problem with that interpretation. In this type of situation, courts should give more weight to the interpretation that lends itself to more uniform application.

f. *Whether the Interpretation Reflects the Human Rights Principles Underlying the Treaty*

Finally, courts should consider whether a given interpretation reflects the fundamental principles underlying the treaty. In the case of the Refugee Convention and Protocol, the relevant principles are those of international human rights, as evi-

282. *See* Lee, *supra* note 250, at 61–62 (discussing the function of the doctrine of *jurisprudence constante*).

denced by the Convention's Preamble.[283] Various scholars have persuasively advocated the use of international human rights law in interpreting the definition of a "refugee," including terms such as "persecution" and "particular social group."[284] Using a common framework, like choosing an interpretation that can be consistently applied, promotes uniform implementation of the treaty. While this factor may overlap with examination of the treaty's context and purpose, it also provides a reasoned way to select among competing interpretations by other contracting parties.[285] In the example discussed above regarding interpretations of PSG, the Canadian Supreme Court's decision in *Ward* strongly connects the protected characteristic approach to the anti-discrimination and human rights principles in the Refugee Convention's preamble, whereas Australia derived the social perception from the dictionary definitions of the words.

Considering all of these factors as a whole should help courts engage in a more structured and meaningful comparative analysis when interpreting treaties and incorporative statutes. Although this Article proposes and examines these factors in the context of the Refugee Protocol, the same basic factors could help guide courts when considering the views of our sister signatories to any treaty.

B. *The Interpretations of a Regional Body: The European Union*

The question of how to select and weigh foreign authorities is complicated enough, but another layer of complexity is added when one turns to the question of what weight, if any,

283. *See* Refugee Convention, *supra* note 1, pmbl. (invoking principles of human rights); *see also supra* Part II (discussing the historical origins of the Refugee Convention and Protocol).

284. *See, e.g.*, Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133 (2002) (recognizing that refugee law increasingly acknowledges its foundation in a human rights paradigm); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 104–05 (1991) (finding that given the Convention drafters' intentions, "persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection"); MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS (2007) 304–39 (discussing the conceptual linkages between particular social groups and economic and social rights).

285. *See* NOLTE, *supra* note 37, at 18 (discussing cases showing that "[s]ubsequent conduct and the object and purpose of a treaty can be closely interrelated").

should be given to the interpretations of a regional body, such as the EU, which has recently taken groundbreaking steps towards the creation of a Common European Asylum System (CEAS). This question is particularly pressing, as the Department of Homeland Security has begun citing to the EU's Qualification Directive in some of its briefs. In a case that was recently remanded by the Third Circuit to the BIA based, among other things, on the BIA's failure to justify its new social visibility requirement, DHS cited the EU's Qualification Directive in its brief to the BIA as providing support for a social perception requirement.[286]

Since the EU itself is not a state party to the Refugee Convention or Protocol, the legal issue is whether its interpretations may be attributed to its 27 Member States, or whether each Member State's views must be considered individually.[287] A starting point 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 protection.[288] For example, the Directive explicates the meaning of "persecution" and each of the five protected grounds, including "membership of a particular social group."[289] The Directive also addresses issues such

286. Brief of Department of Homeland Security at 11, *In re* Valdiviezo-Galdamez, No. A097-447-286 (B.I.A. 2012) (on file with author)); *see also* Valdiviezo-Galdamez v. Att'y Gen. of the U.S., 663 F.3d 582, 589 (3d Cir. 2011). DHS reframed the requirement as "social distinction," but defined this term as requiring that the society in question perceive the group as distinct, thereby folding social perception into the definition. DHS acknowledged that literal visibility is not required. Brief of Department of Homeland Security, *supra*, at 11–12.

287. The 27 EU Member States receive over a quarter of the asylum applications submitted worldwide. *See* ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES, *supra* note 129, at 7–8. 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. *Id.*; *see also* UNHCR Statistical Yearbook 2010, *supra* note 129, at 42.

