IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-71571 (A098-660-718)

ROCIO BRENDA HENRIQUEZ-RIVAS,

Petitioner

v.

ERIC H. HOLDER, Jr.,
U.S. ATTORNEY GENERAL,

Respondent

On Rehearing En Banc of a Petition for Review of an
Order of the Board of Immigration Appeals

BRIEF OF *AMICUS CURIAE* THOMAS & MACK LEGAL CLINIC, UNIVERSITY OF NEVADA, LAS VEGAS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Fatma Marouf is a professor of law at the William S. Boyd School of Law, University of Nevada, Las Vegas. She teaches in the areas of immigration law and international human rights law. Professor Marouf also co-directs the immigration clinic within the Thomas & Mack Legal Clinic, which represents asylum seekers *pro bono*. Professor Marouf has written numerous briefs as well as scholarly articles about the "particular social group" ground for asylum. She wrote the first law review article that addressed the issue of the social visibility.[1] Her research involves comparative and international legal analysis. This case involves significant issues related to her research and practice, including the interpretation of a "particular social group," and, specifically, the social visibility requirement, which have broad implications for the just and uniform application of refugee law. *Amicus* submits this brief under FRAP 29, Circuit Rule 29-2.

INTRODUCTION

A review of the opinions of our sister signatories to the United Nations Protocol Relating to the Status of Refugees ("Protocol") reveals a broad consensus that social visibility is *not* required to establish a "particular social group." The Court should give considerable weight to these opinions because, in interpreting

[1] *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 and Gender*, 27 YALE L. & POL'Y REV. 47 (2008).

the definition of a "refugee," it is interpreting not only a domestic statute, but also an international treaty.[2] Since the social visibility requirement introduced by the Board of Immigration Appeals ("BIA") in *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006) and *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007) conflicts with the international interpretation of the Protocol, as well as Congress's intent to comply with that treaty, this Court should not give it deference.

ARGUMENT

I. THE COURT SHOULD EXAMINE HOW OTHER STATES PARTIES HAVE INTERPRETED A "PARTICULAR SOCIAL GROUP"

The Court should apply the principles of treaty interpretation to a domestic statute that incorporates an international treaty. Under those principles, the interpretation of other states parties merits great weight.

A. The Court Should Apply the Principles of Treaty Interpretation to an Incorporative Statute Such As the Refugee Act of 1980.

"If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire [Refugee Act of 1980], it is that one of Congress' primary purposes was to bring United States refugee law into conformance with

[2] The definition of a "refugee" in Immigration and Nationality Act ("INA") § 101(a)(42), 8 U.S.C. § 1101(a)(42) incorporates the definition in the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 667 [hereinafter "Protocol"]. The Protocol, in turn, substantively incorporates the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter "Convention"].

the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). The Protocol "bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . with respect to 'refugees' as defined in Article 1.2 of the Protocol." *I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984). Consequently, "the definition of 'refugee' that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the Convention." *Cardoza-Fonseca*, 480 U.S. at 437.

Since the refugee definition in INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), incorporates the Protocol, the Court should construe this definition according to the general rules of treaty interpretation, including examining the interpretations of other states parties.[3] The Supreme Court has followed this principle of applying the rules of treaty interpretation to an incorporative statute. *See Cardoza-Fonseca*, 480 U.S. at 437-40 (analyzing the text and negotiating history of Article 1(2) of the Refugee Convention in construing the statutory phrase "well-founded fear"); *Sale v. Haitian Centers Council*, 509 U.S. 155, 177-87 (1993) (analyzing the text and

[3] *See* Guy S. Goodwin-Gill, *The Search For the One, True Meaning…*, *in* THE LIMITS OF TRANSNATIONAL LAW: REFUGEE LAW, POLICE HARMONIZATION AND JUDICIAL DIALOGUE IN THE EUROPEAN UNION 206 (Guy S. Goodwin-Gill and Hélène Lambert, eds. 2010) (arguing that the rules of treaty interpretation should be applied to refugee laws derived from the Convention and Protocol); John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 680 (2010) (arguing that courts should construe an incorporative statute as conforming to the incorporated treaty, applying the canons of treaty interpretation).

negotiating history of Article 33(1) of the Refugee Convention to determine the statute's extraterritorial effect); *Vimar Seguros y Reaseguros v. M/V Sky Reefer,* 515 U.S. 528, 536-37 (1995) (adopting an interpretation of a statute consistent with the interpretation of parties to the treaty on which the statute is based).

