

4-29-2019

# A New Weight on the Scale: Strengthening International Human Rights Law By Relying on Treaties in US Asylum Cases

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## Recommended Citation

Allison Hugi, *A New Weight on the Scale: Strengthening International Human Rights Law By Relying on Treaties in US Asylum Cases*, 17 SANTA CLARA J. INT'L L. 1 (2019).

Available at: <https://digitalcommons.law.scu.edu/scujil/vol17/iss2/3>

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Volume 17 | Issue 1

Article 1

# A New Weight on the Scale: Strengthening International Human Rights Law By Relying on Treaties in US Asylum Cases

By Allison Hugi



**Santa Clara Law**  
**Journal of International Law**

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2019

Volume 17 Issue II

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A New Weight on the Scale:  
Strengthening International Human  
Rights Law By Relying on Treaties in  
US Asylum Cases

By Allison Hugi

**Abstract**

*This Article examines the role that domestic asylum cases in the United States can play in improving countries' compliance with international human rights law. Using Australia, Canada, and the UK as case studies, it advocates for the domestic asylum process in the US to consider the status of international human rights treaties in the home countries of asylum seekers when making asylum decisions. The proposal takes advantage of proven informal enforcement mechanisms for international law, such as norm internalization and collateral consequences of violations; the natural connection between asylum law and international human rights law also means it ought to be less controversial within the US than other attempts to incorporate international law into the domestic legal system would be. The proposal offers a chance to make the abuse of human rights less attractive to countries while improving the robustness of asylum proceedings.*

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## Introduction

It is not hard to find arguments that international law is not worth the paper on which it is printed. A quick Google search offers law review articles inquiring, *Does International Law Matter?*;<sup>1</sup> newspaper articles asking the same;<sup>2</sup> and anxious prospective law students brainstorming on the subject.<sup>3</sup> The argument goes that the international legal arena has no central enforcer, no credible sanctions, no oversight, no meaningful response to invocations of sovereignty, and rampant violations.

International human rights law seems weak even within the field of international law, a catchall term including everything from cross-border transactional law to the law of war.<sup>4</sup> Many other areas of international law at least have the threat of reciprocity to compel compliance. If Greece breaches a trade treaty with Croatia, Croatia can respond in kind. If Greece instead breaches a human rights treaty and tortures its citizens, Croatia cannot effectively reciprocate. Torturing its citizens would hardly cause Greece to internalize the costs of its original breach. In a world where most countries have adopted numerous international human rights treaties, it is impossible to avoid questions such as, “Why has the number of authoritarian countries increased in the last several years? Why do women remain a subordinate class in nearly all countries of the world? Why do children continue to work in mines and factories in so many countries?”<sup>5</sup>

If there were an easy solution to this paradox—international human rights are at once lauded as “universal” and widely, egregiously violated—an enterprising academic presumably would have discovered it. Instead, we must take incremental steps. Human rights abusers see violating human rights as a means to maintaining power and stability. The goal, therefore, is to gradually tip the scale towards making the costs of violating human rights outweigh the benefits thereof.

This Article proposes placing a novel “weight” on this scale, another force to drive up the costs of abusing human rights. Its proposal is that the US should adapt its domestic asylum process so that all parties must rely on international

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<sup>1</sup> Shima Baradaran, et al, Comment, *Does International Law Matter?*, 97 U. MINN. L. REV 743 (2013).

<sup>2</sup> Christopher Shea, *Does International Law Matter?*, WALL ST. J., (May 13, 2011, 1:11 PM ), <https://blogs.wsj.com/ideas-market/2011/05/13/does-international-law-matter/>.

<sup>3</sup> *So does international law really not exist?*, TOP LAW SCHOOLS: FORUMS (Apr. 21, 2015, 12:27 PM), <http://www.top-law-schools.com/forums/viewtopic.php?t=246812>.

<sup>4</sup> Because this Article focuses exclusively on the international human rights subset of international law, the term “international law” is hereafter used interchangeably with “international human rights law.”

<sup>5</sup> Eric Posner, *The Case Against Human Rights*, THE GUARDIAN (Dec. 4, 2014, 10:00 AM), <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights>.



human rights law. Specifically, the Article proposes that asylum seekers (“applicants”) use as evidence their home countries’ failure to ratify international human rights treaties; the countries’ decisions to make relevant reservations to treaties; and the countries’ violations of treaties to prove persecution. Similarly, where a country has ratified, adopted optional protocols to, and complied with a treaty, the US government should argue those facts weaken an applicant’s claim for asylum. Asylum officers and judges should then weigh this evidence when making judgments. The use of treaties in asylum cases in this way may not revolutionize the status of international human rights law. This move will, however, create a new enforcement mechanism for international law that will encourage countries to sign on to and refrain from violating international human rights treaties, as well as allow for more robust analyses in asylum cases.

