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Asylum's Interpretative Impasse: Interpreting "Persecution" and "Particular Social Group" Using International Human Rights Law

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Article

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Abstract

The United States is in the midst of two crises: an overwhelming number of refugees seeking asylum in the United States and an interpretive impasse. Who is a "refugee"? As the Board of Immigration Appeals tightens its interpretation of "refugee" amidst the United States' latest refugee crisis, practitioners must utilize every available tool at their disposal to advance their client's asylum claims. This Article guides practitioners on when and how to use international human rights law arguments in emerging types of asylum claims, particularly those of child applicants and those based on domestic violence. To create a holistic picture, this Article considers the following: (1) current interpretations of the definition of "refugee" under United States law; (2) the incorporation of international human rights law in United States domestic law; (3) sources of international human rights law that may aid in advancing interpretative arguments; and (4) how practitioners can effectively use these sources in legal arguments.

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Introduction

The United States is in the midst of two crises: a refugee crisis and an interpretative impasse. In 2013, U.S. Customs and Border Patrol ("CBP") apprehended 38,833 unaccompanied minors, primarily from El Salvador, Guatemala, Honduras, and Mexico.[1] In addition to these unaccompanied minors, thousands of women have fled to the United States to escape gang violence and domestic abuse in their home countries. In 2013, CBP apprehended 36,174 adults who expressed a fear of returning to their countries of origin, up from 5,369 in 2009.[2] Many of these refugees have experienced domestic violence, child abuse, and gang-related violence in their countries of origin. Fortunately, many nonprofit organizations attempt to provide these refugees with *pro bono* counsel to file for asylum.[3] Unfortunately, current interpretations of the definition of "refugee" make it difficult for practitioners to convince adjudicators of the validity of their claims.

To prevail on an asylum claim, an applicant must establish that he or she is a "refugee" as defined by the Immigration and Nationality Act ("INA"). Section 101(a)(42)(a) defines a "refugee" as:

> [A]ny person who is outside any country of such person's nationality . . . 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 . . . .[4]

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1. *See* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CHILDREN ON THE RUN 16 (2014), http://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html.

2. *See id.* at 4.

3. *See, e.g.*, Jill Bachelder, *Advocates for Human Rights Establishes National Asylum Hotline*, THE JOURNAL (Aug. 3, 2015), http://www.journalmpls.com/news/2015/08/advocates-for-human-rights-establishes-national-asylum-hotline/. We do not mean to suggest that the need for attorneys in the immigration context is easily met. It is not. Much could be done to increase reputation of at-risk immigrant groups in asylum and removal proceedings. What programs and changes to the immigration system could better facilitate representation of refugees is beyond the scope of this Article.

4. 8 U.S.C. § 1101(a)(42) (2012).

The basic elements of an asylum claim are derived from this definition, which Congress adopted in the Refugee Act of 1980 (the "1980 Refugee Act"). An asylum applicant must show he or she is (1) unable or unwilling to return to their home country, (2) because of persecution, (3) by the government or someone the government cannot or will not control, (4) on account of, (5) "race, religion, nationality, membership in a particular social group, or political opinion."[5]

The 1980 Refugee Act derives its definition of refugee from the 1951 Refugee Convention ("Refugee Convention") and the 1967 Protocol Relating to the Status of Refugees (the "1967 Protocol").[6] Neither the 1980 Refugee Act nor the international treaties upon which it is based define "persecution" or "particular social group."[7] Therefore, the Board of Immigration Appeals ("BIA"), U.S. Citizenship and Immigration Services ("USCIS"), and federal courts have interpreted these undefined terms. Practitioners can use international human rights treaties, United Nations High Commissioner for Refugee ("UNHCR") guidelines, and sister signatories' case law as interpretive tools to support various asylum claims.

Recent case law interpreting "refugee," however, has not been friendly to asylum seekers.[8] What, then, can persuade an adjudicator to accept an applicant's proposed interpretation of "persecution," "particular social group," or other ambiguous

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5. *See id*. In addition to the above criteria, an asylum applicant must show that he or she is applying within one year of arriving in the United States and is not barred under INA § 208. *See* 8 U.S.C. § 1158 (2012). These criteria, however, are not related to the definition of "refugee" and this Article does not explore them.

6. *Compare* 8 U.S.C. § 1101(a)(42) (2012), *with* Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention], *and* Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The definitions of the 1980 Refugee Act and the 1951 Refugee Convention vary slightly, though any variation is seemingly insignificant in asylum adjudications. For reference, the 1951 Refugee Convention defines a refugee as any person 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." Refugee Convention art. 1.

7. *See* 8 U.S.C. § 1101(a)(42) (2012); Refugee Convention art. 1, *supra* note 6; Refugee Protocol art. 1, *supra* note 6.

8. *See infra* Part I.B.

terms included in the 1980 Refugee Act?[9] Practitioners should utilize every possible tool at their disposal to convince asylum adjudicators to accept their interpretations of "refugee." In one of its most influential decisions, *Matter of Acosta*, the BIA acknowledged that "it is appropriate for [adjudicators] to consider various international interpretations of [the Refugee Convention]" in construing the elements of "refugee."[10] This Article expands upon the general guidance found in Board of Immigration Appeals' case law and guides practitioners on when and how to use international human rights law arguments in emerging types of asylum claims.

Part I of this Article explains how Congress incorporated the 1951 Refugee Convention and its subsequent 1967 Protocol into the 1980 Refugee Act. Next, it explains how the BIA and circuit courts have subsequently interpreted the 1980 Refugee Act. Part II surveys the incorporation of international law into United States domestic law and suggests that while international human rights law is rarely binding unless incorporated into United States domestic law, practitioners may persuade judges to use international human rights law in interpreting the various pieces of the 1980 Refugee Act's definition of "refugee." Part III explores various instruments of international law, their interpretations, and the ways in which practitioners can use these instruments in international human rights arguments. To do this, Part III examines UNHCR materials, human rights treaties, United Nations General Assembly Resolutions ("GA Resolution"), and foreign case law.

This Article concludes with Part IV, where we apply international human rights law to two fictional cases. Part IV(A) analyzes a hypothetical case of a Salvadoran woman fleeing from her abusive boyfriend. Part IV(B) applies our arguments to a fourteen-year-old Salvadoran child fleeing gang violence. Both of these sections provide a roadmap for practitioners to follow in making their own international human rights law arguments.

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9. This question was initially prompted to the University of Minnesota Immigration and Human Rights Clinic by Advocates for Human Rights, a non-profit that finds pro bono attorneys for asylum seekers in Minneapolis, Minnesota. This Article is our response to that question.

10. *Matter of* Acosta, 19 I. & N. Dec. 211, 220 (B.I.A. 2004) (overruled in part by *Matter of* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987) (holding that *Matter of Acosta*'s "clear probability" and "well-founded fear" standards are not meaningfully different, and therefore that portion of *Matter of Acosta* is overruled)).

I. IMPLEMENTATIONS AND INTERPRETATIONS OF THE 1951 REFUGEE CONVENTION AND THE 1967 PROTOCOL IN UNITED STATES DOMESTIC LAW

To understand how international human rights law can be used to expand interpretations of the definition of "refugee," it is first necessary to explain how the United States immigration system currently interprets the term. Part I(A) examines the adoption of the 1951 Refugee Convention definition of "refugee" in the 1980 Refugee Act, and concludes that the interpretation of these sources of law has been left to the BIA and United States courts. Part I(B) surveys how the BIA and United States courts have interpreted the 1980 Refugee Act. In particular, Part I(B) addresses two key terms: "particular social group" and "persecution." Both Part I(B)(i) and Part I(B)(ii) conclude that the standards and interpretations provided by the BIA are too ambiguous and vague, leaving ample room for practitioners to utilize international human rights arguments in asylum claims.

A. THE RELATIONSHIP BETWEEN THE 1951 REFUGEE CONVENTION, THE 1967 PROTOCOL, AND THE 1980 REFUGEE ACT

Prior to World War II, no internationally accepted definition of "refugee" existed.[11] In light of the significant number of displaced persons after the war, however, the United Nations convened "a conference of plenipotentiaries in Geneva . . . to consider an international agreement to provide legal protection to refugees."[12] As a result, the 1951 Refugee Convention adopted the first internationally recognized definition of "refugee" [13]:

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11. *See* 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, 506 (1993) ("The early international agreements related to refugees tended to focus on particular refugee groups, such as Russians, Armenians, or, even more specifically, German refugees from the Saar." (internal citations omitted)).

12. *Id.* at 508 ("The 1951 Convention, which has been signed by 109 governments to date, was the first international compact to adopt a universal refugee definition, rather than one tied to a particular national or ethnic group.").

13. *See* Daniel J. Steinblock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 739 (1998).

> As a result of events occurring before 1 January 1951 and 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[14]

The Refugee Convention, however, restricted the refugee definition "both temporally and geographically."[15] As described within the treaty, the individual must have been displaced "before 1 January 1951."[16] Furthermore, the displacement must have occurred as a "result of events" occurring before the enumerated date, granting refugee status only to individuals in a geographical area affected by the war.[17] The 1967 Protocol removed the temporal and geographical restrictions, creating a universally applicable definition of "refugee."[18]

The United States is not a party to the Refugee Convention, but has signed the 1967 Protocol.[19] As discussed more thoroughly in Part II, the Refugee Convention is a non-self-executing treaty and is binding on the United States only to the extent that Congress has incorporated it into domestic law.[20] The only language from either the 1967 Protocol or the Refugee Convention that Congress has incorporated in the 1980 Refugee Act is the definition of "refugee":

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14. Refugee Convention art. 1, *supra* note 6.

15. *See* Steinblock, *supra* note 13, at 739. As the refugee definition reveals, the Convention initially only covered individuals who were persecuted before January 1, 1951 "as a result of" the events of World War II. *See* Refugee Convention art. 1, *supra* note 6.

16. Refugee Convention art. 1, *supra* note 6.

17. *Id.*

18. *See* Steinblock, *supra* note 13, at 739; *see also* Refugee Protocol art. 1, *supra* note 6 (stating that a refugee is "any person within the definition of article I of the Convention as if the words 'As a result of events occurring before 1 January 1951 . . . ' and the words ' . . . as a result of such events', in article I A (2) were omitted'").