As Justice Stevens has explained, "[w]hen we interpret treaties, we consider the interpretations of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language." *Negusie v. Holder*, 555 U.S. 511, 537 (Stevens J, joined by Breyer J, concurring in part and dissenting in part) (examining the language of the Refugee Convention and the practice of other states parties in interpreting the "persecutor bar"). Consistent with this principle, in *Sky Reefer,* the Court "decline[d] to interpret our version of the Hague Rules in a manner contrary to every other country to have addressed th[e] issue," citing decisions from England, Australia, and South Africa. *Sky Reefer*, 515 U.S. at 537.

The Ninth Circuit has also drawn on principles of treaty interpretation when construing parts of the INA that incorporate the Protocol, including the meaning of the phrase "a particular social group," which is at issue here. *See, e.g., Sanchez-Trujillo v. INS,* 801 F.2d 1571, 1575-76 (9th Cir. 1986) (looking at sources of international law since "the statutory definition of 'refugee' derives from an international Protocol"); *Perdomo v. Holder*, 611 F.3d 662, 668 n. 7 (9th Cir.

2010) (relying on the drafting language of the Convention and the UNHCR Handbook in finding that a particular social group need not be narrowly defined); *Ali v. Ashcroft*, 394 F.3d 780, 791 (9th 2005) (rejecting a narrow interpretation of the firm resettlement bar since "[t]he international obligation our nation agreed to share when we enacted the Refugee Convention into law knows no such limits"); *Delgado v. Holder*, 648 F.3d 1095, 1110 n.2 (9th Cir. 2011) (Reinhardt J, concurring in part and in the judgment) (endorsing an interpretation of "particularly serious crime" that is "most consistent with the intent of the 1951 Refugee Convention" and that "has been adopted by other countries in interpreting identical provisions of their refugee laws").

These cases provide solid support for applying the same canons of interpretation to an incorporative statute that one would apply to the treaty itself.

B. The Opinions of Our Sister Signatories Are Entitled to Considerable Weight When Interpreting an International Treaty

The Supreme Court has held that "[i]n interpreting any treaty, [t]he opinions of our sister signatories . . . are entitled to considerable weight." *Abbott v. Abbott*, 130 S.Ct. 1983, 1993 (2010) (internal quotations omitted); *see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (same); *Air France v. Saks*, 470 U.S. 393, 404 (1985) (same). This "principle applies with special force"

where "'uniform international interpretation of the Convention' is part of the Convention's framework." *Abbott,* 130 S.Ct. at 1993.

In *Abbott,* the Court analyzed whether a *ne exeat* right (the right of a parent to consent before the other parent takes their child to another country) is a right of custody under the Hague Convention on the Civil Aspects of International Child Abduction. Reviewing decisions from the United Kingdom, Israel, Austria, South Africa, Germany, Australia, and Scotland, the majority found "broad acceptance of the rule that *ne exeat* rights are rights of custody," noting that a more restrictive interpretation by the Canadian Supreme Court was not on point and that French courts were "divided." *Abbott,* 130 S.Ct. at 1993-94. Moreover, "scholars agree[d] that there is an emerging international consensus that *ne exeat* rights are rights of custody, even if that view was not generally formulated when the Convention was drafted in 1980." *Id.* at 1994. The dissent did not dispute that "authorities from foreign jurisdictions" aid "in interpreting ambiguous treaty text" and confirmed that "the views of our sister signatories deserve special attention," but their analysis of the foreign precedents and text led to the opposite conclusion. *Id.* at 2006-09 (Stevens J, dissenting, joined by Thomas J and Breyer J).

The present case, like *Abbott,* requires interpretation of a term ("particular social group") from an international treaty. Under both the majority and dissenting opinions of *Abbott,* the views of other states parties to the Protocol merit

significant weight in deciding whether a "particular social group" must be socially visible. Courts generally agree that the plain language of the refugee definition is ambiguous as to the meaning of "particular social group." *See, e.g.*, *Donchev v. Mukasey*, 553 F.3d 1206, 1215 (9th Cir. 2009) ("On its face, the term 'particular social group' is ambiguous."). In this situation, there is no question that the views of our sister signatories deserve considerable weight.

Indeed, the principle of giving weight to the interpretations of our sister signatories applies here "*with special force*," because the goal of uniform international interpretation is built into the framework of the Protocol. *Abbott*, 130 S. Ct. at 1993 (emphasis added). Article 2.1 of the Protocol specifically requires states parties to cooperate with the UNHCR and to "facilitate its duty of supervising the applications of the Provisions of the present Protocol." By acceding to the Protocol and agreeing to cooperate with UNHCR, the United States agreed to promote uniform interpretation of the treaty.