After providing an overview of international human rights law, Part I argues that countries ought to follow international law, and explores the current enforcement mechanisms’ ability to compel this compliance. From there, the Article moves into its proposal of enforcing international human rights law through asylum law. Part II makes the case for importing international human rights law into domestic US law in order to increase international law’s influence. Asylum law is uniquely compatible with international law, based on its historical roots and subject matter. The use of treaties in asylum cases builds on proven mechanisms of international law compliance, including norm internalization and increased foreign aid, to increase the benefits of complying with international human rights law. Part III moves into the specific mechanics of the proposal. To establish the viability of this proposal, the Article provides a descriptive analysis of comparator countries’ current use of treaties in asylum cases. It concludes by using current trends in US asylum cases to frame hypothetical parties’ arguments and addressing counterarguments to this proposal.

## **I. THE LANDSCAPE: COUNTRIES SHOULD, BUT DON’T, OBEY INTERNATIONAL LAW**

This Part begins, in Part I.A, by providing an overview of international human rights law. Part I.B builds on this by arguing that following international human rights law is a normative good. Finally, Part I.C explores the mechanisms that currently encourage countries to abide by international human rights law commitments, noting the mismatch between the desire to have countries comply with international human rights treaties and their incentives to do so.

### **A. International Human Rights Law and Treaties**

International human rights law is the set of instruments adopted by the international community to “confer[ ] legal form on inherent human rights.”<sup>6</sup> Treaties are the primary embodiment of international human rights law. Other legal

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<sup>6</sup> *International Human Rights Law*, OHCHR (2017), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

instruments include declarations, guidelines, and principles, which have varying degrees of legal authority.<sup>7</sup>

There are nine treaties, passed between 1965 and 2006, which the UN Office of the High Commissioner considers to be “core” international human rights treaties.<sup>8</sup> These treaties—which form the basis of this Article’s proposal—codify widely accepted rights or protect groups of people that have been historically disadvantaged or oppressed. The relevant treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination<sup>9</sup> (ICERD) (1965); International Covenant on Civil and Political Rights<sup>10</sup> (ICCPR) (1966); International Covenant on Economic, Social and Cultural Rights<sup>11</sup> (ICESCR) (1966); Convention on the Elimination of All Forms of Discrimination Against Women<sup>12</sup> (CEDAW) (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>13</sup> (UNCAT) (1984); Convention on the Rights of the Child<sup>14</sup> (CRC) (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>15</sup> (ICMW) (1990); International Convention for the Protection of All Persons from Enforced Disappearance<sup>16</sup> (CPED) (2006); and the Convention on the Rights of Persons with Disabilities<sup>17</sup> (CRPD) (2006).

Because of their centrality to this Article’s proposal, some background on the mechanics of treaties is helpful here. Treaties are binding agreements between states, governed by the 1969 Vienna Convention on the Law of Treaties<sup>18</sup> (“Vienna Convention”). Under the Vienna Convention, a treaty is “an international agreement concluded between States in written form and governed by international

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; See also *The Core International Human Rights Instruments and Their Monitoring Bodies*, OHCHR (2016), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>. This list excludes optional protocols.

<sup>9</sup> International Convention on Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

<sup>10</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>11</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>13</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT].

<sup>14</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>15</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 8, 1990, 2220 U.N.T.S. 3 [hereinafter ICMW].

<sup>16</sup> International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3 [hereinafter CPED].

<sup>17</sup> Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

<sup>18</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

law.”<sup>19</sup> Countries adopt treaties through two primary stages: signing and ratification (in this Article, “adoption” is used to refer to either the signing or the ratification of a treaty).<sup>20</sup> First, a designated country official signs the treaty. At this point the country cannot take steps that “defeat the object and purpose” of the treaty.<sup>21</sup> The treaty legally binds the country once the country ratifies the treaty,<sup>22</sup> often a process requiring approval by the domestic legislature.<sup>23</sup> In the US, for instance, the president alone can sign a treaty, but three-fourths of the Senate must vote to ratify the treaty.<sup>24</sup>