19. *See* Refugee Convention art. 1, *supra* note 6; *see also* Refugee Protocol art. 1, *supra* note 6.

20. *Matter of* D-J-, 23 I. & N. Dec. 572, 584 n.8 (A.G. 2003).

> [A]ny person who is outside any country of such person's nationality . . . 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 . . . .[21]

Thus, the United States is not bound by any other articles of the Refugee Convention. Moreover, the United States is bound by the refugee definition as Congress defined it, not as it has been interpreted by other foreign authorities. As such, the BIA and United States courts are the primary interpreters of the 1980 Refugee Act.[22] Given the difficult task of interpreting the broad definition of "refugee," UNHCR documents and foreign case law—while only non-binding, persuasive authority—may provide guidance to the BIA and United States courts.

B. INTERPRETATION OF "REFUGEE" BY UNITED STATES COURTS

The ambiguity of the 1980 Refugee Act leaves space for expansive interpretation by the BIA and United States courts. This section covers the two of the most ambiguous—and therefore two of the most contested—terms: "particular social group" and "persecution."

1. Interpreting "Particular Social Group"[23]

In 1986, the BIA interpreted the phrase "particular social group" for the first time in *Matter of Acosta*.[24] Using the

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21. 8 U.S.C. § 1101(a)(42) (2012). *Compare id.*, *with* Refugee Convention art. 1, *supra* note 6, *and* Refugee Protocol art. 1, *supra* note 6. The variation between refugee definitions of the 1980 Refugee Act and 1951 Refugee Convention does not matter for purposes of interpretation.

22. *See Matter of Acosta*, 19 I. & N. Dec. at 232–33 (applying the doctrine of *ejusdem generis* to the definition of "refugee" in order to interpret "particular social group").

23. For more on the "particular social group standard," its evolution, and the struggles it presents to practitioners, see Nicholas R. Bednar, *Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Adjudications*, 100 MINN. L. REV. 355 (2015).

24. *See Matter of Acosta*, 19 I. & N. Dec. at 233.

interpretative canon of *ejusdem generis*,[25] the BIA created an "immutable characteristic" standard to evaluate whether or not the asylum applicant articulated a valid "particular social group." To satisfy the immutable characteristic standard, members of the proposed particular social group must share a characteristic "that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed."[26] Under this standard, the BIA and circuit courts have accepted broad particular social groups, including those defined by homosexuality,[27] forced marriage,[28] ethnicity,[29] and a variety of other immutable characteristics.[30]

The majority of federal circuits embraced the *Acosta* standard, and for nearly two decades it remained the primary test for determining the validity of a particular social group.[31] In 2002, following the promulgation of a different interpretation of

25. *Ejusdem generis* is a textual canon employed by courts to interpret general terms using the specific terms surrounding the general term as context. *See* James v. United States, 550 U.S. 192 (2007).

26. *Matter of Acosta*, 19 I. & N. Dec. at. 233. For a more thorough analysis of the *Acosta* standard, see IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 622–28 (14th ed. 2014), and REGINA GERMAIN, ASYLUM PRIMER 50–58 (6th ed. 2010).

27. *See, e.g.*, *Matter of* Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

28. *See* Gao v. Gonzales, 440 F.3d 62, 70 (2d Cir. 2006).

29. *See, e.g.*, Ahmed v. Keisler, 504 F.3d 1183, 1198–99 (9th Cir. 2007) (finding Bihari living in Bangladesh to be a particular social group); Ali v. Ashcroft, 394 F.3d 780, 784–87 (9th Cir. 2005) (holding gang-rape of asylum seeker was on account of her membership in the Midgan clan of Somalia); Mihalev v. Ashcroft, 388 F.3d 722, 726 (9th Cir. 2004) (holding Bulgarian national of Roma descent constituted a particular social group).

30. *See, e.g.*, Lwin v. INS, 144 F.3d 505, 510–12 (7th Cir. 1998) (holding that parents of Burmese student dissidents constituted a particular social group); Gebremichael v. INS, 10 F.3d 28, 35–36 (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."). For a substantial list of additional cases finding the existence of a particular social group, see KURZBAN, *supra* note 26, at 622–28.

31. *See, e.g.*, Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005); Castellano-Chacon v. INS, 341 F.3d 533, 546–48 (6th Cir. 2003); Lwin v. INS, 144 F.3d 505, 511 (7th Cir. 1998); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994); Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993); Alvarez-Flores v. INS, 909 F.2d 1, 7 (1st Cir. 1990). *But see* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1574–75 (9th Cir. 1986) (adopting the "voluntary associational relationship" test). Since *Sanchez-Truijllo*, the Ninth Circuit has shifted more towards the *Acosta* standard. *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (overruled by Thomas v. Gonzales, 409 F.3d 177 (9th Cir. 2006) (cert. granted, judgment vacated on other grounds, 547 U.S. 183 (2006)).

"particular social group" by Australia, the UNHCR proposed a uniform definition in its 2002 *Guidelines on International Protection*:

> [A] group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[32]

The UNHCR's uniform definition attempted to merge *Acosta*'s immutable characteristic test and Australia's social visibility test by allowing the refugee to prove either to establish the existence of a particular social group.

Following the publication of the UNHCR Guidelines, in 2006 the BIA reinterpreted "particular social group" to include the elements of "social visibility" and "particularity" in addition to an immutable characteristic.[33]In *Matter of S-E-G-*, the BIA articulated its understanding of these elements. The BIA defined the test for particularity as "whether the proposed description is sufficiently 'particular,' or is 'too amorphous . . . to create a benchmark for determining group membership.'"[34] To satisfy the element of social visibility, the applicant must show that his or her particular social group is "recognizable by others in the community . . . considered in the context of the country of concern and the persecution feared."[35] The BIA did not adopt alternative immutable characteristic or social visibility tests as suggested by the UNHCR Guidelines but rather required the refugee to prove that the particular social group shared an immutable characteristic, was socially visible, and was defined with particularity.

In two more recent cases, *Matter of M-E-V-G-* and *Matter of W-G-R-*, the BIA clarified its interpretation of particularity and social visibility. According to the BIA, the purpose of

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32. *See Matter of* S-E-G-, 24 I. & N. Dec. 579, 582 (2008) (citing the UNHCR guidelines).

33. *See generally Matter of* C-A-, 23 I. & N. Dec. 951, 957–61 (B.I.A. 2006) (discussing whether "noncriminal informants" or "noncriminal drug informants working against the Cali drug cartel" are valid particular social groups in the context of that case).

34. *Matter of S-E-G-*, 24 I. & N. Dec. at 584 (emphasis added) (citing Davila-Mejia v. Mukasey, No. 07-2567, 2008 WL 2630085, at *3 (8th Cir. July 7, 2008)).

35. *Id.* at 586–87.

particularity is to allow the adjudicator to clearly identify who is and who is not a group member.[36] Therefore, the particular social group must "be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective."[37] In addition, the BIA renamed "social visibility" as "social distinction" in order to alleviate confusion and explain that "[l]iteral or 'ocular' visibility is not . . . a prerequisite."[38] Social distinction requires a particular social group to "be perceived as a group by society," not just the persecutor.[39] The BIA acknowledged some overlap between the elements of particularity and social distinction but noted that particularity addresses the "'outer limits' of a group's boundaries," while social distinction addresses whether "society would perceive a proposed group as sufficiently separate or distinct."[40]

The BIA and circuit courts use particularity and social distinction to deny asylum to individuals from Central America, whose particular social groups allegedly cannot meet these criteria. In particular, the BIA has yet to accept particular social groups involving gangs or drug cartels. In *Matter of C-A-*, the BIA concluded that a particular social group of "noncriminal informants" was "too loosely defined." [41] Similarly, in *Matter of M-E-V-G-*, the BIA rejected the particular social group of "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."[42] In *Matter of W-G-R-*, the BIA denied asylum to an applicant claiming persecution as a member of the particular social group defined as "former members of the Mara 18 gang in El Salvador who have renounced their gang membership."[43] Circuit court precedent has also illustrated a hesitation to accept gang-based asylum claims.[44] Despite its unwillingness to accept these

36. *See Matter of* W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014) ("A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.").

37. *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

38. *Id.* at 238. The Seventh Circuit had rejected the criterion of "social visibility," believing that applicants could only satisfy social visibility by "pinning a target to their backs." *See* Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009).

39. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240.

40. *Id.* at 241 (citing Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003)).

41. *See Matter of C-A-*, 23 I. & N. Dec. at 957.

42. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 228.

43. *Matter of W-G-R-*, 26 I. & N. Dec. at 209.

44. *See, e.g.*, De Leon-Saj v. Holder, No. 13-60898, 583 F. App'x 429, 430

particular social groups, the BIA continues to affirm that these decisions are not a "blanket rejection of all factual scenarios involving gangs."[45]

Particular social groups defined in part by sex have had more success. In *Matter of A-R-C-G-*, the only BIA case to uphold a particular social group since the inception of particularity and social visibility, the BIA accepted "married women in Guatemala who are unable to leave their relationship" as a particular social group.[46] In *Paloka v. Holder* the Second Circuit remanded to the Immigration Judge ("IJ") an application involving a particular social group defined as "unmarried young women in Albania," implying that the particular social group was valid.[47] Many sex-based particular social groups, however, remain untested and there has yet to be a BIA or circuit court decision examining sexual violence in a gang context.

Plenty of other scholars and advocates have acknowledged the potential constitutional and international law issues brought by particularity and social distinction.[48] Indeed, the National Immigrant Justice Center declares that particularity "effectively precludes the use of common parlance labels to describe a [particular social group], even as the social distinction test requires that a [particular social group] be limited by parameters a society would recognize."[49] The purpose of this Article is not to explore those claims. Rather, this Article hopes to illustrate how practitioners may use international human rights law to persuade justices that their particular social group is protected under the 1980 Refugee Act.

(5th Cir. Nov. 4, 2014) (rejecting "students in Guatemala targeted by gangs"). Note that per the Fifth Circuit's rules of Appellate Procedure, this unpublished opinion may not be used as precedent except in limited circumstances.