288. *See* María-Teresa Gil-Bazo, *Refugee Status and Subsidiary Protection Under EC Law: The Qualification Directive and the Right to Be Granted Asylum*, *in* WHOSE FREEDOM, SECURITY AND JUSTICE?: EU IMMIGRATION AND ASYLUM LAW AND POLICY 229, 229 (Anneliese Baldaccini, Elspeth Guild & Helen Toner eds., 2007).

289. *See* Qualification Directive, *supra* note 143, arts. 9–10.

as persecution by non-state actors, internal relocation, exclusion from refugee status, and the cessation of refugee status.[290] 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.

Significantly, the Qualification Directive sets forth only *minimum* standards, leaving Member States free to provide more favorable standards if they so desired, as long as these standards remained compatible with the Directive. Looking only at the Qualification Directive therefore provides little information about the actual interpretation of EU Member States. For example, even if one interprets article 10(1)(d) of the Qualification Directive as setting forth dual requirements for establishing a particular social group (i.e., both a protected characteristic *and* social perception), that simply means that EU Member States may not impose a *more rigorous* definition of a particular social group, but they remain free to establish a less onerous standard, such as by allowing either criterion to suffice. As discussed above, the 2008 survey by the ECRE indicated that many EU Member States permit a particular social group to be defined based on *either* a particular characteristic *or* social perception. This example illustrates the importance of looking past the language of the Qualification Directive to the actual interpretation or practice of EU Member States.

Moreover, it remains unclear whether or to what extent EU Member States have incorporated the Qualification Directive into their domestic laws. Studies conducted by the UNHCR and the ECRE revealed significant discrepancies among EU countries in the degree of implementation of the Qualification Directive, as well as disparities among decision-making bodies within particular countries in interpreting and applying the Qualification Directive. 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.[291] France

290. *See id.* arts. 6, 8, 11–12.

291. UNHCR, ASYLUM IN THE EUROPEAN UNION: A STUDY OF THE IMPLEMENTATION OF THE QUALIFICATION DIRECTIVE 9 (2007), *available at* http://www.unhcr.org/47302b6c2.html.

had transposed the Directive back in 2003, before it was formally adopted, so it was missing some of the provisions from the final version.[292]

In addition, UNHCR found that "some courts, on some specific issues, persisted with an interpretation based on established national practice *incompatible* with the Directive."[293] 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."[294] 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."[295] Similarly, German courts applied the Directive in some cases but not others.[296]

A subsequent study in 2008 by the 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.*"[297] Complicating matters, "[m]any provisions were not transposed literally, and some are mistranslated in national laws."[298] 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."[299] In fact, the study's "overarching conclusion" was that "considerable scope remains for future harmonisation."[300]

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

292. *Id.* at 35.
293. *Id.* at 9 (emphasis added).
294. *Id.*
295. *Id.* at 36.
296. *Id.* at 37.
297. ECRE STUDY, *supra* note 180, at 5 (emphasis added).
298. *Id.*
299. *Id.* at 7.
300. *Id.*

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."[301] The ECRE observed that "[f]ortunately, 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."[302] 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.[303] As Hélène 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."[304]

In light of these studies, U.S. 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."[305] 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

301. *Id.* at 6.

302. *Id.* at 6, 21. The ECRE reasoned that "[t]his interpretation is consistent with the Refugee Convention." *Id.* at 21, 36.

303. *See id.* at 20–21 (reviewing the divergent interpretations given to the directive by national courts).

304. Lambert, *supra* note 246, at 2 (emphasis added); *see also* ECRE STUDY, *supra* note 180, at 6 (stressing the importance of national courts in interpreting and applying EU laws).

305. *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*, § 4 COM (2008) 360 final (June 17, 2008) [hereinafter *Policy Plan on Asylum*].

seventy-fold, depending on where he or she applies."[306] This discrepancy exists, in part, because the Qualification Directive sets only a minimum floor.[307] Looking only at the Qualification Directive would obscure the more favorable norms in many states and hide patterns of providing greater protection that are relevant to treaty interpretation. The Qualification Directive also provides only *general* guidance, leaving many specific interpretive issues to be resolved by the courts.