C. The Examination of Foreign Precedents Is Uncontroversial In the Context of Treaty Interpretation

The principle that courts should consider the interpretations of other states parties when interpreting an international treaty is not controversial. Indeed, some of its strongest champions are the more conservative members of the Supreme Court. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the majority opinion

by Chief Justice Roberts highlights the views of sister signatories in interpreting Article 36 of the Vienna Convention on Consular affairs, which requires authorities to notify detained foreign nationals of their right to contact their consulate. In discussing whether a violation of that right should lead to the suppression of incriminating statements, Justice Roberts stressed that "[t]he exclusionary rule as we know it is an entirely American legal creation" that "is still 'universally rejected' by other countries." *Sanchez-Llamas*, 548 U.S. at 343-44. Accordingly, he found "no reason to suppose that Sanchez-Llamas would be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention." *Id.* at 344.

The dissent agreed on the importance of examining the interpretations of other states parties, discussing cases from Australia, Canada and Germany, but reached different results. *Id.* at 394-96 (Breyer J, dissenting, joined by Stevens J, Souter J, and Ginsburg J in part). Moreover, both the majority and dissent engaged in a detailed discussion of relevant decisions by the International Court of Justice, recognizing that such decisions merit "respectful consideration," since "uniformity is an important goal of treaty interpretation." *Id.* at 382-83. Thus, as in *Abbott*, the disagreement between the majority and dissent in *Sanchez-Llamas* did not concern *whether* to examine foreign and international precedents, but, rather, what conclusions to reach in light of those precedents.

Justice Scalia's dissent in *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004), which involved an issue of interpretation under the Warsaw Convention, also stresses the principle of consulting foreign precedents when interpreting an international treaty. This dissent clearly distinguishes between examining foreign precedents to help interpret the U.S. Constitution, which Justice Scalia abhors, and examining foreign precedents when interpreting an international treaty, which he wholeheartedly endorses. *See Olympic Airways,* 504 U.S. at 658. Justice Scalia criticized the majority for "its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us." *Id.* at 658. Discussing decisions by "appellate courts in both England and Australia . . . squarely at odds with [the] holding," he forcefully argued that "*[w]e can, and should, look to decisions of other signatories when we interpret treaty provisions*." *Id.* at 600 (emphasis added).

Justice Scalia's analysis indicates that when other countries have *already rejected* a certain interpretation of a treaty, then the United States should follow their lead as long as it is reasonable, even if there are other, equally reasonable interpretations. *Id.* at 664. Applying this rationale to the present case, the Court should reject social visibility because our sister signatories *have already considered and rejected social perception as a requirement* for establishing a particular social group. Several of the foreign precedents discussed below are even

more compelling than those on which Justice Scalia relied, because they represent the views of the *highest courts* in these countries.

Consistent with the Supreme Court, the Ninth Circuit has also found foreign authorities to be relevant in construing an international treaty. *See, e.g.*, *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023, 1028 & n.5 (9th Cir. 2011) (noting that "Warsaw Convention precedent includes the judicial opinions of our sister signatories" and being "guided by the Ontario Supreme Court of Canada's ruling"); *In re B. Del C.S.B.*, 559 F.3d 999 (9th Cir. 2009) (examining a case from England in interpreting a term in the Hague Convention on the Civil Aspects of International Child Abduction).

D. The Vienna Convention on the Law of Treaties and the International Court of Justice Confirm the Importance of Examining State Practice in Interpreting a Treaty

Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth the rules of treaty interpretation.[4] Article 31.1 provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Article 31.3(b) goes on to explain that "[t]here shall be taken into account, together with the context . . . *any subsequent practice in the application of the treaty* which

[4] *See* Vienna Convention on the Law of Treaties art. 31-32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

establishes the agreement of the parties regarding its interpretation." (Emphasis added). One scholar opines that "concordant practice of the parties is *best evidence* of [a treaty's] correct interpretation."[5]

Judicial decisions that reflect a consistent interpretation among states parties may serve as indicators of state practice.[6] "In assessing the legal weight to be attached to such practice in international law, it is relevant to consider not only its extent, uniformity and consistency, but also which states are involved, whether the practice represents . . . 'significant actors in refugee protection,' or a regional group."[7] The countries discussed below include most of the significant actors in refugee protection, and none of them requires social visibility. Even where judicial decisions do not meet the standard required to show "subsequent practice" under Article 31.3(b), however, they still serve as a "supplemental means of interpretation" under Article 32 of the Vienna Convention.[8] Article 32 permits the use of such "supplemental means" when Article 31 leaves the meaning ambiguous or leads to an unreasonable result.