45. *Matter of M-E-V-G-*, 26 I. & N. at 251.

46. *Matter of* A-R-C-G-, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014).

47. *See* Paloka v. Holder, 762 F.3d 191, 194 (2d Cir. 2014).

48. *See* Brief of Amici Curiae of the American Immigration Lawyers Association and the Central American Resource Center in Support of Petitioner at 5–7, Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (No. 09-71571); Bednar, *supra* note 23, at 380–86; Benjamin Casper et al., Matter of M-E-V-G- *and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group,"* 14-06 IMMIGR. BRIEFINGS 1, 19 (2014).

49. Nat'l Immigrant Just. Ctr., Particular Social Group Practice Advisory: Applying for Asylum After *Matter of M-E-V-G-* and *Matter of W-G-R-* 3 (2014), http://immigrantjustice.org/sites/immigrantjustice.org/files/PSG%20Practice%20Advisory%20and%20Appendices-Final-1.22.16.pdf.

2. Interpreting "Persecution"

Like "particular social group," the 1980 Refugee Act does not define the term "persecution," but rather leaves its interpretation to the BIA and federal courts. *Matter of Acosta* serves as a starting point for the interpretation of "persecution." First, relying in part on the UNHCR Handbook, the BIA concluded that the applicant must establish that her "primary motivation for requesting refuge in the United States is 'fear,' i.e., a genuine apprehension or awareness of danger in another country."[50] Examining its case law prior to the enactment of the 1980 Refugee Act, the BIA defined persecution as "a threat to life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[51] The BIA created a two-part test from this definition: (1) the "harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome;"[52] and (2) the "harm 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."[53] *Matter of Acosta*, however, says little about what types of harm would constitute persecution: "[t]he harm or suffering inflicted could consist of confinement or torture,"[54] "[the harm] could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom,"[55] and "[g]enerally harsh conditions shared by many other persons did not amount to persecution."[56]

Since *Matter of Acosta*, the BIA and circuit courts have continued to refine the definition of persecution. A single incident of persecution may be sufficient,[57] but the adjudicator

50. *Matter of Acosta*, 19 I. & N. Dec. at 221.

51. *Id.* at 222 (citing Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969); *Matter of* Maccaud, 14 I. & N. Dec. 429, 434 (B.I.A. 1973) (additional citations omitted)).

52. *Id.* (quoting *Matter of* Diaz, 10 I. & N. Dec. 199, 204 (B.I.A. 1963)).

53. *Id.* (quoting McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981) (additional citations omitted)).

54. *Id.* (quoting Blazina v. Bouchard, 286 F.2d 507, 511 (3d Cir. 1961)).

55. *Id.* (quoting Dunat v. Hurney, 297 F.2d 744, 746 (3d Cir. 1962) (additional citations omitted)).

56. *Id.* (quoting Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968)).

57. *See generally* Corado v. Ashcroft, 384 F.3d 945, 947 (8th Cir. 2004) (finding that a single incident of persecution is not outside of the legal definition of "persecution" for asylum claims).

should examine multiple instances of harm cumulatively.[58] Persecution does not require that the harm result in permanent or serious injuries,[59] and may include emotional or psychological harm, as opposed to physical harm.[60] At the same time, the harm must "rise above unpleasantness, harassment, and even basic suffering."[61] Additionally, persecution does not include mere discrimination.[62] While many of the BIA's past cases "involved actors who had a subjective intent to punish their victims . . . this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution."[63]

In some respects, the forms of harm that constitute persecution are obvious. For example, in *Gomes v. Gonzales*, the Seventh Circuit found persecution where Muslim fundamentalists harmed Catholics in Bangladesh by severely beating them, threatening them with knives, and murdering their Catholic relatives.[64] Severe forms of often gender-based harm such as rape,[65] female genital mutilation ("FGM"),[66] and forced marriage similarly constitute persecution.[67]

Unlike "particular social group," Congress has also stepped in to broaden the definition of "persecution." In 1996 Congress modified the definition of "refugee" to include:

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population

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58. *See, e.g.*, Haider v. Holder, 595 F.3d 276, 286 (6th Cir. 2010).

59. *See Matter of* O-Z- & I-Z-, 22 I. & N. Dec. 23, 25–26 (B.I.A. 1998).

60. *See* Mashiri v. Ashcroft, 383 F.3d 1112, 1120–21 (9th Cir. 2004).

61. Jorgi v. Mukasey, 514 F.3d 53, 57 (1st Cir. 2008) (quoting Nelson v. INS, 232 F. 3d 258, 263 (1st Cir. 2000)).

62. *Matter of* A-M-, 23 I. & N. Dec. 737, 739–40 (B.I.A. 2005).

63. *Matter of* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (citing *Matter of* Kulle, 19 I. & N. Dec. 318 (B.I.A. 1985); *Matter of Acosta*, 19 I. & N. Dec. at 222–23.

64. *See* Gomes v. Gonzales, 473 F.3d 746, 752–57 (7th Cir. 2007).

65. *See* Lopez-Galarza v. INS., 99 F.3d 954, 960 (9th Cir. 1996) ("[R]ape and physical abuse at the hands of Sandinista military officers, coupled with her imprisonment, food deprivation, and forced labor, satisfies the definition of 'persecution.'").

66. *Matter of Kasinga*, 21 I. & N. Dec. at 365; Hassan v. Gonzales, 484 F.3d 513, 517–518 (8th Cir. 2007).

67. *See, e.g.*, Al-Ghorbani v. Holder, 585 F.3d 980, 996 (6th Cir. 2009) (recognizing that the right to marry is fundamental and persecution in the form of forced marriage may lead to the formation of a valid particular social group).

> control program, shall be deemed to have been persecuted on account of a political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or [be] subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.[68]

Congress therefore recognizes the existence of gender-specific persecution, at least in the context of forced sterilization and abortion.

While death threats and severe physical violence rise above the level of harassment or discrimination, other forms of persecution remain subject to reinterpretation and conflicting case law. For example, *Matter of Acosta* established that economic deprivation in some cases may be persecution but left open the question of when deprivation is "severe" enough to rise above generally "harsh conditions."[69] In an effort to clarify its understanding of economic persecution, in *Matter of T-Z-,* the BIA elaborated that the deprivation must be the "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life,"[70] but the resulting economic difficulties must be "above and beyond" those shared by others in the country.[71] Yet, what specific facts illustrate a sufficiently severe deprivation is unclear. Practitioners representing unaccompanied minors may wish to use economic deprivation as a basis for persecution, but will need alternative sources to advance a compelling interpretation.[72]

Other forms of persecution relevant to the United States' current refugee crisis may also require novel interpretations.

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68. 8 U.S.C. § 1101(a)(42), revised under the Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996).

69. *See Matter of Acosta*, 19 I. & N. Dec. at 222 (citing Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2d Cir. 1967) (citations omitted)).

70. *See Matter of* T-Z-, 24 I. & N. Dec. 163, 163 (B.I.A. 2007).

71. *See id.* at 170–74.

72. *See, e.g.*, Brief of Kids in Need of Defense as Amicus Curiae in Support of Respondent, Feb. 20, 2015, *Matter of* Z-T-, __ I & N ___ (BIA 2015), https://supportkind.org/wp-content/uploads/2015/04 /KIND_Amicus_Brief_Feb_2015-1.pdf (discussing the severe economic deprivation a child would endure if sent back to Honduras); *see generally* Jonathan L. Falkler, *Economic Mistreatment as Persecution in Asylum Claims: Towards a Consistent Standard*, 2007 U. CHI. LEGAL FORUM 471 (2007) (describing the standards for economic deprivation under asylum law).

Practitioners may be able to persuade adjudicators that forms of harm such as forced gang recruitment, domestic violence, child abuse, and child abandonment amount to persecution in certain cases. Arriving at these interpretations, however, will require resorting to authority beyond current U.S. case law. International human rights law offers one way of buttressing novel interpretations of the refugee definition.

II. INCORPORATION OF INTERNATIONAL LAW INTO UNITED STATES DOMESTIC LAW

United States courts must respect international law that has a binding effect on the United States. Unfortunately, however, the United States is bound only to those international human rights treaties that are self-executing or are incorporated into domestic law through ratification by the Senate. As such, most sources of international human rights law are persuasive authority only.[73] According to scholar David Cole:

> [I]nternational human rights feel aspirational, without the force of law. It is not surprising then, that international human rights arguments are rarely advanced in domestic U.S. courts—in immigration cases or elsewhere. Nor should it be surprising that in those few instances where such arguments are broached, they are as often as not ignored or summarily dismissed.[74]

Generally, United States judges are reluctant to cite to international law, and international human rights law in particular. Indeed, the late Justice Scalia once referred to international human rights law as a "brooding omnipresence in the sky."[75] As judges are already averse to relying on international law in their opinions, they may grow tired of

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73. *Cf.* El Al Israel Airlines, Ltd. v. Tsui Yuan Tseung, 525 U.S. 155, 176 (1999) (quoting Air France v. Saks, 470 U.S. 389, 404 (1985)) ("The 'opinions of our sister signatories' . . . are 'entitled to considerable weight.'"); INS v. Cardoza-Fonseca, 480 U.S. 421, 438–40 (1987) (recognizing the value of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status in interpreting the definition of "refugee").

74. David Cole, *The Idea of Humanity: Human rights and Immigrants' Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 629 (2006).

75. William S. Dodge, *Justice Scalia on Foreign Law and the Constitution*, OPINIO JURIS (Feb. 22, 2006), http://opiniojuris.org/2006/02/22/justice-scalia-on-foreign-law-and-the-constitution/.

frequent citations to international human rights treaties and foreign sources if practitioners use them carelessly. With these caveats in mind, attorneys may use treaties, along with other interpretive sources available from United Nations' bodies, NGOs, and foreign immigration authorities, to advance international human rights arguments in United States jurisdictions.