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.[308] Three Member States have opted out of the amended Directive: the United Kingdom, Ireland, and Denmark.[309] By not opting out, the other Member States have agreed to comply with the minimum standards set forth in the Qualification Directive.[310] Given the remaining EU Member

306. Erika Feller, Assistant U.N. High Commissioner for Refugees, Remarks at the Public Hearing on the Future Common European Asylum System (Nov. 7, 2007), *reprinted in* 20 INT'L J. REFUGEE L. 216, 217 (2008).

307. *See id.* at 219 (discussing "minimum standards" for EU member states).

308. *See* European Council on Refugees and Exiles, *Qualification Directive: Latest Developments* (Feb. 1, 2013, 2:10 PM), http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html (discussing the new version of the directive).

309. *Id.* The Qualification Directive is the first among five legal instruments that the EU plans to adopt by the end of 2012 for the creation of a Common European Asylum System. *See* Press Release, Council of the European Union, Asylum Qualification Directive: Better, Clearer and More Harmonised Standards for Identifying Persons in Need of International Protection (Nov. 24, 2011), *available at* http://www.consilium.europa.eu/ue docs/cms_data/docs/pressdata/en/jha/126305.pdf.

310. 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 v. Belgium, Decision on Admissibility, 2001-XII Eur. Ct. H.R. 333, ¶ 62 (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 32, 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 LAW OF THE UNITED STATES, §102 cmt. *c* (1987) ("Inaction may constitute state practice . . . .").

States' responses to the initial Directive, however, it seems unlikely that the amended version will lead to genuine harmonization for quite some time, as courts and legislatures in the various EU countries must first address the myriad of challenging issues that require interpretation.[311]

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.[312] 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."[313] If the EU's interpretations are attributed to its Member States, any errors would be magnified, having a dangerous cascade-like effect on treaty interpretation worldwide as other countries give weight to an erroneous interpretation by the EU.

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.[314] The European Commission's Policy Plan on Asylum specifically noted border control mechanisms that "lack the necessary

311. Lambert, *supra* note 246, at 14 ("[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 (emphasis added).

312. *See* Maria O'Sullivan, *Acting the Part: Can Non-State Entities Provide Protection under International Refugee Law?*, 24 INT'L J. REFUGEE L. 85 (2012).

313. ECRE Study, *supra* note 180, at 4.

314. *See* Michael Campagna, Note, *Effective Protection Against* Refoulement *in Europe: Minimizing Exclusionism in Search of a Common European Asylum System*, 17 U. MIAMI INT'L & COMP. L. REV. 125, 144-45 (2010) (describing the history of the CEAS).

mechanisms to identify potential asylum seekers."[315] Ironically, however, various components of the Common European Asylum System are now *creating* a zone of exclusion.[316]

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.[317] 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. 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 rights and consistent with international human rights principles, and enhance equality in the asylum process.[318] 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.[319] The European Court of Justice (ECJ), which interprets EU law to ensure that it is applied in a uniform way in all Member States, will likely play a critical role in resolving disputes about how to

315. *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*, § 2.1.2.1, COM (2008) 360 (June 17, 2008).

316. *See* Silas W. Allard, Comment, *Casualties of Disharmony: The Exclusion of Asylum Seekers Under the Auspices of the Common European Asylum System*, 24 EMORY INT'L L. REV. 295 (2010) (discussing flaws in the CEAS).

317. *See* Lambert, *supra* note 246, at 16 ("[I]t is now strongly believed that the communitarization of asylum/refugee law is forcing change more rapidly.").

318. The EU specifies that not only the Geneva Convention, but also "the evolving jurisprudence of the European Court of Human Rights (ECtHR) and the full respect of the Charter of Fundamental Rights and Freedoms will be a constant reference for [the asylum policy] strategy." *Policy Plan on Asylum, supra* note 305, at § 2.