"While the United States is not a signatory to the Vienna Convention, it is the policy of the United States to apply articles 31 and 32 as customary international law." *Gonzalez v. Gutierrez,* 311 F.3d 942, 950 n. 15 (9th Cir. 2002),

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[5] RICHARD GARDINER, TREATY INTERPRETATION 225 (2008) (emphasis added).
[6] *See* Goodwin-Gill, *supra* note 3, at 209-10, 218.
[7] *Id.* at 214.
[8] *Id.* at 209-10.

abrogated on other grounds by Abbott, 130 S.Ct. 1983 (2010). Accordingly, Supreme Court precedents reflect the same principles of treaty interpretation set forth in the Vienna Convention, including the importance of state practice. *See, e.g., Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996) (stating that the "postratification understanding of the contracting parties" has traditionally served as an aid to treaty interpretation).

The International Court of Justice has also confirmed "[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation," noting that "it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty." Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1075-76 (Dec. 13). This mode of interpretation "is well-established in the jurisprudence of international tribunals." *Id.*

As discussed below, an examination of state practice demonstrates that our sister signatories to the Protocol do not interpret a "particular social group" as requiring social visibility.[9]

[9] Please see the *amicus* brief submitted by UNHCR for a discussion of how the social visibility requirement also conflicts with the object and purpose of the Protocol.

II. THE SOCIAL VISIBILITY REQUIREMENT DEPARTS FROM OUR SISTER SIGNATORIES' INTERPRETATIONS OF A "PARTICULAR SOCIAL GROUP"

The BIA's seminal decision in *Acosta* defined a "particular social group" as a group that shares "a common, immutable characteristic," one that "either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). This definition profoundly influenced courts around the world. Common law countries with well-developed bodies of refugee law have endorsed *Acosta*'s "protected characteristic" approach and rejected social visibility as a requirement.

While civil law countries generally provide little reasoning in their asylum decisions, cases from France, Germany and Belgium highlight the importance of a common characteristic, at most suggesting that social perception may be an alternative test. Moreover, the European Union's Qualification Directive ("QD") presents the protected characteristic and social perception approaches as *two examples* of how to define a "particular social group."[10] In this respect, the QD is

[10] *See* Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, art. 10(1)(d), 2011 O.J. (L 337) 9, 16 (EU), available at http://www.unhcr.org/refworld/docid/4f197df02.html. This directive amended the

consistent with UNHCR's Guidelines, which describes these approaches as *alternative* tests.[11] Thus, the United States stands alone in requiring social visibility, and it is a house divided.[12]

A. Common Law Countries

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

1. Canada

The Supreme Court of Canada has found that *Acosta* proposed "a good working rule" for defining a "particular social group" in a way that "take[s] into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection

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Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, art. 10(1)(d), 2004 O.J. (L 304) 12, 17 (EU), available at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4157e75e4. The relevant language on "particular social group" did not change.

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

[12] Two circuits have already rejected a social visibility requirement. *See Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009); *Valdiviezo-Goldamez v. U.S. Att'y Gen.*, 663 F.3d 582, 589 (3d Cir. 2011).

initiative." *Canada (Attorney-General) v. Ward*, [1993] 2 S.C.R. 689, 739 (Can.). The court set forth three possible categories for a particular social group:

> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanent.

Id. None of these categories focuses on social perception.

In 1992, Canada's Immigration and Refugee Board issued a position paper on the particular social group ground that provides additional insight.[13] The Board set forth a two-part test very similar to UNHCR's current approach. First, the adjudicator should determine whether the group shares "an internal characteristic," which may be innate, immutable, or fundamental to identity or human dignity.[14] If no such characteristic exists, the adjudicator may still find a social group based on external perceptions of the group.[15] The Board clearly viewed these two

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[13] Immigration and Refugee Board, Preferred Position Paper, "Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution" (March 1992); *see also* Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L. J. 505, 540-41 (1993) (discussing the Immigration and Refugee Board's approach).
[14] Fullerton, *supra* note 13, at 540.
[15] *Id.*

standards as *alternatives.*[16] Thus, Canada has considered the role of external perceptions, but has rejected it as a *requirement*.