When adopting a treaty, a country may adopt it in its entirety. It can also either adopt only sections of the treaty by making “reservations” or voluntarily accept additional obligations by signing the “optional protocol.” A reservation is a “unilateral statement” by a country “whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>25</sup> A reservation to Section 2, for instance, means a country is legally bound to all provisions of the treaty except those contained in Section 2. Countries can make any reservation not “incompatible with the object and purpose of the treaty.”<sup>26</sup> The flip side of the reservation coin is that a country can opt into a treaty having *more* authority over it by adopting an optional protocol.<sup>27</sup> Most such optional protocols allow countries to voluntarily submit to jurisdiction of treaty committees that receive and adjudicate complaints concerning violations of the treaty.<sup>28</sup>

## B. Countries Should Obey International Human Rights Law

With this basis in international human rights law, this Article must address its primary normative assumption: countries *should* obey international human rights law. If this were not true then there would be little reason to argue that asylum law ought to strengthen it. This normative belief has two bases. Even skeptics

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<sup>19</sup> *Id.* at § 2(1)(a). See also *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE (2016), <http://www.state.gov/s/l/treaty/faqs/70139.htm>. Although the US has never ratified the Vienna Convention, it treats it as customary international law, which binds even non-consenting countries.

<sup>20</sup> Vienna Convention, *supra* note 18, at §§ 12–16.

<sup>21</sup> *Id.* at § 16.

<sup>22</sup> See also *id.* at § 24. Or once the treaty enters into force, whichever comes later. The treaty enters into force once a set number of countries have adopted it.

<sup>23</sup> See Vienna Convention, *supra* note 18, at § 16.

<sup>24</sup> See U.S. CONST. art. 2, § 2, cl. 2. See also *The Senate’s Role in Treaties*, U.S. SENATE (2016), <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>

<sup>25</sup> Vienna Convention, *supra* note 18 at § 2(1)(d).

<sup>26</sup> *Id.* at § 19(c). For more on prohibited reservations, see generally Roslyn Moloney, *Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent*, 5 MELBOURNE J. INT’L. L. 155 (2004).

<sup>27</sup> See *The Core International Human Rights Instruments*, *supra* note 8. The ICESCR, ICCPR, CEDAW, CRC, UNCAT, and CRPD have optional protocols.

<sup>28</sup> See, e.g., Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83.

generally admit the first: international law is a “source of expectations.”<sup>29</sup> As with any law, international law aligns expectations and provides notice.

This argument does not have the same force as the more substantial one: international law should be obeyed, simply, because it is the right thing to do. Trite as it may sound, the world would be a better place if all countries honored international human rights law. Although occasionally raising ideological battles<sup>30</sup> and leading to debates over the degree to which “universal” rights are in fact Western rights,<sup>31</sup> the core UN treaties protect accepted, largely uncontroversial rights such as non-discrimination and due process. The overwhelming number of countries that have adopted these treaties demonstrates the universality of respect for these rights, at least theoretically.<sup>32</sup> Even scholars who dispute the relevance of international law do not argue it is *bad* when countries obey it.

Perhaps the strongest counterargument to this assertion is that it’s fine to support these rights, but that should be done through domestic means. There is arguably more force, however, to the idea that a right is truly accepted as global; that it transcends domestic borders. Practically speaking, many countries that adopt treaties are not yet in a place to pass domestic legislation protecting the same. In these situations, international law is an important baby step—not the end, but the beginning, of rights recognition. For example, Saudi Arabia has adopted CEDAW<sup>33</sup> despite “deeply entrenched discrimination” within its domestic legal system, including the requirement that a woman have a male guardian responsible for her legal decisions.<sup>34</sup>

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<sup>29</sup> Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901, 1902 (2003).

<sup>30</sup> The ratification of ICESCR led to an ideological split during the Cold War between “Western” countries supporting civil and political “negative” rights and those aligned with the USSR, which argued for social, “positive” rights (requiring affirmative government services); See Philip Alston, *Putting Economic Social, and Cultural Rights Back on the Agenda of the United States*, in THE FUTURE OF HUMAN RIGHTS: U.S. POLICY FOR A NEW ERA 122 (William F. Schulz ed., 2008).

<sup>31</sup> See Shashi Tharoor, *Are Human Rights Universal?*, 16 WORLD POL’Y J. 1 (2000) (“The growing consensus in the West that human rights are universal has been fiercely opposed by critics in other parts of the world.”). See also generally, e.g., Surya P. Subedi, *Are the Principles of Human Rights “Western” Ideas? An Analysis of the Claim of the “Asian” Concept of Human Rights from the Perspectives of Hinduism*, 30 CAL. WESTERN INT’L. L. J. 45 (1999) (framing human rights from a non-Western perspective).