319. *See* ECRE STUDY, *supra* note 180, at 5 ("In [some] areas, *implementation appears to have lowered standards, mostly around the definition of a particular social group*, or insufficient safeguards against *refoulement*.") (first emphasis added).

interpret the Qualification Directive, including different interpretations of a "particular social group." At this point, with only minimum standards that have not even been fully implemented, 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 developments represent a progression or regression of current standards for international protection.

C. *The Interpretations of UNHCR*

Just as a regional body, such as the EU, raises interesting legal issues relevant to assessing the interpretations of our sister signatories, so does the role of UNHCR. 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 may entrust UNHCR to perform this function through Memoranda of Understanding or simply through a "tacit quid pro quo," whereby the government accedes to the Refugee Convention and, in return, UNHCR agrees to bear the cost of identifying eligible refugees.[320]

In this situation, where States Parties have effectively delegated their job of interpreting the Convention and/or Protocol to UNHCR, and UNHCR has assumed functions traditionally performed by the state, one could argue that UNHCR's interpretations constitute subsequent practice and "stand-in" for the interpretations of the state.[321] This argument gains

320. Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms*, 37 N.Y.U. J. INT'L L. & POL. 869, 877, 886 (2005); *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."); GUGLIELMO VERDIRAME & BARBARA HARRELL-BOND, RIGHTS IN EXILE: JANUS-FACED HUMANITARINISM 113 (2005) ("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.'").

321. This reading of "subsequent practice" comports with decisions of the ICJ, which has recognized that the "output of an international organization

force from Article 35 of the Convention and Article II of the Protocol, which create a "nexus between UNHCR's role and the obligations of states."[322] 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."[323] 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.[324] Thus, simply by ratifying the Convention and/or Protocol, countries arguably agree to follow UNHCR's interpretations.[325]

UNHCR, however, has repeatedly emphasized that the primary responsibility for refugees lies with the state and that it only exercises authority on a transitional basis.[326] Citing its

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has the potential to constitute subsequent practice for the purposes of the Vienna rules." GARDINER, *supra* note 32, at 248 (discussing Legality of the Use of Nuclear Weapons, 1996 I.C.J. 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 UN." *Id.* at 249 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 27–28 (July 9)).

322. Marjoleine Zieck, *Vanishing Points of the Refugee Law Regime: Response to James Hathaway*, 20 OHIO ST. J. ON DISP. RESOL. 217, 235–36 (2005).

323. Refugee Convention, *supra* note 1, art. 35.

324. *See* Walter Kälin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 613, 623 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003) (deriving such a conclusion from the UNHCR statute and Refugee Convention).

325. *See id.* at 627 ("[Case law] acknowledges that, as 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*, 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.").

326. *See, e.g.*, UNHCR, Executive Committee of the High Commissioner's Programme, Note on International Protection, ¶ 2, U.N. Doc. A/AC.96/930

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 construes its purpose as "ensuring that Governments take the necessary action."[327] Treating UNHCR as a *de facto* state may be a dangerous proposition, as this posture could weaken both UNHCR's and States Parties' abilities to "promote respect for refugee law."[328] As UNHCR's role becomes more prominent, the notion of state responsibility withers.[329] Allowing UNHCR's interpretations to "stand in" for the interpretations of the state may simply create a slippery slope towards affirming states' abdication of responsibilities to UNHCR, thereby undermining the Convention's goal of promoting state responsibility for the protection of refugees.

A different argument for treating UNHCR's interpretations as a form of "subsequent practice," which does not involve ascribing it with any attributes of a *de facto* state, might highlight how its interpretations often *reflect* state practice. Due to its presence on the ground in so many countries, UNHCR can directly observe decision-making, as well as access

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(July 7, 2000) ('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, Executive Committee of the High Commissioner's Programme, Note on International Protection, ¶ 13, U.N. Doc. A/AC.96/830 (Sept. 7, 1994) [hereinafter 1994 Note on International Protection] ("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."); *see also* Volker Turk & Elizabeth Eyster, *Strengthening Accountability in UNHCR*, 22 INT'L J. REFUGEE L. 159, 163 (2010) ("[T]he main responsibility for safeguarding the rights of refugees lies with states.").