2. The United Kingdom

The U.K. House of Lords has also long embraced *Acosta*'s definition of a "particular social group." *See Islam v. Secretary of State for the Home Department* and *Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah,* [1999] 2 A.C. 629 (H.L.) 640-41 (U.K.) [hereinafter *Shah and Islam*]. In *Shah and Islam,* the Lords not only endorsed *Acosta,* but rejected additional requirements outside of the protected characteristic framework. Specifically, Lord Steyn reasoned that it was "not justified [] to introduce . . . an additional restriction of cohesiveness," because "[t]o do so would be contrary to the ejusdem generis approach so cogently stated in *Acosta*." *Id.* at 643. Lord Hoffmann likewise endorsed *Acosta,* rejecting an additional element of cohesiveness that was "irrelevant" to the principle of non-discrimination and did not apply to any of the other protected grounds. *Id.* at 651. The same reasoning supports rejecting an element of social visibility.

In fact, in 2006, the House of Lords did consider and reject the notion of an additional "social recognition" requirement analogous to the BIA's social visibility test. *See Secretary of State for the Home Department v. K and Fornah v. Secretary of State for the Home Department*, [2006] UKHL 46 [hereinafter *Fornah and K*].

[16] *Id.* at 541.

This issue arose in the context of interpreting the EU Council's Qualification Directive ("QD"), which was adopted on April 29, 2004 as part of the process for establishing a Common European Asylum System (CEAS).[17]

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

> (d) a group shall be considered to form a particular social group where *in particular:*
>
> (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;[18]

The implementing regulation uses the same language except that it replaces "*in particular*" with the words "*for example*."[19] Both phrases –"*in particular*" and "*for example*" – indicate that the protected characteristic and social perception

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[17] *See* Council Directive 2004/83/EC of 29 April 2004, *supra* note 10, at art. 10(1)(d) (emphasis added).

[18] *Id*. (emphasis added). As stated in footnote 10, this Directive was amended in December 2011, but the relevant language quoted here remained the same.

[19] *The Refugee or Persons in Need of International Protection (Qualification) Regulations 2006* [UK], Statutory Instrument 2006 No. 252, 18 September 2005, para. 6(1)(d), available at http://www.unhcr.org/refworld/docid/47a7081c0.html.

approaches are *two ways* to establish a "particular social group," rather than dual requirements.

This is precisely how the House of Lords interpreted the QD in *Fornah and K.* Lord Bingham reasoned that if Article 10(d) "were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then . . . *it propounds a test more stringent than is warranted by international authority*." *Fornah and K*, [2006] UKHL 46 at para 16 (emphasis added). He therefore supported UNHCR's view that "*the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met*." *Id.* His decision stressed that UNHCR's interpretation was "clearly based on a careful reading of the international authorities" and "provide[s] a very accurate and helpful distillation of their effect." *Id.* at para 15 (Bingham J) (emphasis added).

Similarly, Lord Hope of Craighead found that "*it would be a mistake to insist that [social] recognition is always necessary*." *Id.* at para 46 (Lord Hope) (emphasis added). Lord Brown of Eaton-Under-Heywood agreed, entirely accepting UNHCR's definition and concluding that the QD "will . . . have to be interpreted consistently with this definition." *Id.* at para 118 (Lord Brown). Thus,

the House of Lords has squarely rejected any additional requirement of social recognition/visibility.

3. Ireland

In interpreting Ireland's 1996 Refugee Act, "the Irish courts have consistently drawn upon, and accepted as persuasive, leading cases on the concept of a 'particular social group,' from the USA, Canada, and the UK."[20] Specifically, the Irish courts have followed the protected characteristic approach set forth in *Acosta, Ward,* and *Shah and Islam,* discussed above.[21]

4. Australia

Of the common law countries, only Australia has emphasized social perception in analyzing claims based on membership of a protected social group, but it has clarified that social perception is not a requirement. In *Applicant A*, Justice McHugh of the High Court of Australia discussed the "external perceptions of the group." *Applicant A v. Minister of Immigration and Ethnic Affairs* [1997] HCA 4, 190 CLR 225, 264 (High Ct. Aust.) (McHugh J). He confirmed *Acosta's* idea that the members or a particular social group must share "some characteristic, attribute, activity, belief, interest or goal that unites them," but also opined that "[*i*]*f the group is perceived by people in the relevant country as a particular social*

[20] Siobhán Mullally, *Speaker Across Borders: The Limits and Potential Transnational Dialogue on Refugee Law in Ireland, in* THE LIMITS OF TRANSNATIONAL LAW, *supra* note 3, at 164.
[21] *Id.* at 164 n. 70.

group, it will usually but not always be the case that they are members of such as group." *Id.* (emphasis added). The Full Court of the Federal Court of Australia later interpreted Justice McHugh's opinion in *Applicant A* as requiring not only a common characteristic, but also "*recognition within the society* that the collection of individuals is a group that is set apart from the rest of the community." *Minister for Immigration and Multicultural Affairs v. Zamora*, (1998) 85 FCR 458, 454 (emphasis added).