<sup>32</sup> See *The Core International Human Rights Instruments*, *supra* note 8. All but ten countries have signed more than five international human rights treaties and optional protocols; the vast majority has signed over ten.

<sup>33</sup> See *Saudi Arabia – Status of Ratification Interactive Dashboard*, OHCHR (2016), <http://indicators.ohchr.org/>.

<sup>34</sup> *Boxed In: Women and Saudi Arabia’s Male Guardianship System*, HUMAN RIGHTS WATCH (July 16, 2016), <https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system>.

Skeptics of international law would argue that Saudi Arabia is using CEDAW as window dressing without meaningful behavior change. This is an argument not truly about the wisdom of international law, however, but about the ability of international law to effect positive change, to nudge countries towards respecting rights. And this is the place into which this Article's proposal inserts itself: the power of international treaties to enforce rights that ought to be enforced.

### C. Existing Enforcement Mechanisms—And Their Failure to Deliver

There are both formal and informal mechanisms to enforce international human rights law, which this Section introduces. Although the inefficacy of these enforcement mechanisms is at times overstated, the widespread violations of international human rights treaties by countries throughout the world speak for themselves: these enforcement mechanisms are not doing enough.

#### i. Formal Enforcement Mechanisms

The trope about international law not having formal sanctions or enforcement mechanisms is not, technically, true. There is actually a sprawling set of formal tribunals. Several treaties allow countries to opt in to the jurisdiction of treaty committees.<sup>35</sup> Venues such as the International Court of Justice<sup>36</sup> and the United Nations Human Rights Council<sup>37</sup> process and adjudicate complaints.

Where these formal enforcement mechanisms do exist, however, they are voluntary, “weak,” or “deficient.”<sup>38</sup> The experience of the International Criminal Court (ICC) illustrates these limitations: Created in 1998 and lauded as “extremely efficient and successful,”<sup>39</sup> the ICC's weaknesses were exposed in 2017 as several African countries announced plans to withdraw from the jurisdiction of the court, citing bias against African countries.<sup>40</sup> The ICC's experience shows how an international forum that energetically fulfills its mandate may risk triggering an

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<sup>35</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83.

<sup>36</sup> See *International Court of Justice: The Court*, ICJ (2017), <http://www.icj-cij.org/homepage/>.

<sup>37</sup> See *Human Rights Council Complaint Procedure*, OHCHR (2017), <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCCComplaintProcedureIndex.aspx>.

<sup>38</sup> Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 926 (2005).

<sup>39</sup> Daniel Donovan, *International Criminal Court: Successes and Failures*, INT'L POL'Y DIG. (Mar. 23, 2012), <https://intpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures/>.

<sup>40</sup> Norimitsu Onishi, *South Africa Reverses Withdrawal From International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>.

exodus, as countries find the benefits of submitting to its jurisdiction outweighed by the cost of this voluntary legal exposure.

## ii. Informal Enforcement Mechanisms

Beyond these formal enforcement mechanisms, several informal mechanisms enforce international law. The perceived viability of such enforcement mechanisms varies considerably. Realist scholars such as Professors Jack Goldsmith and Eric Posner dispute that international law holds any intrinsic power separate from that which countries give it to advance their own interests.<sup>41</sup> When treaty provisions and state action align, realists see the alignment as a “coincidence of interest” that originates in the national self-interests of the adopting countries.<sup>42</sup>

International institutionalists, such as Professors Harold Koh and Oona Hathaway, are correct to find that arguments along these lines “give shape to only parts of the blind men’s elephant.”<sup>43</sup> Institutionalists have offered numerous theories purporting to explain the informal power of international law to shape the behavior of countries, with three primary explanations emerging: norm internalization; domestic pressure; and recognition that international law can be used as an advantageous signaling device.<sup>44</sup>

Norm internalization is particularly relevant to this Article.<sup>45</sup> The “touchstone” here is “that identification with a reference group generates varying degrees of cognitive and social pressures—real or imagined—to conform.”<sup>46</sup> Koh points to numerous times where norm internalization and related pressures led to the US conforming its behavior to international law in a way that “neither interest, identity, or international society” can explain.<sup>47</sup> These include the US internalizing the norms of the UN’s landmines treaty (even without adopting the treaty) by changing its approach to landmines quickly after the UN’s passage of the convention, instituting a moratorium, and pledging over \$100 million a year to

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<sup>41</sup> See generally JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>42</sup> *Id.* at 111.

<sup>43</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2599, 2602 (1997).