Countries incorporate international law into their domestic law in a variety of ways. Scholars define the way countries view treaties vis-à-vis national law under one of two main concepts: monism or dualism. In a simplistic monist state, international law is automatically incorporated into domestic law.[76] Importantly, the legislature, executive, and judicial branches of a monist state are obligated to give effect to international law over domestic law in cases of conflict.[77] In comparison, in a simplistic dualist state, international law and domestic law remain two separate authorities that "govern different actors and issues."[78] Unlike monist states, dualist states selectively choose whether and how specific instruments of international law will be incorporated into domestic law.[79] In reality, states tend to fall along a spectrum of monist and dualist policies, as opposed to simply accepting a form of pure monism or dualism.[80]

The United States is no exception. Article VI of the United States Constitution states that both "the Laws of the United States" and treaties shall be "supreme Law of the Land."[81] Additionally, the Supreme Court has acknowledged the importance of adherence to international law. Under *The Charming Betsy* doctrine, a canon of statutory interpretation derived from an early Supreme Court case, domestic law is to be interpreted to avoid conflicts with international law.[82] Ralph G. Steinhardt argues that *The Charming Betsy* doctrine is a

76. *See* JEFFREY DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, AND PROCESS 243–44 (3d ed. 2010).

77. *See id.* at 245 (stating that the Netherlands is an example of a monist state). *See* ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 17 (1986) ("[W]hen someone in Holland feels his human rights are being violated he can to a Dutch judge and the judge must apply the law of the convention. He must apply international law even if it is not in conformity with Dutch law.").

78. DUNOFF ET AL., *supra* note 76, at 244.

79. *Id.*

80. *See id.*

81. U.S. CONST. art. VI, cl. 2.

82. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 66–69 (1804).

reflection of the appreciation of monist values in United States jurisprudence.[83]

Treaty interpretation in the United States has been influenced by both monism and dualism.[84] The Supreme Court has recognized self-executing treaties—treaties that do not require implementation by Congress into domestic law—as binding where the treaty is unambiguous and requires only judicial implementation.[85] The incorporation of self-executing treaties into domestic law is a reflection of the monist view of international law at work in the United States legal system. For example, the Supreme Court in *Trans World Airlines, Inc. v. Franklin Mint Corporation* concluded that the Warsaw Convention, an international air carriage treaty that sets a limit on an air carrier's liability for lost cargo, is a self-executing treaty.[86] But treaties can also be non-self-executing, requiring Congress to implement the terms of the treaty by statute. As such, treaties fall along a spectrum of dualist (non-self-executing treaties) and monist (self-executing treaties) approaches to international law. United States diplomats negotiate human rights treaties as non-self-executing, requiring legislative adoption of the treaty into domestic law for the treaty to gain binding effect.[87] Courts are reluctant to read self-executing language into these human rights treaties.[88] Even if the Senate ratifies a human rights treaty, the United States typically

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83. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1129 (1990) ("The monist view of international law in domestic courts similarly denies that international conduct or emerging norms of law can be relevant only if recognized and adopted by Congress.").

84. *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 638–39 (2007).

85. *See* Foster v. Neilson, 27 U.S. 253, 314 (1829); *see also* United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) ("[I]f, as respondent asserts, [the treaty] is self-executing, it would appear that a court must enforce it on behalf of an individual . . . .").

86. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) ("[T]he Convention is a self-executing treaty. Though the Convention permits individual signatories to convert liability limits into national currencies by legislation or otherwise, no domestic legislation is required to give the Convention the force of law in the United States.").

87. Waters, *supra* note 84, at 639.

88. *See, e.g.* White v. Johnson, 79 F.3d 432, 440 n.2 (finding the language of the International Covenant on Civil and Political Rights and the Convention Against Torture did not permit a reading of the treaties as self-executing); Sei Fujii v. California, 38 Cal. 2d 718, 721–25 (1952) (holding that the U.N. Charter was not self-executing).

includes enough reservations to prevent the treaty from "altering domestic law."[89] For example, Attorney General John Ashcroft made it explicitly clear that the Refugee Convention and the 1967 Protocol are not self-executing treaties and therefore do not have the force of law.[90] The BIA has also held that only the provisions of the 1967 Protocol and the Universal Declaration of Human Rights incorporated into domestic law by statute are binding in United States immigration proceedings.[91] In short, practitioners must understand the relative authority of international human rights treaties in United States domestic law and be careful not to overstate the binding authority of international law.

III. SOURCES AND INTERPRETATIONS OF INTERNATIONAL LAW

Human rights treaties and their interpretations can be used to buttress asylum claims. As discussed in Part II, courts are unlikely to cite to international human rights law in support of a decision. Treaties, U.N. reports, and foreign authorities can, however, demonstrate to an adjudicator the prominence and viability of a particular interpretation of the refugee definition and help persuade a court to rule in favor of an asylum applicant. This section analyzes various instruments of international law and provides examples as to which of these or similar instruments have been recognized by federal courts, the BIA, and Department of Homeland Security (DHS) agencies.

A. UNHCR INTERPRETATIONS OF THE REFUGEE CONVENTION

UNHCR guidelines are among the most practical sources that practitioners can cite when interpreting the 1980 Refugee Act. As the UNHCR is the United Nations administrative body for the Refugee Convention, adjudicators tend to defer more readily to its interpretations. Article 35 of the Refugee Convention requires contracting states "to cooperate with the

89. David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 172 (1999).

90. *Matter of D-J-*, 23 I. & N. Dec. at 584 n.8.

91. *Matter of* A-G-, 19 I. & N. Dec. 502, 507–08 (B.I.A. 1987).

Office of the [UNHCR], or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."[92] Article 35 of the Refugee Convention, however, has not been incorporated into domestic law and therefore the United States is not bound by UNHCR interpretations of the Refugee Convention.. Regardless, UNHCR materials remain a great source of interpretative guidance.

The UNHCR publishes two types of materials—a handbook and various guidelines—each of which interpret provisions of the Refugee Convention. It is important to remember, however, that UNHCR guidelines are merely persuasive authority and their interpretations are therefore not binding on the United States. As the Supreme Court stated in *INS v. Cardoza-Fonesca*:

> We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any way binds the [United States] with reference to the asylum provisions of § 208(a) . . . . Nonetheless, the Handbook [and Guidelines] provide[] significant guidance in construing the Protocol, to which Congress sought to conform.[93]

The BIA, IJs, USCIS, and appellate courts use the UNHCR Handbook and guidelines to interpret the 1980 Refugee Act.[94] The United States Supreme Court has used the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* in interpreting the definition of "refugee."[95] In *INS v. Cardoza-Fonseca*, the Supreme Court cited the UNHCR *Handbook* to adopt a broad definition of "well-founded fear" that

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92. Refugee Convention art. 35, *supra* note 6.

93. INS v. Cardoza-Fonesca, 480 U.S. 421, 439 n.22 (1987).

94. *See, e.g.*, *Matter of S-E-G-*, 24 I. & N. Dec. at 586 (referring to the 2002 Guidelines of the UNHCR to mandate the requirement of social visibility); *Matter of C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) ("The recent *Guidelines* issued by the United Nations confirm that 'visibility' is an important element in identifying the existence of a particular social group."); Asylum Officer Basic Training, *Female Asylum Applicants and Gender-Related Claims*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Mar. 12, 2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf (citing UNHCR gender-based claims "[r]ecognizing the particular vulnerability of women").

95. *INS v. Cardoza-Fonseca*, 480 U.S. at 438–39.

benefited the applicant. In *Mohammed v. Gonzales*, the Ninth Circuit quoted the 2002 UNHCR's *Guidelines on International Protection: Membership of a Particular Social Group*, noting that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic."[96] Similarly, USCIS training materials defer substantially to UNHCR interpretations in determining how to analyze gender-based asylum claims.[97]

Yet the BIA has not always adhered faithfully to UNHCR interpretations, even when using UNHCR materials as persuasive authority. In *Matter of S-E-G-*, the BIA cited the UNHCR's *Guidelines on International Protection: Membership of a Particular Social Group* in justifying its adoption of the "social visibility" requirement.[98] Scholars have suggested that this interpretation of the UNHCR Guidelines obscures the UNHCR's original intention to create alternative "immutability" and "social visibility" tests, as opposed to one test possessing both requirements.[99] In *Matter of Thomas*, the UNHCR filed an amicus brief in opposition to "social visibility," claiming that "[t]he UNHCR would caution the board against adopting such a rigid approach which may disregard groups that the Convention is designed to protect."[100] The BIA's interpretation of "social visibility" shows that the BIA considers the UNHCR Handbook persuasive, but does not automatically adopt the UNHCR's interpretation of the handbook. The risk of unfavorable precedent, however, should not dissuade practitioners from using the UNHCR guidelines in support of their arguments.

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96. Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005) (quoting UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group*, at 4, U.N. Doc. (HCR/GIP/02/02, (May 7, 2002)).

97. *See* Female Asylum Applicants and Gender-Related Claims, supra note 94.

98. *Matter of S-E-G-*, 24 I. & N. Dec. at 586. Since *S-E-G-*, the BIA has replaced "social visibility" with "social distinction." *See generally Matter of M-E-V-G-*, 26 I. & N. Dec. at 236.

99. *See* Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation*, 27 YALE L. & POL'Y REV. 47, 70–71 (2008) (comparing the BIA's "social visibility" interpretation to the UNHCR Guidelines); see also Casper, *supra* note 48, at 1–2, 19–22.

100. Brief of the Office of the United Nations High Commissioner for Refugees as Amici Curiae at 10, *Matter of* Thomas, No. A75-597-033 (2007), http://www.refworld.org/pdfid/45c34c244.pdf.

When arguing gender-based asylum claims, practitioners should consider citing to the UNHCR's *Guidelines on International Protection: Gender-Related Persecution*.[101] These guidelines are helpful in cases involving domestic violence, rape, sexual violence, or other gender-based persecution. Paragraph nine is particularly germane:

> While female and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex. International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterization as serious abuses, amounting to persecution. In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act. There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.[102]

This paragraph supports the argument that adjudicators must look to international law when identifying whether or not gender-based violence is persecutory. Following paragraph nine, the guidelines proceed to analyze specific common incidents of gender-based persecution and particular social groups (e.g. prostitutes and homosexuals).[103]

The guidelines further suggest that, in addition to particular social group arguments, practitioners should evaluate potential political opinion arguments in gender-based asylum claims.[104] The UNHCR acknowledges that "[t]he image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some

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101. *See* UNHCR, *Guidelines on International Protection: Gender-Related Persecution*, U.N. Doc. HCR/GIP/02/01, (May 7, 2002).