327. 1994 Note on International Protection, *supra* note 326, ¶ 13.

328. VERDIRARME & HARRELL-BOND, *supra* note 320, at 113 ("[B]y assuming responsibility for status determination UNHCR weakened its ability to promote respect for refugee law.").

329. *See* Turk & Eyster, *supra* note 326, at 164 (quoting Amy Slaughter & Jeff Crisp, *A Surrogate State? The Role of UNHCR in Protracted Refugee Situations*, (EUPA Working Papers, Research Paper No. 168, 2009)) ("[T]he notion of state responsibility was weakened further, while UNHCR assumed (and was perceived to assume) an increasingly important and even preeminent role.").

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."[330] For example, in analyzing the European Court of Justice's decision on the provision of the Qualification Directive pertaining to the cessation of refugee status, Roger Errera notes that "*state practice has been aptly summed up by the UNHCR.*"[331] Certain courts have also endorsed this perspective. The House of Lords 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 our judgment, *good evidence of what has come to be international practice* within Art. 31(3)(b) of the Vienna Convention."[332] 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

330. GARDINER, *supra* note 32, at 249 n.138 (emphasis added); *see also* Arthur C. Helton, *Refugee Protection Under International Law,* C399 ALI-ABA 59 (1989) (stating that "soft law" sources such as the UNHCR Handbook can be "evidence of state practice").

331. Roger Errera, *Cessation and Assessment of New Circumstances: A Comment on Abdulla CJEU, 2 March, 2010,* at 11, (International Association of Refugee Law Judges – European Chapter Conference, Sept. 23–24, 2010), *available at* http://www.iarlj.org/general/images/stories/lisbon_sep_2010/errera.pdf (discussing the European Court of Justice's decision in Joined Cases C-175/08, C-176/08, C-178/08, & C-179/98, Abdulla v. Bundesrepublik Deutschland, 2010 E.C.R. I-01493). Other scholars, however, have pointed out conflicts between UNHCR's interpretation of the cessation clauses and the interpretations of some states. *See* Marissa Elizabeth Cwik, Note, *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).

332. R v. Sec'y of State for the Home Dep't *ex parte* Adan [1999] 4 All E.R. 774 (A.C.) 500 (emphasis added), *reprinted in* 11 INT'L J. REFUGEE L. 702 (1999).

UNHCR's exhortations."[333] 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."[334] 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."[335] 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."[336] 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 committee, yet according to the UNHCR Germany has never conformed to its requirements in practice."[337]

While UNHCR's Handbook "has had immense influence on state practice" and certainly deserves "a measure of deference," there are areas where UNHCR's interpretations are not grounded in state practice.[338] For example, Professor James C. Hathaway has criticized UNHCR's support for a broad interpretation of the Convention's provisions related to cessation of refugee status, noting that UNHCR claimed the interpretation "is now well-grounded in State Practice" yet conceded that "declarations [of cessation due to changed conditions] are in-

333. *Re* AA, [2005] UKIAT 00104, ¶ 67 (emphasis added), *reprinted in* 20 INT'L J. REFUGEE L. 203, 215 (2008).

334. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] ¶ 34, 10 C 33.07, OVG 16 A 4354/05.A (Ger.) (*reprinted in* 21 INT'L J. REFUGEE L. 549 (2009)).

335. *Id.*

336. *Id.*

337. *Id.*

338. *See* James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder,* 34 CORNELL INT'L L.J. 257, 296–97 (2001).

frequent."[339] In addition, Professor 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, finding it doubtful that UNHCR's interpretation "will survive in state practice" given the "logically compelling" judicial trend to the contrary.[340]

In short, determining whether or not UNHCR's interpretation of a particular provision of the Refugee Convention or Protocol *reflects* state practice or is meant to *shape* state practice could be a very tricky undertaking for a U.S. court. Even if a court determines that a certain interpretation by UNHCR reflects state practice, an even more difficult question follows regarding how much weight to give that interpretation. Should the court give it as much weight as it would give to an interpretation adopted by a large number of states that satisfy the criteria set forth above? How are courts to determine how many states and which states endorse the interpretation adopted by UNHCR?