<sup>44</sup> This Article, as with most other scholarship concerning the power of international human rights treaties, does not explore the use of military intervention. For more on the connection between human rights enforcement and military intervention, see generally Sueng-Whan Choi and Patrick James, *Why Does the US Intervene Abroad? Democracy, Human Rights Violations, and Terrorism*, 60 *J. CONFLICT RESOL.* 899 (2016).

<sup>45</sup> See Koh, *Why Do Nations Obey International Law?*, *supra* note 43, at 2602–03.

<sup>46</sup> See Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L. J.* 621, 626–27 (2004).

<sup>47</sup> Koh, *Why Do Nations Obey International Law?*, *supra* note 43, at 2648.

eradicating landmines.<sup>48</sup> The US also gradually adopted UN-promoted anti-torture norms in its domestic legal system after the passage of the UNCAT.<sup>49</sup>

Domestic pressure, often from civil society, can also drive compliance with international law.<sup>50</sup> This pressure can take the form of “naming and shaming governments for failure to comply, mobilizing citizens to pressure their governments, or teaming up with more powerful states to leverage changes in human rights protections.”<sup>51</sup> Generally speaking, this mechanism is more powerful in democratic countries where “powerful actors can hold the government to account,” as opposed to authoritarian countries that lack parallel institutions.<sup>52</sup> Democratic countries that have adopted the UNCAT and ICCPR have lower rates of torture and civil liberty abuses, respectively, than those that have not; the same is not true of authoritarian countries.<sup>53</sup>

Finally, international law acts as a signaling mechanism that countries recognize can boost their reputation, improve international relations, and gain other collateral benefits, namely increased foreign aid, trade, and investment.<sup>54</sup> This occurs because signing onto international commitments demonstrably “tie[s] the hands” of political leaders by “increasing the cost of renegeing.”<sup>55</sup> Such costs include diminished reputation and credibility, from the perspective of both the country’s domestic and international audiences.<sup>56</sup> In addition, committing to a treaty can lead international investors and countries to commit investment funds and foreign aid to a country.<sup>57</sup> The World Bank “frequently” considers a country’s human rights record when making loan determinations; the European Union requires that countries adopt several human rights treaties before entering the Union.<sup>58</sup> Economic sanctions take the stick, rather than the carrot, approach, and

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<sup>48</sup> See Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 INDIANA L. J. 1397, 1412 (1999).

<sup>49</sup> See *id.*

<sup>50</sup> See Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 596 (2007).

<sup>51</sup> HEATHER SMITH-CANNOY, *INSINCERE COMMITMENTS: HUMAN RIGHTS TREATIES, ABUSIVE STATES, AND CITIZEN ACTIVISM* 34 (2012).

<sup>52</sup> Hathaway, *supra* note 50, at 593.

<sup>53</sup> See *id.*

<sup>54</sup> See Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 88–94 (2002); Hathaway, *supra* note 50, at 592.

<sup>55</sup> Michael Tomz, *Reputation and the Effect of International Law on Preferences and Belief* 5 (Stan. Uni., Working Paper, 2008).

<https://web.stanford.edu/~tomz/working/Tomz-IntlLaw-2008-02-11a.pdf>.

<sup>56</sup> See *id.* See also Roda Mushkat, *State Reputation and Compliance with International Law: Looking Through a Chinese Lens*, 10 CHINESE J. INT’L L. 703, 731 (2011).

<sup>57</sup> Hathaway, *supra* note 50, at 596–97. See also Joel P. Trachtman, *Who Cares about International Human Rights?: The Supply and Demand of International Human Rights Law*, 44 INT’L L. & POL. 851, 856 (2012); Arvind Magesan, *Human Rights Treaty Ratification of Aid Receiving Countries*, 45 WORLD DEV. 175, 180 (2013) (finding that the adoption of international human rights treaties is statistically significantly correlated to increased foreign aid).

<sup>58</sup> See Hathaway, *supra* note 50, at 596.

countries' compliance with international human rights law can lead to the lifting of such sanctions.<sup>59</sup>

### iii. These Enforcement Mechanisms Do Not Tip the Scale

For our purposes, there is no need to get bogged down into the precise power of each of these enforcement mechanisms, already covered extensively in other scholarship.<sup>60</sup> It is enough to say that these enforcement mechanisms have made inroads into enforcing international law, but they've been insufficient. Research suggests that treaty adoption modestly improves human rights compliance.<sup>61</sup> Precise empirics can be debated; what cannot is that international law has not fulfilled its mandate. A representative snapshot shows that worldwide, 30 million people work against their will in slave-like conditions;<sup>62</sup> 1-in-3 girls under the age of 18 in developing countries are married;<sup>63</sup> and 77 percent of the population face significant restrictions on religious practices.<sup>64</sup>

International human rights law can and does currently influence countries. That does not change that, in the end, countries are under-incentivized to comply with international human rights law. The benefits that countries believe they accrue from violating human rights (such as maintaining control, decreasing crime, and promoting economic development)<sup>65</sup> too often outweigh the benefits from upholding them.