102. *Id*. at 3.

103. *Id.* at 3–11.

104. *Id.* at 8–9.

societies."[105] Persecutors may impute women with the "political opinions of their family or male relatives."[106] Women may also engage in political activity by refusing "to engage in certain activities, such as providing meals to government soldiers."[107] In many circumstances, an imputed political opinion claim may be more applicable than a claim based on a gender-oriented particular social group. Of course, in other circumstances, an applicant may be able to establish a more direct political opinion through overt feminist activism.[108]

For practitioners representing children in asylum claims, the UNHCR has also published *Guidelines on International Protection*: *Child Asylum Claims*. In these guidelines, the UNHCR encourages "[a] child-sensitive application of the refugee definition," as would be consistent with the 1989 Convention on the Rights of Child ("CRC").[109] The UNHCR indicates that the CRC requires adjudicators to consider the "best interests of the child as a primary consideration in all actions concerning children."[110] As discussed below in Section B(ii), the CRC has not been ratified by the United States. As such, when citing to these guidelines, practitioners should be careful that the suggested interpretation is not dependent on the CRC. Regardless, practitioners may find these guidelines helpful in framing arguments for asylum claims regarding underage recruitment, child trafficking and labor, female genital mutilation, domestic violence, and other child-specific forms of persecution. In particular, these guidelines may be useful in suggesting that any of these acts constitute persecution.

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105. *Id.* at 8.

106. *Id.*

107. *Id.*

108. *See, e.g.*, Fatin v. INS, 12 F.3d 1233, 1241–42 (3d Cir. 1993) ("[I]f a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as 'so fundamental to [her] identity or conscience that [they] ought not be required to be changed.' (citing *Matter of Acosta*, 19 I. & N. Dec. at. 234)).

109. UNHCR, *Guidelines on International Protection: Child Asylum Claims*, at 4, U.N. Doc. HCR/GIP/09/08, (Dec. 22, 2009).

110. *Id.*

B. TREATIES

Most human rights treaties are not self-executing and have not been incorporated into domestic law. There is a plethora of human rights treaties that, though not binding, can still be used as persuasive authority in domestic violence-based asylum claims and asylum claims involving children. This section will discuss three such treaties: the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"); the Convention on the Rights of the Child; and the International Covenant on Civil and Political Rights ("ICCPR").

1. The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women was signed by the United States on July 17, 1980, but has not been ratified.[111] It is the leading international covenant addressing gender-based human rights violations. Article 1 defines discrimination against women very broadly as

> [A]ny distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[112]

CEDAW also established the Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW Committee") to provide interpretive guidance and recommendations.[113] Numerous provisions of CEDAW grant expansive protection to women, and the CEDAW Committee's

111. *See* Luisa Blanchfield, *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate,* CONG. RESEARCH SERVICE, at 1 (June 28, 2011), https://www.fas.org/sgp/crs/row/R40750.pdf.

112. Convention on the Elimination of All Forms of Discrimination Against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

113. *Id*. arts. 17, 21.

interpretations of these provisions may be relevant to gender-based asylum claims.[114] The CEDAW Committee's General Recommendations No. 32 and No. 14 provide the most relevant and specific support for domestic violence-based asylum claims.

General Recommendation No. 32—"the gender related dimensions of refugee status, asylum, nationality, and stateless women"—published in November of 2014, specifically addresses gender-based asylum claims.[115]. The CEDAW Committee makes clear that one of the purposes of General Recommendation No. 32 is to provide guidance to states on how to address gender discrimination in order to fulfill the rights of asylum-seeking women.[116] The Committee also states that it intends for its interpretation to fit within the existing international law framework, comprised of other treaties that relate to asylum-seeking women, including the Universal Declaration of Human Rights and the Refugee Convention.[117] This Recommendation contains two particularly useful provisions.

The first is from General Recommendation No. 32 is paragraph 15, where the CEDAW Committee states that "gender-related forms of persecution" may include:

> [T]he threat of female genital mutilation, forced/early marriage, threat of violence and/or so-called "honour crimes," trafficking in women, acid attacks, rape and other forms of sexual assault, serious forms of domestic violence, the imposition of the death penalty or other physical punishments existing in discriminatory justice systems, forced sterilization, political or religious

114. *See id.* arts. 2, 3, 5, 9; *see also* Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 12: Violence against Women, U.N. Doc. A/44/38 (1989), http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom12 (declaring that States must protect women from "violence of any kind occurring within the family. . . or in any other area of social life"); Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence against Women, para. 1, U.N. Doc. A/47/38 (1992), http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19 ("Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.").

115. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 32: On the Gender-Related Dimensions of Refugee Status, Asylum, Nationality, and Stateless Women, U.N. Doc. CEDAW/C/GC/32 (Nov. 14, 2014), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/627/90/PDF/N1462790.pdf?OpenElement.

116. *Id.* at para. 4.

117. *Id.* at paras. 5, 9.

> persecution for holding feminist or other views and the persecutory consequences of failing to conform to gender-prescribed social norms and mores, or for claiming their rights under the Convention.[118]

Practitioners may cite to paragraph 15 to support the assertion that these various forms of domestic violence constitute "persecution" for purposes of the Refugee Convention and are thus a valid and recognized basis for asylum.

Additionally, in paragraph 13, the CEDAW Committee states that the purpose of Recommendation No. 32 is to ensure the application of "a gender perspective when interpreting all five grounds [for asylum], and [the] use [of] gender as a factor in recognizing membership in a particular social group. . . ."[119] Practitioners can use this statement to bolster the argument that asylum claims founded on gender-based domestic violence satisfy the "immutability" requirement for particular social group claims, because gender is an immutable characteristic.[120]

Paragraph 13 also encourages adjudicators to take a gender-based perspective with all asylum claims, not only for "particular social group" claims. A practitioner might cite to this paragraph when explaining how an asylum claim that does not appear to be related to gender is gender-based. For example, the asylum claim of a female who has been targeted by Salvadoran gangs may be dismissed by an adjudicator as a gang-related claim, which has been held, on its own, to not qualify as a ground for asylum. However, explaining that there is a gendered component to the targeting of females in Salvadoran gang culture, as opposed to in male recruitment cases, could support a particular social group or political opinion claim.

Another useful General Recommendation from the CEDAW Committee is General Recommendation No. 14.[121] This Recommendation addresses female genital mutilation.[122]

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118. *Id*. at para. 15

119. *Id*. at para. 13.

120. *See Matter of A-R-C-G-*, 26 I. & N. at 392–94 (holding that an applicant for asylum seeking relief based on membership in a particular social group must establish that the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question).

121. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 14: Female Circumcision, U.N. Doc. A/45/38 and Corrigendum (1990), http://www.refworld.org/docid/453882a30.html.

122. *Id*.

Though Recommendation No. 14 does not explicitly say that FGM is persecution,[123] it has been cited in both federal court and BIA cases in support of this conclusion. In *Abay v. Ashcroft*, the Sixth Circuit cited General Recommendation No. 14 to support the conclusion that FGM is a recognized violation of women's and female children's rights, and constitutes persecution.[124] Recommendation No. 14 was also referenced in *Abankwah v. INS*, again as evidence that FGM is an internationally recognized crime rising to the level of persecution.[125]

More generally, evidence that practitioners have successfully cited to General Recommendations indicates a willingness on the part of federal courts and the BIA to consider non-binding international law when deciding various claims. The CEDAW Committee's General Recommendations No. 32 and No. 14 themselves provide support for establishing that various forms of domestic violence rise to the level of persecution, that gender may be used to satisfy the immutability requirement in PSG claims, and that FGM is persecution. In addition to the Recommendations discussed here, CEDAW and other CEDAW Committee materials may also support general claims about the prevalence of gender-related domestic violence, and how it affects asylum seekers.[126]

2. The Convention on the Rights of the Child

The Convention on the Rights of the Child recognizes and grants broad protection to children's fundamental rights.[127] With 140 signatories, the CRC is the most widely ratified treaty in history.[128] The United States signed the CRC on February 16,

123. *Id*. The text of General Recommendation No. 14 recognizes that "the practice of female circumcision and other traditional practices [that are] harmful to the health of women" and recommends various methods by which States can combat FGM and other harmful practices.

124. Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004).

125. Abankwah v. INS, 185 F.3d 18, 23 (2d Cir. 1999).

126. Though a comprehensive list of such resources is beyond the scope of this article, the Committee's website offers numerous resources, including annual reports and general recommendations. *See* UNHCR, Comm. on the Elimination of Discrimination Against Women, http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx

127. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, http://www.ohchr.org/en/professionalinterest/pages/crc.aspx [hereinafter CRC].

128. UNICEF and the CRC, *Convention on the Rights of the Child, A World of Difference: 25 CRC Achievements,* UNICEF (last updated June 18, 2014), http://www.unicef.org/crc/index_73549.html.

1995, but has not ratified it and the United States Supreme Court explicitly rejected the theory that the pervasive ratification of the CRC elevated the treaty to a manifestation of customary international law.[129]

Though the CRC has gained unprecedented global acceptance, this treaty remains non-binding on the United States. However, it remains persuasive authority for United States courts, the BIA, and asylum officers. There are many ways that the CRC can be used to support children's asylum claims, including the use of Articles 12 and 22. Under United States law, children often receive refugee or asylee status as derivatives of a parent's application.[130] The CRC, however, recognizes that children are independent individuals that are entitled to rights and protections separate from their parents.[131] Article 12 requires that parties allow a child who is capable of forming his or her own views and respect the right of the child to express those views freely in all matters affecting that child.[132] Article 22 represents an important provision in the context of an asylum claim for a child, stating:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.[133]

Thus, the CRC broadly recognizes that children are independently entitled to rights and protections, and specifically points out that this entitlement extends to the right to independently apply for asylum.