Currently, the role of UNHCR's interpretations in U.S. asylum adjudications remains unclear. While U.S. courts do frequently consult UNHCR's 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 and simply ignoring its views in others."[341] Courts would do well to clarify the role of UNHCR and to consider its views with greater consistency as they approach asylum cases with the serious task of interpreting an international treaty. However, courts should engage in a separate analysis that involves examining the views of our sister signatories. UNHCR's views cannot serve as a substitute or shortcut for this analysis. The most persuasive support for a given interpretation, of course, would be where the weight of foreign authorities and the views of UNHCR are in alignment.

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339. James C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 OHIO ST. J. ON DISP. RESOL. 175, 204 n.105 (2005) (alteration in original); *see also* Zieck, *supra* note 322, at 217–18 (responding to Hathaway's argument).

340. Hathaway & Harvey, *supra* note 338, at 313.

341. Farbenblum, *supra* note 7, at 1077.

D. *Fears of Weakening Protection for Asylum Seekers in the United States*

One of the potential risks involved in giving weight to the interpretations of other contracting parties is that the resulting rules and standards may weaken protections for asylum seekers in the United States. On some issues, U.S. asylum law may be more favorable to asylum-seekers than the law of other countries. Would we really want to risk making U.S. asylum law "worse" by looking abroad? As an example, consider the question of whether a gay individual who can avoid persecution by remaining "discreet" (i.e. closeted, at least in public) should be eligible for asylum. The United States has never required a gay asylum seeker to modify his or her behavior in order to avoid persecution. During the past decade, Australia and the United Kingdom have similarly rejected any discretion requirement, after years of denying gay and lesbian individuals asylum on this basis.[342] Yet other countries, even ones that are generally supportive of gay rights, remain divided about this issue, as evidenced by recent requests for clarification from the ECJ.

In 2010, Germany requested a preliminary ruling from the ECJ on whether "a homosexual person [can] be told to live with his or her sexual orientation in his or her home country in secret and not allow it to become known to others."[343] While this request was withdrawn after the applicant was granted asylum, the question was recently revived by the Netherlands, which submitted three requests for preliminary rulings on this same issue in 2012.[344] These three cases, which

342. *See* HJ (Iran) v Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31 [22], [2011] 1 A.C. 596 [625] (appeal taken from Eng. & Wales C.A.) (rejecting a requirement that a person keep their sexual orientation concealed in order to avoid persecution); *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (S395) (2003) 216 CLR 473 (Austl.) (same); *see also* James C. Hathaway and Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 315, 324–30 (2012) (discussing the rejection of the "duty to be discrete").

343. Reference for a Preliminary Ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany) Lodged on 1 December 2010 – Kashayar Khavand v Federal Republic of Germany (Case C-563/10), 2011 O.J. (C 38) 7.

344. *See* Reference for a Preliminary Ruling from the Raad van State (Netherlands) Lodged on 27 April 2012 – Minister voor Immigratie en Asiel v X (Case C-199/12), 2012 O.J. (C 217) 7 (involving an applicant from Sierra

involve gay asylum seekers from Sierra Leone, Uganda, and Senegal, ask the ECJ to address, *inter alia*, whether "foreign nationals with a homosexual orientation [can] be expected to conceal their orientation from everyone in their country of origin in order to avoid persecution," and, if not, whether they can "be expected to exercise restraint, and if so, to what extent."[345] The requests further inquire whether "greater restraint [can] be expected of homosexuals than of heterosexuals."[346] If the ECJ were to find that "concealment" or some level of "restraint" can be expected of gay asylum seekers, then this interpretation would be binding on all members of the EU. Should U.S. courts give weight to such a decision, even though it is inconsistent with U.S. precedents?