The High Court, however, subsequently clarified its interpretation of a particular social group in *Applicant S*, explicitly holding that social perception is "*not a requirement*," although it may be relevant to the analysis. *Applicant S v. Minister for Immigration and Multicultural Affairs*, [2004] HCA 25 at para 16 (Gleeson CJ, Gummow J and Kirby J) (emphasis added). The High Court explained that Justice McHugh's opinion in *Applicant A* merely expounded on the idea that a particular social group must be distinguished from society at large, and that "*[o]ne way* in which this may be determined is by examining whether the society in question perceives there to be such a group." *Id.* at para 27 (emphasis added). "*The general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society*." *Id.* (emphasis added).

The Court recognized that making social perception a requirement could

seriously distort the analysis, as "[c]ommunities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community." *Id.* at para 34. "Those communities do not recognize or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist." *Id.*

Justice McHugh's opinion in *Applicant S* confirms that "it is not necessary that a 'particular social group' be *recognized* as a group that is set apart from the rest of society." *Id.* at para 61 (McHugh J) (emphasis added). Indeed, he found that "[t]o require evidence of a recognition or perception by the society . . . is to *impose a condition that the Convention does not require*." *Id.* at para 68 (emphasis added). Thus, the High Court of Australia, which spawned the idea of social perception, has since rejected it as a requirement.

5. New Zealand

Rodger Haines, Chairperson of New Zealand's Refugee Status Appeals Authority ("RSAA"), states that *Acosta*'s approach "has been adopted also in New Zealand." Refugee Appeal No. 1312/93 *Re GJ* [1995], 1 NLR 387 (N.Z.).[22] New Zealand has embraced "[t]he *Acosta* ejusdem generis interpretation of 'particular social group'" because it "firmly weds the social group category to the principle of

[22] This case is available at http://www.refugee.org.nz/rsaa/text/docs/1312-93.htm.

the avoidance of civil and political discrimination." Refugee Appeal No. 71427/99 [2000] N.Z.A.R. 545 at para 104 (N.Z.).[23] In rejecting social perception as an alternative formulation, the RSAA reasoned that "by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be particular social group." Refugee Appeal No. 1312/93 *Re GJ* [1995], 1 NLR 387 (N.Z.).[24]

B. Civil Law and Hybrid Law Countries

Civil law countries do not have a rich jurisprudence on refugee issues like the common law countries, and their analysis of a "particular social group" is usually spare. The EU's Qualification Directive will guide many civil law countries and, as discussed above, permits either a protected characteristic or social perception to define a "particular social group." This section adds to the discussion by examining the legal analysis in three civil law countries, Germany, France and Belgium, in addition to South Africa, which has a hybrid legal system.

1. Germany

Judge Tiedemann of the Administrative Court in Frankfurt am Mein reports that "[t]here is no established interpretation of the Convention ground of social

[23] This case is available at http://www.refugee.org.nz/Casesearch/Fulltext/71427-99.htm.
[24] *See supra* note 22.

group in Germany."[25] He states that "[t]he German jurisprudence on the Convention ground 'membership of a particular social group' is very sparse," and "[t]he few cases in which courts do make a statement concerning the question of a the social group ground are not illuminating."[26]

Some cases do, however, shed at least a little light on the analysis of German courts. In 1983, pre-*Acosta,* the Wiesbaden Administrative Court considered both popular perception and the perspective of an objective observer in determining that a homosexual from Iran belonged to a particular social group based on his sexual orientation.[27] Two post-*Acosta* decisions, on the other hand, focused instead on internal characteristics. In 1988, the Federal Administrative Court observed that "homosexuality can be considered as an attribute that could be ground[s] for asylum, *if it is an irreversible personal characteristic*."[28] Similarly, in 1993, the High Administrative Court "ruled that homosexuality as a ground for asylum is

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[25] Paul Tiedemann, *Protection Against Persecution Because of 'Membership of a Particular Social Group' in German Law, in* THE CHANGING NATURE OF PERSECUTION 340 (International Association of Refugee Law Judges, 4th Conference, Berne, Switzerland, Oct. 2000), *available at* http://www.refugee.org.nz/PaulT.htm.