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129. *See* Roper v. Simmons, 543 U.S. 551, 621–23 (2005) (stating that the failure of the United States to ratify the CRC indicates a lack of national consensus on the issue).

130. *See* INA, § 208(b)(2); 8 U.S.C. § 1158(b)(3) (2014).

131. CRC, *supra* note 127, art. 12.

132. *Id.*

133. *Id.* art. 22.

Some provisions in the CRC may be helpful in making arguments regarding the definition of "persecution" as it relates to children. Article 36 broadly requires that state parties "protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare."[134] Article 37 states that children should be protected from "torture" and "cruel, inhuman, or degrading treatment."[135] There is additional support in the CRC that recruitment of children by armed groups constitutes "persecution."[136] Article 38 requires states to ensure that children younger than fifteen "do not take a direct part in hostilities."[137] These provisions suggest that the recruitment of children to take part in armed violence as well as the torture or exploitation of children by armed groups may qualify as "persecution."

Other provisions of the CRC support the assertion that children, who among themselves have a shared experience, constitute a "particular social group." The CRC supports this assertion by advocating for the notion that children are independent legal agents entitled to their own rights and protections. The independent rights of children, for example, are recognized by Articles 12 and 22. In addition, many CRC provisions demonstrate the distinct right of children to seek rights and protection under the law.[138] Recognizing children as independent and autonomous beings entitled to rights and protections supports the argument that children are socially distinct. This, in turn, reemphasizes that children constitute a "particular social group." One can argue, therefore, that children recruited by armed groups would qualify as refugees under the "particular social group" category based on their age at the time of recruitment and their shared experiences of abduction, torture, and escape.

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134. *Id.* art. 36.

135. *Id.* art. 37.

136. *Id*. art. 38.

137. *Id.*

138. *See, e.g.*, *id.* art. 3 ("In all actions concerning children. . . the best interests of the child shall be a primary consideration."); *id.* art. 8 ("States Parties undertake to respect the right of the child to preserve his or her identity, including nationality. . . ."); *id*. art.12 ("States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child. . . ."); *id.* art. 24 ("States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health. . . ."); *id.* art. 28 ("States Parties recognize the right of the child to education. . . .").

3. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights is a broad human rights treaty signed and ratified by the United States.[139] As a result, the ICCPR might provide strong support for asylum claims. In reality, however, it is only binding to the extent that Congress incorporates it into domestic law.[140] In practice, the ICCPR has not proven to be influential or useful in most asylum claims.[141] Nonetheless, there are a number of relevant and useful provisions in this treaty that should not be overlooked, specifically those provisions that assist in interpreting "particular social group" or "persecution."

The ICCPR includes a number of general provisions useful in interpreting the definition of "particular social group." Article 2 requires that states respect individuals of any "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[142] While the refugee definition in United States law explicitly protects many of these groups, others—such as property status or sex—are not included in the definition. Practitioners can use Article 2 to suggest that the "particular social group" category is intended to protect these other groups. Article 3, which requires that states "undertake to ensure the equal right of men and women" further supports construing "particular social group" to include sex.[143] Article 24 of the ICCPR explicitly protects children, suggesting that they too may be a protected "particular social group."[144]

Furthermore, practitioners can utilize the ICCPR to construe "persecution." Among other things, the ICCPR prohibits depriving an individual of life,[145] torture or "cruel, inhuman or degrading treatment or punishment,"[146] slavery,[147]

139. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171[hereinafter ICCPR].

140. *Cf.* Sloss, *supra* note 89, at 171–72.

141. DANIEL WILSHER, IMMIGRANT DETENTION: LAW, HISTORY, AND POLITICS 166 (2012) (noting that the ICCPR has a lack of influence on detention practices in the U.S., most of Europe, and Australia) ("[R]epresents an unusually clear failure of the international human rights system as a tool of legal and political change.").

142. ICCPR, *supra* note 139, art. 2(1).

143. *Id.* art. 3.

144. *Id.* art. 24.

145. *Id.* art. 6.

146. *Id.* art. 7.

147. *Id.* art. 8.

arbitrary arrest or detention,[148] and restricting freedom of thought, conscience, and religion.[149] Article 23 is particularly pertinent in gender-based and domestic violence claims, requiring "free and full consent" of individuals seeking to marry.[150] Forced marriage may therefore qualify as persecution. Additionally, Article 23(4) states that parties must "take appropriate steps to ensure equality of rights and responsibilities of spouses."[151] Practitioners may use this provision to suggest domestic violence is persecution, especially when the government is unwilling to intervene or pass laws criminalizing domestic violence.

C. U.N. GENERAL ASSEMBLY RESOLUTIONS—THE UNIVERSAL DECLARATION ON HUMAN RIGHTS

Arguably, the single most influential U.N. General Assembly Resolution is the Universal Declaration on Human Rights ("UDHR").[152] The U.N. General Assembly adopted the UDHR on December 10, 1948 as a non-binding resolution, laying out the basic human rights to which all individuals are entitled.[153] Since its adoption, the UDHR has gained prominence as the fundamental international instrument on basic human rights.[154]

The UDHR gave rise to several human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").[155] In addition, the Preamble to the Refugee Convention specifically references the UDHR.[156] Many

148. *Id.* art. 9.

149. *Id.* art. 18; *see id.* art. 19, 22, 25.

150. *Id.* art. 23.

151. *Id.* art. 23(4).

152. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

153. *See* DUNOFF ET AL., *supra* note 76, at 410–11.

154. *Id.* at 416 ("After the UN Charter, the Universal Declaration is often considered to be the most influential international instrument of the twentieth century.").

155. *Id.* at 410 ("[G]overnments intended the Universal Declaration to serve principally as an intermediate step toward the preparation of a binding international human rights treaty, delays in the preparation of the two subsequent International Covenants left the Universal Declaration for many years as the primary and most heavily invoked international human rights instrument.").

156. Refugee Convention, *supra* note 6 (referencing the UDHR in the

scholars believe that the UDHR has been so influential, and has been cited and utilized so often by both international and domestic law, that it has been partially elevated and transformed into binding customary international law.[157]

The United States was a major proponent of the UDHR and voted for its adoption in the General Assembly in 1948.[158] Since its adoption, United States courts have cited to the UDHR extensively,[159] including in an array of asylum cases.[160] When compared with other international instruments, the UDHR has been referenced—and even relied on—more than most, if not all, other international sources.[161] Despite the influential role the UDHR has played in United States case law, the BIA has held that in asylum cases, the provisions of the UDHR are only binding if they have been specifically adopted into United States law.[162] Nevertheless, due to its exalted status in international law and the extensive reference to the UDHR in United States case law, adjudicators of asylum cases may be more open to UDHR-supported arguments. Specifically, its provisions may be cited as interpretive support in defining "particular social group" and "persecution" within the context of domestic violence-based asylum claims.

Article 2 grants "all of the rights and freedom set forth in [the] Declaration, without distinction of any kind, such as

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beginning of the Preamble).

157. *See* DUNOFF ET AL., *supra* note 76, at 416 ("The UDHR has been cited with approval in countless successor treaties, declarations, and resolutions by the United Nations and regional organizations, and many of its provisions have been incorporated into the constitutions and laws of individual states. At least some of its provisions are now part of customary international law.").

158. See Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?*, 41 CORNELL INT'L L.J. 251, 254 (2008).

159. *See id.* at 272 (explaining that the author found 238 reported federal and state cases from 1948 to October 1, 2007, that referred to the Universal Declaration).

160. *See, e.g.*, Zheng v. Gonzales, 192 Fed. App'x 733 (10th Cir. 2006); Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003).

161. *See* Cheng, *supra* note 158, at 288 (pointing out that though the UDHR has had "marginal impact on U.S. law", this instrument has had influence over certain areas of the law that "is therefore not an achievement critics should belittle or ignore.").

162. *Matter of A-G-*, 19 I. & N. Dec. at 508. It is also important to note that some commentators and judges have interpreted the Supreme Court case, *Sosa v. Alvarez-Machain*, as holding that the UDHR is not a binding source of international law. *See* Cheng, *supra* note 158, at 274.

. . . sex" to everyone.[163] Article 14 of the UDHR further provides that individuals have a "right to seek and to enjoy in other countries asylum from persecution."[164] Read together, these provisions support the assertion that asylum adjudicators should take a gender-based perspective when considering asylum claims, especially particular social group and political opinion claims.[165] These provisions also support the argument that sex should be protected under the "particular social group" category within the refugee definition.[166]

The UDHR can also be used to help define "persecution." Like the ICCPR, the UDHR contains provisions that protect basic human rights, which can be used to interpret the meaning of "persecution." Article 3 protects individuals' right to "life, liberty, and security of person."[167] Article 4 requires that no individual be subjected to "slavery or servitude."[168] The right to be free from torture and degrading treatment is protected by Article 5,[169] while a person's right to "leave any country, including his [or her] own . . . ." is granted by Article 13.[170] Importantly for domestic-violence-based claims, Article 16 protects individuals' right to marry, but also the right to consent to marriage.[171] All of these provisions of the UDHR—and more—can be cited in support of the assertion that deprivation of these rights constitutes "persecution" for the purposes of asylum.

D. SISTER SIGNATORIES' INTERPRETATIONS OF THE REFUGEE CONVENTION AND OTHER HUMAN RIGHTS TREATIES

In addition to the interpretive tools discussed above, the inclusion of foreign cases and interpretations of treaties can support a specific interpretation of the refugee definition under United States law.[172] Practitioners can utilize foreign case law

163. UDHR, *supra* note 152, art. 2.

164. *Id.* art. 14.

165. See Female Asylum Applicants and Gender-Related Claims, *supra* note 94, at 16–17.

166. *Id.* at 27.

167. UDHR, *supra* note 152, art. 3.

168. *Id.* art. 4.

169. *Id.* art. 5.

170. *Id*. art. 13.

171. *Id.* art. 16.