Another example of an issue where U.S. law may be more favorable to asylum seekers than the law in many other countries concerns non-state actors as agents of persecution. The United States has long recognized that non-state actors may be agents of persecution as long as the state is *unable or unwilling* provide protection.[347] France and Germany, on the other hand, are among the countries that have traditionally refused to view non-state actors as agents of persecution.[348] According to a 2004 survey by UNHCR, at least fourteen countries did

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Leone); Reference for a Preliminary Ruling from the Raad van State (Netherlands) Lodged on 27 April 2012 – Minister voor Immigratie en Asiel v Y (Case C-200/12), 2012 O.J. (C 217) 8 (involving an applicant from Uganda); Reference for a Preliminary Ruling from the Raad van State (Netherlands) Lodged on 27 April 2012 – Z v Minister voor Immigratie en Asiel (Case C-201/12) 2012 O.J. (C 217) 8 (involving an applicant from Senegal).

345. Cases cited *supra* note 344.

346. Cases cited *supra* note 344. In addition, the requests for preliminary rulings inquire, "if a distinction can be made between forms of expression which relate to the core area of the [sexual] orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?"

347. *See, e.g.*, In re Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) ("[H]arm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.").

348. *See* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 265–66 (2008) (explaining that French courts denied asylum to Algerians escaping militias, while German Courts denied asylum to Afghans, Bosnians, Sri Lankans, and Somalis persecuted by non-state actors).

not recognize persecution by non-state actors.[349] Moreover, the language of the EU's recast Qualification Directive recognizes non-state actors in a much more limited way than U.S. law, requiring not only that the *state* be unable or unwilling to provide protection, but also that "parties or organisations controlling the State, or a substantial part of the territory of the State," including "international organizations," be unable or unwilling to do so.[350] Thus, for example, if a majority clan with a militia in Somalia or the NATO-led International Security Assistance Force in Afghanistan could protect asylum seekers fleeing these countries from harm by non-state actors, then their asylum applications could potentially be denied under the minimum standard set forth in the Qualification Directive, even if their States were unable or unwilling to protect them. Should European countries decide to follow this minimum standard, the weight of foreign authorities could shift towards far weaker protection for individuals persecuted by non-state actors.

These examples may foment fears that giving weight to foreign authorities will constrict U.S. asylum law in crucial

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349. *See* U.N. HIGH COMMISSIONER FOR REFUGEES, EVALUATION AND POLICY ANALYSIS UNIT, COMPARATIVE ANALYSIS OF GENDER-RELATED PERSECUTION IN NATIONAL ASYLUM LEGISLATION AND PRACTICE IN EUROPE, ¶ 247 (2004), *available at* http://www.jrseurope.org/accompanydetainees/docs/Crawley%20Report%20on%20EU%20Gender%20and%20Asylum.pdf (surveying the recognition of non-state actors as agents of persecution in the laws of European countries).

350. *See* Council Directive 2011/95/EU, *supra* note 144, art. 6(b)–(c). This language regarding international organizations has been criticized by UNHCR, Amnesty International, and others. UNHCR, for example, has commented:

> [N]on-state actors in principle should not be considered actors of protection. Parties and organizations, including international organizations, do not have the attributes of a state and do not have the same obligations under international law. In practice, this means that their ability to enforce the rule of law is limited, and thus their ability to render protection . . . would not qualify an international body as capable of providing protection.

UNHCR, COMMENTS ON THE EUROPEAN COMMISSION'S PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS OR STATELESS PERSONS AS BENEFICIARIES OF INTERNATIONAL PROTECTION AND THE CONTENT OF THE PROTECTION GRANTED (COM(2009)551, 21 OCTOBER 2009), at 5 (2010), *available at* http://www.unhcr.org/4c5037f99.pdf.