Although not central to this Article's argument, it worth noting that international human rights law differently affects subsets of countries. Developed countries more frequently comply with international law, both due to genuine commitment to the ideals and the fact that they often drafted the agreements with which they are complying.<sup>66</sup> Meanwhile, scholars generally believe that international law most strongly influences transitioning democracies such as Ecuador and South Africa.<sup>67</sup> Such countries are the most susceptible to informal

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<sup>59</sup> See *id.* at 592. See also generally Aryeh Neier, *Sanctions and Human Rights*, 82 SOC. RES. 875 (2015).

<sup>60</sup> See, e.g., Neumayer, *supra* note 38; Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935 (2002).

<sup>61</sup> In autocracies, some variables showed negative effects after treaty adoption. See Hathaway, *supra* note 50, at 596.

<sup>62</sup> Posner, *supra* note 5.

<sup>63</sup> Nisha Varia, *Ending Child Marriage: Meeting the Global Development Goals' Promise to Girls*, HUMAN RTS. WATCH (2016), <https://www.hrw.org/world-report/2016/ending-child-marriage>.

<sup>64</sup> *Latest Trends in Religious Restrictions and Hostilities*, PEW RES. CTR., (Feb. 26, 2015), <http://www.pewforum.org/2015/02/26/religious-hostilities/>.

<sup>65</sup> Posner, *The Case Against Human Rights*, *supra* note 5.

<sup>66</sup> See GOLDSMITH AND POSNER, *supra* note 41, at 111; Neumayer, *supra* note 38, at 940–49.

<sup>67</sup> See Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 INT'L L. & POL. 707, 753–57 (2006); Smith-Cannoy, *supra* note 51, at 34–36; Simon Hug and Simone Wegmann, *Complying with Human Rights*, 42 INT'L INTERACTIONS 590, 592–98 (2016).



enforcement mechanisms, including a reliance on foreign aid and a desire to integrate into communities such as the European Union. Authoritarian “antisocial” regimes such as North Korea, on the other hand, have intentionally distanced themselves from the international community. These countries have weaker institutions to hold governments accountable.<sup>68</sup> Though even North Korea is a UN member state and has adopted some treaties,<sup>69</sup> its apparent lack of interest in treaty compliance put it squarely in the group of regimes most resistant to the influence of international human rights law.

## II. DOMESTIC US ASYLUM LAW: A NEW ENFORCEMENT MECHANISM

This Part argues that, given the failure of existing enforcement mechanisms, international human rights law ought to be assimilated into domestic US law as a means to create new pressure on countries not to violate human rights. After providing background on asylum law, this Part discusses the unique aspects of asylum law that make this pairing natural and particularly fruitful.

### A. Why It Is Worth Finding a Niche for International Law in Domestic US Law

This proposal finds itself in a hostile environment: the US and its judiciary are famously wary of international law.<sup>70</sup> The US has not signed widely accepted treaties, including the UN Convention on the Law of the Sea, the Convention on the Rights of the Child, and the Mine Ban Treaty, all signed by over 150 countries; every single country except for the US and South Sudan has adopted the CRC.<sup>71</sup>

Despite the US’s resistance to allowing international law to meddle with its internal affairs, this Article proposes an enhanced degree of reliance by US courts on international law. Two impetuses drive this proposal, one facing outwards and one inwards. The outwards facing argument is of primary significance: increasing the role of international law in domestic US law will serve as a new enforcement mechanism to increase the cost of violating international human rights law. A country that violates international human rights law under this proposal faces the general consequences of violation as well as a new cost: its citizens are more likely to be granted asylum in the US on the grounds of persecution (Part II.B.ii discusses why this is a cost).

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<sup>68</sup> Hathaway, *supra* note 50, at 593.

<sup>69</sup> See *Democratic People’s Republic of Korea – Status of Ratification Interactive Dashboard*, OHCHR (2016), <http://indicators.ohchr.org/>.

<sup>70</sup> See generally Linda S. Bishai, *America’s Love/Hate Relationship with International Law*, 34 REV. OF INT’L STUD. 425 (2008).