172. *See generally* Fatma Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT'L L. & POL. 391 (2013) (analyzing the role of foreign authorities in United States asylum adjudication). From a policy

and agency manuals to show an interpretative pattern among sister signatories. This is particularly true in cases where an issue has been scarcely analyzed by United States adjudicators, including various human rights issues. Practitioners must be careful, however, to select only the most persuasive foreign authorities. Use of foreign authorities by courts may result in the adoption of the more restrictive or inappropriate asylum policies of other nations by United States adjudicators.[173] By including international human rights arguments in asylum claims, however, practitioners can facilitate the adoption of a shared understanding of international human rights law by those countries that are bound to follow it.

The United States Supreme Court has recognized that when interpreting a treaty, "the 'opinions of our sister signatories' . . . are 'entitled to considerable weight.'"[174] In *Lawrence v. Texas*, for example, the Supreme Court cited to the European Court of Human Rights in deciding to overturn its decision in *Bowers v. Hardwick*.[175] Foreign case law has also been cited extensively in cases concerning capital punishment. In *Roper v. Simmons*, the Supreme Court acknowledged that "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[176] In particular, the Court relied heavily on the experience of the United Kingdom, suggesting that the "historic ties between our countries" shed significant light on the issue.[177] As such, it is not unheard of or abnormal for adjudicators to look toward foreign

standpoint, Marouf contends that foreign authorities must be included in legal arguments to encourage states to "[E]ngage in a productive dialogue and seek to persuade one another about how to interpret various provisions of [international human rights treaties]." *Id.* at 483–84. By including international human rights arguments in asylum claims, practitioners can facilitate the adoption of a shared understanding of international human rights law by those countries that are bound to follow it.

173. *See id.* at 480–84.

174. Abbott v. Abbott, 560 U.S. 1, 16 (2010) (citing El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999)).

175. *See* Lawrence v. Texas, 539 U.S. 558, 560 (2003). In *Bowers*, the Supreme Court held that a Georgia sodomy statute did not violate the fundamental rights of homosexuals. *See* Bowers v. Hardwick, 478 U.S. 1039 (1986). The European Court of Human Rights overturned a statute similar to the one in *Bowers*, though it did not cite *Bowers* itself. *See* P.G. & J.H. v. United Kingdom, 2001-IX Eur. Ct. H. R. 195, App. No. 00044787/98, para.56.

176. *Roper*, 543 U.S. at 575 (citing Trop v. Dulles, 356 U.S. 86 (1958)) (emphasis omitted).

177. *Id.* at 577.

court interpretations of treaties or legal doctrine relevant to the case at hand in interpreting United States domestic law.

Unfortunately, the BIA and federal courts only rarely defer to foreign interpretations of the Refugee Convention or the 1967 Protocol in their adjudications.[178] For example, in a concurring opinion in *Matter of Kasinga*, Judge Rosenberg cited Canadian case law to support her argument that gender-based asylum claims are becoming internationally recognized.[179] And in his concurrence in *Negusie v. Holder*, Justice Stevens cited cases from Australia, Canada, New Zealand, and the United Kingdom to support his interpretation of the persecutor bar.[180] These cases suggest that some judges may find foreign authorities at least mildly persuasive. Unfortunately, these cases represent an exception, not the rule. Instead, these courts typically prefer traditional rules and canons of statutory interpretation to the Refugee Act, thereby "ignoring the incorporated treaty."[181]

Immigration agencies within DHS—mainly USCIS and Immigration and Customs Enforcement ("ICE")—may be more likely to consider foreign authorities than the courts. Asylum officers are trained to evaluate gender-based asylum claims using international cases and guidelines published by countries such as Australia, Canada, and the United Kingdom.[182] In its *Matter of L-R-* brief, DHS cited to the Canadian *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* in support of recognizing asylum claims from domestic violence-based particular social groups.[183] DHS's and USCIS's use of foreign case law and agency sources suggests that immigration

178. Professor Marouf acknowledges that "[i]n very rare cases, 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 the principled approach to treaty interpretation." Marouf, *supra* note 172, 418–19 (emphasis omitted).

179. *Matter of Kasinga*, 21 I. & N. Dec. at 377.

180. Negusie v. Holder, 129 S. Ct. 1159, 1175 n.7 (2009) (citing Canada v. Asghedom [2001] F.C.T. 972 (Can. Fed. Ct.); Gurung v. Secretary of State for Home Dept., [200] UKAIT 4870 (U.K.Immigr.App.Trib.); SRYYY v. Minister for Immigration & Multicultural & Indigenous Affairs, [2005] 147 F.C.R. 1 (Austl.Fed.Ct.); Refugee Appeal No. 2142/94 (N.Z. Refugee Status App. Auth., Mar. 20, 1997)).

181. *Matter of Kasinga*, 21 I. & N. Dec. at 393.

182. *Female Asylum Applicants and Gender-Related Claims*, *supra* note 94, at 7–9.

183. Brief for Department of Homeland Security at 13 n.10, *Matter of L-R-* (filed Apr. 13, 2009), http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf.

agencies under DHS are more likely to accept arguments based on foreign case law than federal courts or IJs.

Practitioners should incorporate foreign authorities into their international human rights arguments, but must do so tactfully. As mentioned above, an increased offering of foreign case law may cause United States Courts to further eschew foreign authorities.[184] Professors Eric Posner and Cass Sunstein have proposed three factors to be considered when selecting foreign authorities. First, the foreign authority must "reflect a judgment based on that state's private information about how some question is best answered."[185] Second, the issue discussed in the foreign authority must be similar to the problem before the interpreting court.[186] Third, the foreign authority must be an "independent judgment," and not merely the result of an emerging jurisprudential trend.[187]

Professor Fatma Marouf provides an analysis of how these criteria may be applied to foreign authorities interpreting the Refugee Convention and 1967 Protocol.[188] First, the foreign authority should offer something not available to United States adjudicators, primarily 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 the state's government."[189] Second, the authority should "address a

184. *See* Stephen Meili, *When Do Human Rights Treaties Help Asylum Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990*, 51 OSGOODE HALL L.J. 627, 656 (2014) (quoting telephone interview with C-6 (Jan. 5, 2012)) (discussing the use of human rights arguments in asylum cases: "It's always counterproductive to argue things that the court is not going to be receptive to. I mean in the sense if that you are just irritating the decision maker, in my experience that's generally counterproductive, unless you are setting up a record for appeal or you have some other strategy in mind."); Stephen Meili, *U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law*, 54 B.C. L. REV. 1123, 1143 (2013) (discussing the use of treaty-based arguments: "[O]ne attorney stated that lawyers who push such arguments at the Tribunal level, where—according to this lawyer—the judges do not like complicated law, might end up biasing the court against their client. Other lawyers noted, for example, that '[p]eople feel they have to throw everything in . . . I've sat at the back of the courts lots of times and watched judges say 'what does this add your argument?' Why be put in that position?'").

185. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 144 (2006) (emphasis omitted).

186. *Id.*

187. *Id.*

188. *See* Marouf, *supra* note 172, at 452–72.

189. *Id.* at 454.

question similar to the one before the domestic court and share a common general understanding of the concept involved."[190] Third, the foreign state must "exercise independent judgment in its interpretation."[191] As such, practitioners should be wary of European Union states with less developed asylum systems and those states which blindly adopt UNHCR guidelines without independent investigation.[192] In addition to these three criteria, Marouf suggests that the following six factors are important in determining how much weight to accord foreign authorities:

> (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 consistently applied; and
> (6) whether the interpretation reflects the human rights principles underlying the treaty.[193]

As an example, United States practitioners could use *Islam v. Secretary of State for the Home Department* in international human rights arguments exploring foreign case law.[194] In *Islam*, the United Kingdom's House of Lords granted asylum to a Pakistani woman fleeing domestic violence. The House of Lords began its discussion by explaining its interpretation of "particular social group" using United States cases, most notably *Matter of Acosta*.[195] Citing *Acosta*, the court stated that a common immutable characteristic "might be an innate one 'such as sex, color, or kinship ties.'"[196] "This reasoning covers Pakistani women because they are discriminated against and as

190. *Id.* at 457.
191. *Id.*
192. *Id.*
193. *Id.* at 457–58.
194. Islam v. Secretary of State for the Home Department, [1999] 2 WLR 1015 (HL) (UK).
195. *Id.*
196. *Id.*

a group they are unprotected by the state."[197] In addition, the court suggested that it would have accepted a more narrow group definition formulated by "[t]he unifying characteristics of gender, suspicion of adultery, and lack of protection."

Islam offers an example of a case that fits Marouf's criteria. The United Kingdom asylum system is robust, well-developed, and uses the *Acosta* standard for particular social group determinations.[198] Since *Islam* cites United States law so heavily it is more likely to persuade U.S. adjudicators because the case is founded on law that is binding on U.S. adjudicators. Furthermore, the United Kingdom has a large population of refugees.[199] Overall, the case is well-argued and advances a position only recently recognized in the United States. Marouf's criteria suggest that *Islam* would be an ideal case to include when making International Human Rights arguments in a domestic violence-based asylum claim.

Practitioners may carefully incorporate foreign case law and treaty interpretations into their arguments to buttress asylum claims using the criteria advanced by Marouf to select cases that are likely to be accepted by United States adjudicators. The inclusion of these authorities benefits the individual asylum applicant, and legitimizes the overall United States asylum system.

IV. EXAMPLES OF INTERNATIONAL HUMAN RIGHTS ARGUMENTS IN ASYLUM ADJUDICATIONS

The preceding analysis reveals the many sources of international human rights law practitioners can and should use to bolster their asylum arguments and argue for favorable

197. *Id.*

198. *See generally* Robert Thomas, *Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom*, 20 INT'L J. REFUGEE L. 489 (2008); 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 (Erika Fuller et al. eds., 2003).

199. From 2010-2014, the United Kingdom had a refugee population of 149,799. During the same period, the United States had a refugee population of 262,023. *See Refugee Population by Country or Territory of Asylum*, THE WORLD BANK, http://data.worldbank.org/indicator/SM.POP.REFG (last visited Feb. 17, 2015).

interpretations of the definition of "refugee." This section will use two hypothetical fact patterns to construct international human rights arguments based on the information provided in Parts I, II, and III. Both hypotheticals present claims that have not been resolved by the BIA or the federal courts as of early 2016. Part A evaluates the asylum claim of Ana, a Salvadoran woman seeking protection from her abusive boyfriend, while Part B examines the case of Santiago, a fourteen-year-old Salvadoran youth seeking asylum due to gang recruitment. These cases present novel arguments for resolving similar claims.