[26] *Id.*

[27] Fullerton, *supra* note 13, at 534 (citing Judgment of April 26, 1983, No. IV/I E 06244/81, *Verwaltungsgericht Wiesbaden* [Wiesbaden Administrative Court]).

[28] *See* Case Abstract IJRL/004, 1 INT'L J. REF. L. 110 (1989); *see also* Tiedemann, *supra* note 25, at para. 2.6; Refugee Appeal No. 1312/93 *Re GJ* [1995], 1 NLR 387 (N.Z.), *supra* note 22 (discussing the German cases mentioned here).

relevant only in cases of non-reversibility."[29] Thus, the German courts have focused on external perceptions in some cases and internal, immutable characteristics in others, even when examining the very same issue, but there is no evidence that they require *both* social perception and a protected characteristic to establish a "particular social group."[30]

2. France

The decisions of La Commission Des Recours Des Refugies (CRR), the appeal body responsible for refugee status determinations in France, generally involve limited legal reasoning.[31] A case called *Ourbih,* involving an Algerian transsexual, does, however, present a more analytic definition of a "particular social group." There, the Conseil d'Etat, which is the highest administrative court, rejected the CCR's decision to deny asylum, reasoning that the CCR had not properly examined the evidence to determine whether transsexuals were regarded

[29] HÉLÈNE LAMBERT, SEEKING ASYLUM: COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES 82-83 (1995) (internal quotations omitted)
[30] Fullerton, *supra* note 13, confirms that different analytical approaches seem to "co-exist in German jurisprudence" without any attempt at synthesis.
[31] T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership in a Particular Social Group,' in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 280 (Erica Feller, Volker Türk and Frances Nicholson, eds., 2003) (discussing *Ourbih,* Conseil d'Etat, SSR, Decision No. 171858, June 23, 1997, available at http://www.unhcr.org/refworld/docid/3ae6b67c14.html).

as a social group in Algeria "by reason of the common characteristics which define them in the eyes of the authorities and of society."[32]

At first glance, this statement seems to combine both the protected characteristic and social perception approach. When the case was returned to the CCR for reconsideration, however, the CCR clarified the standard, holding on May 15, 1998 that "transsexuals in Algeria could constitute a particular social group because of a *common characteristic that set them apart* and exposed them to persecution that was tolerated by the authorities in Algeria."[33] A report prepared by Rodger Haines for the International Association of Refugee Law Judges confirms that the decision in *Ourbih* "liberalized the interpretation [of 'a particular social group'], with only limited requirements beyond the persecution*: a group of common characteristics setting it apart from the rest of society*."[34] The analysis in *Ourbih* "referred to German and US jurisprudence as well as Anglo-Saxon academic writing."[35]

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[32] *Id.* at 281 (quoting the Conseil d'Etat's decision in *Ourbih*) (translated from French).
[33] *Id.* (citing *Ourbih*, CRR, SR, Decision No. 269875, May 15, 1998).
[34] Rodger Haines, *Interim Report on Membership of a Particular Social Group*, International Association of Refugee Law Judges Ottawa Conference (October 1998) at Appendix I, available at http://www.refugee.org.nz/Reference/larljpaper.htm.
[35] Hélène Lambert and Janine Silga, *Transnational Refugee Law in the French Courts: Deliberate or Compelled Change in Judicial Attitudes?*, *in* THE LIMITS OF TRANSNATIONAL LAW, *supra* note 3, at 46.

During the past decade, the CCR has also been influenced by decisions from Canada and the United Kingdom in finding that former prostitutes comprise a particular social group based on a *former immutable status*,[36] and that women who refuse to be forcibly married constitute a group based on their *common characteristics*.[37] Thus, the French jurisprudence clearly reflects the protected characteristics approach.

3. Belgium

Belgium also follows the protected characteristics approach. The decisions of the Permanent Refugee Appeals Commission (PRAC) "often refer to the Canadian Supreme Court's opinion in *Ward* . . . lead[ing] to [the] conclu[sion] that the social group can be defined from the existence of inborn or immutable features, such as gender."[38] Some PRAC decisions refer to English and French cases in interpreting the meaning of a "particular social group," expressing "a concern to

[36] *Id.* at 45 (citing *M,* CRR, SR, Application No. 42394, October 17, 2003, which involved an applicant from the Dominican Republic who claimed that she was forced into prostitution in Haiti).
[37] *Id.* at 45-46 (citing *Noreen Nazia,* CCR, SR, Application No. 444000, October 15, 2004, involving a woman from Pakistan who claimed that she had been forcibly married, and *Tas*, CCR, SR, Application No. 489014, March 4, 2005, involving a woman from Turkey who claimed that she was confined for refusing to marry).
[38] Jean-Yves Carlier and Dirk Vanheule, *Where is the reference? On the Limited Role of Transnational Dialogue in Belgian Refugee Law*, *in* THE LIMITS OF TRANSNATIONAL LAW, *supra* note 3, at 26 (internal quotations omitted).