ways. One might wonder whether U.S. courts would overrule existing precedents based on the development of more restrictive interpretations by our sister signatories. While the Supreme Court has occasionally overruled precedents in other contexts, such as admiralty law, based on subsequent developments in other nations' interpretations of certain rules, this is by no means the inevitable result of a practice that involves considering foreign authorities.[351] The principle of giving weight to the interpretations of our sister signatories does not require "unthinking acquiescence."[352] The basic idea is simply to give the interpretations of other signatories "the courtesy of respectful consideration," even if we disagree.[353] After considering the views of other signatories, a court may provide sound reasons for why those views are unpersuasive. However, a court should not just ignore interpretations by other signatories, as is now the norm, or depart from those interpretations without a cogent explanation.[354] Ultimately, in order to move towards more uniform interpretation of refugee status, states must engage in a productive dialogue and seek to persuade one another about how to interpret various provisions of the Refugee

351. *See, e.g.*, United States v. Reliable Transfer Co., 421 U.S. 397, 397–98 (1975) (overruling an earlier admiralty rule and reasoning that "[t]he courts of every major maritime nation except [the United States] have long since abandoned th[e] rule"); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 388–89 (1970) (overruling a longstanding admiralty rule based, inter alia, on judicial and legislative developments in England).

352. *See* Van Alstine, *supra* note 86, at 1941. Van Alstine describes the proper approach as one of "controlled deference, which at a minimum requires respectful consideration of the persuasive force of a foreign court's interpretive analysis." *Id.* at 1941–42; *see also* Onyeanusi v. Pan Am., 952 F.2d 788, 791–92 (3d Cir. 1992) (discussing a conflict between a French and an American case in interpreting a treaty and concluding that the U.S. court's interpretation was "more sound").

353. Olympic Airways v. Husain, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("[E]ven if we disagree, we surely owe the conclusions reached by appellate courts of other [treaty] signatories the courtesy of respectful consideration.").

354. *See* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 513 (2003) ("[N]ational courts interpreting international law should consider relevant decisions of foreign courts interpreting the same treaty or principle of customary international law and should not depart from those precedents *without articulating clear reasons for doing so.*") (emphasis added).

Convention and Protocol.[355] Avoiding foreign authorities out of fear makes it impossible to accomplish this goal.

VI. CONCLUSION

While the U.S. Supreme Court requires adjudicators to give weight to the views of our sister signatories when interpreting an international treaty, lower courts have generally failed to apply this principle, likely due to lack of more specific guidance as well as the extra effort involved in researching foreign laws. An additional hurdle exists in the area of asylum law, as our domestic statute shrouds the international treaty that it incorporates. Across Europe, where states' international obligations towards refugees have likewise been transposed into national laws, the same pattern emerges, with judges "rarely us[ing] each other's decisions within the EU."[356] This Article urges U.S. judges to pierce the veil of the 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, 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 to 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

355. *Cf.* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 74–75 (2004) (arguing, in the context of constitutional interpretation, that judges who refuse to participate in transnational dialogue undermine their own power to influence others).

356. Lambert, *supra* note 246, at 8.

pose practical challenges to transnational dialogue.[357] The practical challenges are substantial and require detailed examination in a manner beyond the scope of this Article. 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.[358] In addition, 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 United States' 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 relations."[359] 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. Instead of 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.[360]

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357. *See id.* at 12 (stating that while language is not an "insurmountable" obstacle, inaccessibility of judgments, judges' lack of time, and lack of familiarity with foreign legal systems may present larger challenges).

358. *Id.* at 13.

359. *See id.* at 15.

360. *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 United States Supreme Court"); *see also* 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 ten-

Rather than succumbing to this diminished influence, appellate judges and attorneys should actively engage with the interpretations of our sister signatories. They should recognize that refugee law has the potential to become the centerpiece of transnational dialogue in the realm of treaty interpretation.[361]

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dency to look inward may well make the judgments of U.S. courts increasingly less relevant internationally.").

361. *See* James C. Hathaway, Developments, *A Forum for the Transnational Development of Refugee Law: The IARLS's Advanced Refugee Law Workshop*, 15 INT'L J. REFUGEE L. 418 (2003); *see also* Lambert, *supra* note 246, 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").