A. ANA: A SALVADORAN WOMAN SEEKING PROTECTION FROM HER ABUSIVE BOYFRIEND

1. Facts

Ana is a twenty-five-year-old woman fleeing her abusive boyfriend, Alberto, in El Salvador. She and Alberto met three years ago and moved in together shortly thereafter. According to Ana, Alberto was a member of the MS-13 gang and a habitual drunk. Ana originally became Alberto's girlfriend out of fear that members of the MS-13 gang would kill her if she refused. Alberto frequently beat Ana with his fists. Once, while Alberto was drunk, he shot at Ana with a pistol; the bullet grazed her hip. Ana fled the house and went to the police, who laughed at Ana, refused to file the report, and called Alberto to pick her up. After picking her up, Alberto beat Ana unconscious. The next morning, Ana fled to the United States with the help of her uncle. Ana is filing for asylum as a member of the particular social group: "Salvadoran women who are unable to leave their relationship."[200]

2. Using International Human Rights Arguments in Ana's Case

International law recognizes domestic violence as a form of persecution. In its guidelines, the UNHCR declared that

200. The proposed particular social group of this hypothetical is substantially similar to *Matter of A-R-C-G-*. *See* 26 I. & N. Dec. 388 (B.I.A. 2014). The facts have been altered to provide a more novel discussion of the hypothetical claim.

"domestic violence . . . [is an act] which inflict[s] severe pain and suffering—both mental and physical—and which ha[s] been used as [a] form[] of persecution, *whether perpetrated by State or private actors*."[201] Other international agreements and bodies similarly recognize domestic violence as persecution. In General Recommendation No. 32, the CEDAW Committee interpreted "persecution" under the Refugee Convention to include "serious forms of domestic violence."[202] The United Kingdom has accepted this interpretation in its case law.[203] Using these arguments, it can be reasoned that Ana suffered "persecution" under the Refugee Convention in the form of domestic violence.

Some courts may be hesitant to recognize a claim stemming from cohabitation alone (i.e. when the victim was not married to his or her persecutor). However, international human rights treaties speak of the need for states to respect and enforce equality between men and women—not just spouses.[204] For example, CEDAW states that women have a right to "fundamental freedoms"—including freedom from domestic violence—"irrespective of their marital status."[205] Therefore, domestic violence includes violence between men and women living together—regardless of the legal recognition of their relationship. As Ana and Alberto cohabitate, Alberto's violence against Ana constitutes persecution. Ana does not need to show a marital relationship in order to establish persecution or to show that she is unable to leave her relationship for purposes of her particular social group.

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201. *Guidelines on International Protection: Gender-Related Persecution*, *supra* note 101, at 3 (emphasis added).

202. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 32, *supra* note 115, at para. 15.

203. *See, e.g.*, Islam v. Secretary of State for the Home Department, [1999] 2 WLR 1015 (HL) (UK).

204. *See generally* ICCPR, *supra* note 139, art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 2 (Dec. 10, 1948) (protecting "all of the rights and freedoms set forth in [the] Declaration, without distinction of any kind, such as . . . sex").

205. CEDAW, *supra* note 112, art. 1.

B. SANTIAGO: A FOURTEEN-YEAR-OLD SALVADORAN YOUTH SEEKING ASYLUM DUE TO FORCED GANG RECRUITMENT.

1. Facts

Santiago is a fourteen-year-old Salvadoran youth seeking asylum based on MS-13 gang recruitment. One day in October, Xavier, a member of the MS-13 gang, approached Santiago while he was on his way to school and demanded that he join the gang. Santiago knew Xavier was a member of the MS-13 gang because of his facial tattoos. Santiago refused to join the gang, telling Xavier he wanted to continue going to school. Xavier proceeded to beat Santiago with a pistol and rob him of his belongings. From October to December, Xavier followed Santiago to school and threatened to kill him if he did not join the gang. Finally, Xavier and three other gang members kidnapped Santiago, tied him up, and poured gasoline on him. Santiago was able to escape and eventually fled to the United States. Santiago is filing for asylum as a member of the particular social group: "Salvadoran youth who oppose gang recruitment."[206]

2. Using International Human Rights Arguments in Santiago's Case

As a child seeking asylum, Santiago is entitled to heightened protections under international law. Both the UNHCR and the CRC emphasize that in asylum cases, "the best interests of the child shall be a primary consideration."[207] In determining the "best of interests of the child," asylum adjudicators must consider "their age, their level of maturity and development and their dependency on adults," as well as "child specific rights."[208] These child specific rights include, among others, protection from violence, protection from under-age recruitment, and the right to education.[209] MS-13, and the El

206. The proposed particular social group of this hypothetical is substantially similar to *Matter of S-E-G-*. *See* 24 I. & N. Dec. 579 (B.I.A. 2008). The facts have been altered to provide a more novel discussion of the hypothetical claim.

207. CRC, *supra* note 127, art. 3(1); *accord Guidelines on International Protection: Child Asylum Claims*, *supra* note 109, at 4.

208. *See Guidelines on International Protection: Child Asylum Claims*, *supra* note 109, at 3–4.

209. *Id.* at 8.

Salvador government, violated all three of Santiago's fundamental rights. The Court and asylum officer must evaluate Santiago's claim in light of these denials of basic human rights coupled with his age.

Furthermore, the UNHCR has concluded that the "agent of persecution," or "non-State actor," can be a "criminal gang[]" for the purposes of asylum:[210]

> Where children are singled out as a target group for recruitment or use by an armed force or group, they may form a particular social group due to the innate and unchangeable nature of their age as well as the fact that they are perceived as a group by the society in which they live . . . .[A] child who . . . refuses to become associated with an armed force may be perceived as holding a political opinion in which case the link to the Convention ground of political opinion may also be established. [211]

The CRC reinforces that a gang—as an armed group—can be an agent of persecution. CRC Article 38 suggests that states have an obligation under international law to prevent forced recruitment of children by armed groups.[212] El Salvador, as a signatory of the CRC, has failed to protect children from gang recruitment. As the MS-13 gang targeted Santiago for recruitment, Santiago suffered persecution by a non-State actor.

In addition, Santiago's particular social group, "Salvadoran youth who oppose gang recruitment," is socially distinct and particular under international understandings of these terms. The UNHCR emphasizes that age, and in particular "youth," is immutable, particular, and socially distinct.[213] According to the UNCHR guidelines:

> [B]eing a child is in effect an immutable characteristic at any given point in time. A child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution feared. The fact that the child eventually will grow older is irrelevant to the identification of a particular social group . . . .Being a

210. *Id.* at 16.

211. *Id.* at 20.

212. *See* CRC, *supra* note 127, art. 38.

213. *See Guidelines on International Protection: Child Asylum Claims*, *supra* note 109, at 3–4.

> child is directly relevant to one's identity, both in the eyes of society and from the perspective of the individual child . . . .In most societies, children are set apart from adults as they are understood to require special attention or care, and they are referred to by a range of descriptors used to identify or label them, such as "young," "infant," "child," "boy," "girl," or "adolescent." The identification of social groups also may be assisted by the fact that the children share a common socially-constructed experience, such as being abused, abandoned impoverished or internally displaced.[214]

The United Kingdom recognizes that although an applicant "will in due course cease to be a child, he is immutably a child at the time of assessment."[215] As Santiago was a child at the time of filing, "youth" constitutes an immutable and particularly-defined characteristic. Furthermore, the UNHCR interprets social visibility to encompass gang recruitment of children.[216] As discussed above, Article 38 of the CRC reinforces that forced recruitment is socially recognizable in countries in which it is an issue.[217] Therefore, "Salvadoran youth who oppose gang recruitment" meets the criteria of immutability, particularity, and social distinction when these terms are interpreted using international understandings of these terms.

Both Ana and Santiago's cases utilize international human rights arguments in emerging types of asylum claims. Although international human rights law is only persuasive authority, these types of arguments bolster their claims by demonstrating to the adjudicator that international law generally favors protection of these individuals. The use of international human rights arguments is not limited to cases of domestic violence or gang recruitment. Practitioners should carefully examine their cases to see if international human rights arguments would assist the adjudicator in more readily finding a "particular social group" or "persecution."

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214. *Id.* at 19.

215. LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department, [2008] UKAIT 00005, at 3, 15 Mar. 2007.

216. *See Guidelines on International Protection: Child Asylum Claims*, *supra* note 109, at 20 ("Where children are singled out as a target group for recruitment or use by an armed force or group, they may form a particular social group due to the innate and unchangeable nature of their age as well as the fact that they are perceived as a group by the society in which they live.").

217. *See* CRC, *supra* note 127, art. 38.

Conclusion

International sources such as the UNHCR handbook, international human rights treaties, and foreign case law offer interpretations of the 1980 Refugee Act's more ambiguous terms—particularly "particular social group" and "persecution." These interpretations aid in asylum claims—such as child asylum claims or those founded on domestic violence—that have yet to be fully explored in the United States. Without context, adjudicators may have a difficult time understanding why an asylum applicant's claim articulates a particular social group or persecution. International human rights treaties provide practitioners with support for unique and persuasive arguments to buttress their clients' asylum claims. Reliance on international human rights law is almost necessary whenever approaching a case unfamiliar to U.S. immigration officials. New refugee crises bring new forms of persecution and particular social groups, all of which the adjudicator must assess under the 1980 Refugee Act.

From an overarching policy standpoint, the use of international human rights law arguments serves a greater purpose. As asylum adjudicators begin to see increased usage of international law, they may become more comfortable relying on UNHCR interpretations, treaties, and sister signatories' interpretations of those treaties. Adjudicators will hopefully adapt and more readily entertain these sorts of arguments. Thus, the use of international human rights law is not only beneficial for advocating on behalf of the individual client, but for establishing a healthy and safe immigration system for refugees as a whole.