bring its interpretation of the notion of the refugee definition in line with those of other EU Members states."[39]

4. South Africa

South Africa has a hybrid legal system that combines civil law, common law, and customary law. In a reported decision, the High Court of South Africa (Transvaal Provincial Divison) endorsed the three-part definition of a particular social group set forth by the Canadian Supreme Court in *Ward*, which, as discussed above, does not mention social perception. *See Fang v. Refugee Appeal Board and Others* (40771/05) [2006] ZAGPHC 101 (HC) at para 6 (S. Afr.).[40] South Africa's Refugee Appeal Board has also applied the protected characteristic approach embraced by *Acosta, Shah and Islam,* and *Re GJ*, all discussed above, in finding that homosexuals constitute a particular social group.[41]

The foregoing demonstrates a broad consensus among countries that have addressed the issue that social visibility is not required to establish a "particular social group."

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[39] *Id.* at 25-26.
[40] This decision is available at http://www.saflii.org/za/cases/ZAGPHC/2006/101.pdf.
[41] *See U v. Refugee Status Determination Officer*, South Africa Refugee Appeal Board December 1, 2002, available at www.refugeecaselaw.org.

III. AN AGENCY'S INTERPRETATION THAT CONFLICTS WITH CONGRESSIONAL INTENT AND INTERNATIONAL LAW DOES NOT DESERVE *CHEVRON* DEFERENCE.

Chevron addresses what deference, if any, a reviewing court should give to an administrative agency's interpretation of a statute, setting forth a two-part test. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Here, the Court should reject the BIA's "social visibility" requirement under step one of *Chevron* because it conflicts with Congress's expressed intent to bring U.S. immigration law into conformity with the Protocol and Convention.[42] *Id.* at 842-43 ("If the intent of Congress is clear, that is the end of the matter.").

However, even if the Court proceeds to step two, it should find that the BIA's interpretation of a "particular social group" is unreasonable in requiring social visibility.[43] *Id.* at 844. Specifically, the BIA's interpretation is unreasonable not only because it conflicts with Congress's general intent to make U.S. law consistent with international standards, but also because it violates the *Charming*

[42] *See* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L. J. 1059, 1096 (2011) ("courts may reject a Convention-incompatible construction under *Chevron*'s first step").
[43] *Id.* at 1098-1103.

Betsy principle and the presumption that acts of Congress are consistent with U.S. treaty obligations absent a contrary statement from Congress.[44]

For the past two hundred years, *Charming Betsy* has required that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804); *see also Weinberger v. Rossi,* 456 U.S. 25, 29-30 (1981). This principle protects the separation of powers, ensures respect for Congress, and helps prevent debacles in foreign affairs.[45]

The Ninth Circuit has characterized the *Charming Betsy* doctrine as a "*presumption that Congress intends to legislate in a manner consistent with international law*," *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005) (emphasis added), and has reaffirmed this rule on many occasions. *See Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) ("Under *Charming Betsy*, we should interpret the INA in such a way as to avoid any conflict with the Protocol"); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 & n. 30 (9th Cir. 2001) ("Although Congress may override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled

[44] Congress has not expressed any intention of abrogating its obligations under the Protocol. *See In re Q-T-M-T*, 21 I. & N. Dec. 639, 660 (BIA 1996).
[45] Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1130 (1990).

with the law of nations."); *U.S. v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990) (explaining that the court adheres to *Charming Betsy* "out of respect for other nations"); *see also Negusie* , 555 U.S. at 518 (2009) (describing international law as "persuasive in determining whether a particular agency is reasonable").

This Court should not give deference to an interpretation of the BIA that conflicts with Congress's explicit intent to conform the INA to the Protocol and contradicts the presumption that Congress intends to legislative consistently with treaty obligations.

CONCLUSION

Engaging in transnational dialogue with our sister signatories is critical to promoting uniform interpretation of the Protocol and giving effect to Congress's goals of complying with our international obligations. This Court should reject social visibility as a requirement for establishing a "particular social group" because it conflicts with other states parties' interpretations of this term and undermines Congress's intent to comport with international law.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(a) and (a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word 2003 in Times New Roman 14-point font.

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s/ Fatma Marouf
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