<sup>71</sup> See Joshua Keating, *America the Exception: 7 Other Treaties the U.S. Hasn’t Ratified*, FOREIGN POL’Y (May 17, 2012), <http://foreignpolicy.com/2012/05/17/america-the-exception-7-other-treaties-the-u-s-hasnt-ratified/>.

Because of the US's historic aversion towards international law and its uniquely powerful role in the world, its use of international law will exert more pressure on other countries than would the adoption of this proposal by a different country. Although this may seem counterintuitive—why would other countries listen to a country that has itself eschews international law?—this argument aligns with what already happens. There exists a “curious tension between the consistent rejection of the application of international norms [in the U.S.], on the one hand, and the venerable U.S. tradition of support for human rights.”<sup>72</sup> “[V]igorous” attempts by the US to “enforce global human rights standards through rhetorical disapproval, foreign aid, sanctions, military intervention, and even multilateral negotiations” surpass those of any other country.<sup>73</sup> Even when it has not signed on to a treaty, the US often helps draft it; it “initiated” seven of the articles included in the CRC.<sup>74</sup> The US commonly refrains from adopting international human rights treaties due to concerns about domestic sovereignty, not based on actual disapproval of the norms espoused in the treaty, explaining some of this apparent tension.<sup>75</sup>

The corresponding, inwards facing argument is that the US is not shielded from the effects of norm internalization. In other words, the US's role is not solely to fix other countries. Because this proposal uses treaties to assess other countries' behavior, not to bind the US, concerns about domestic sovereignty should be assuaged; the US does not need to cede power to any international actor. On the other hand, the US already showed in the UNCAT and other contexts that it is receptive to norm internalization.<sup>76</sup> The same ought to be true for other international human rights treaties. In this way, relying on international law in domestic law should not just make other countries better, but for the same reasons improve the US.

## **B. The Ideal Conduit for International Human Rights Law: Domestic US Asylum Law**

Domestic US law has unique potential to increase compliance with international human rights law; within domestic US law, asylum law is the field that will most successfully do so. After introducing domestic US asylum law, this

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<sup>72</sup> Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy* 147, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005).

<sup>73</sup> *Id.* at 147–48.

<sup>74</sup> Thalif Deen, *US May Soon Stand Alone Opposing Children's Treaty*, *COMMON DREAMS* (Jan. 23, 2015), <https://www.commondreams.org/news/2015/01/23/us-may-soon-stand-alone-opposing-childrens-treaty>.

<sup>75</sup> See *United States Ratification of International Human Rights Treaties*, *HUMAN RTS. WATCH* (July 24, 2009), <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> (“The treaties espouse non-discrimination, due process, and other core values that most American[s] unquestionably support. They are also largely consistent with existing US law and practice.”).

<sup>76</sup> See Koh, *How is International Human Rights Law Enforced?*, *supra* note 48, at 1414.

Section argues that asylum law is particularly conducive to this proposal due to historical and substantive links between international law and asylum law.

At this point, it is important to note that this Article does not submit that relying on treaties is the panacea to inadequacies of the asylum process. As Part III addresses, this proposal will improve the robustness of domestic asylum cases by adding relevant evidence into the analyses. If policymakers aim to fix asylum procedures in the US, though, they should start elsewhere. They would be wise to provide increased training for immigration judges;<sup>77</sup> divert additional resources to these courts;<sup>78</sup> or address the wildly inconsistent rates of how different judges rule on asylum cases.<sup>79</sup> Others have written on how to most improve the integrity and competency of immigration courts.<sup>80</sup> These are valid and necessary considerations, but not the core concern of this Article's proposal.

### i. Domestic US Asylum Law

This Section offers an overview of domestic US asylum law mechanics to inform this Article's proposal. The bird's-eye view is that an asylum seeker is a person physically in the US who meets the definition of refugee,<sup>81</sup> as articulated by the Immigration and Nationality Act.<sup>82</sup> The Attorney General decides whether to grant asylum; the Department of Homeland Security (DHS) and its Office of Citizenship and Immigration Services(USCIS) oversee the process.<sup>83</sup>

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<sup>77</sup> See *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner) (“the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”).

<sup>78</sup> See *Immigration Court Backlog Continues to Grow*, HUM. RTS. FIRST (Jan. 18, 2017), <http://www.humanrightsfirst.org/press-release/immigration-court-backlog-continues-grow> (remarking on “an all-time high backlog of 533,909 pending cases.”).

<sup>79</sup> See generally *Jaya Ramji-Nogales et al.*, 60 STAN. L. REV. 295 (2010). An applicant in Newark between 2011 and 2016 could have had an 84.3% chance of receiving asylum if he were assigned Judge Frederic G. Leeds—or a 1.4% chance if he had the misfortune to argue before Judge Margaret R. Reichenberg. See *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2011–2016*, TRAC IMMIGRATION, (2016), <http://trac.syr.edu/immigration/reports/447/include/denialrates.html>.

<sup>80</sup> For a few of the many articles addressing this issue, see generally Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467 (2008); Erin B. Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L. A. L. REV. 119 (2014).

<sup>81</sup> See *Refugees & Asylum*, U.S. OFF. OF CITIZENSHIP & IMMIG. SERVICES (2017), <https://www.uscis.gov/humanitarian/refugees-asylum>. A “refugee” is a person *outside of the US* who comes to the US under the Refugee Resettlement program, among other requirements. See *Refugee Admissions*, U.S. DEPT. OF ST. (2017), <https://www.state.gov/j/prm/ra/>. The terms are often conflated. This Article focuses on asylum seekers because theirs are the cases that arise in domestic courts.

<sup>82</sup> Immigration and Nationality Act of 1965, 8 U.S.C. § 1101 (2012).

<sup>83</sup> See 8 U.S.C. § 1158(a). See also, e.g., *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

Generally speaking, an applicant begins by sending in an application to USCIS.<sup>84</sup> Asylum officers, housed within regional offices, then interview the applicant in a non-adversarial setting. Asylum officers sometimes make asylum determinations; more often the officer refers the applicant for a *de novo*, adversarial hearing before an immigration judge (IJ). An attorney housed in the Bureau of Immigration and Customs Enforcement (ICE) argues for the government.<sup>85</sup> Hearings usually last two to four hours.<sup>86</sup> The applicant and any witnesses can be cross-examined; applicants provide counsel at their own expense.<sup>87</sup> The IJ often issues an oral decision at the hearing, but may release a written decision at a later date.<sup>88</sup> Unless there are “exceptional circumstances,” the entire asylum process is supposed to take at most 180 days.<sup>89</sup> Either party can then appeal the decision to the Board of Immigration Affairs (BIA) and ultimately to a federal circuit court.<sup>90</sup>

The substantive law underlying asylum decisions, key to this Article’s proposal, is that an individual must be “unable or unwilling to return to, and [ ] 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” in order to receive asylum.<sup>91</sup> The cruxes of an asylum claim are (1) demonstrating membership in a protected category and (2) proving persecution.<sup>92</sup> An applicant must then show a “nexus” between these two factors.<sup>93</sup> Although four of the protected categories (race, religion, nationality, and political opinion) are relatively self-explanatory, “particular social group” (PSG) is defined neither by neither treaty nor statute. The BIA defines PSG as “a group of persons all of whom share a common, immutable characteristic,”<sup>94</sup> and courts in turn classify PSGs on a case-by-case basis. Past PSGs include “homosexuals in Cuba who were forced to register

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<sup>84</sup> Applicants apply for asylum from two different routes: affirmatively and defensively. Asylum seekers apply for asylum affirmatively when, within a year of their arrival in the US, they apply for asylum. Meanwhile, they apply defensively when raising asylum as a defense against removal proceedings.

<sup>85</sup> See Ramji-Nogales, *supra* note 79, at 305–06.

<sup>86</sup> See *id.* at 308–09.

<sup>87</sup> See *id.*; *Immigration Court Proceedings*, IMMIGRATION EQUALITY (2017), <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/immigration-court-proceedings/>.

<sup>88</sup> See *Immigration Court Proceedings*, *supra* note 87.

<sup>89</sup> *How Long Does the Process Take?*, USCIS (2017), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/faq/how-long-does-process-take> (acknowledging, that due to “expanding caseloads,” the intended timelines are often not met).

<sup>90</sup> For a detailed explanation of the asylum process, see *Obtaining Asylum in the United States*, USCIC (2017), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>

<sup>91</sup> See 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (2012).

<sup>92</sup> See *Li v. Holder*, 559 F.3d 1096, 1102 (9th Cir. 2009).

<sup>93</sup> See *id.*

<sup>94</sup> *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (citing *Matter of Acosta*, 19 I & N Dec. 211, 233 (BIA 1985)).

with the government; young female members of a tribe in Togo who had not undergone female genital mutilation and were opposed to the practice; and Filipinos of mixed Filipino–Chinese ancestry.”<sup>95</sup> PSGs must have “particularity” and “social visibility,”<sup>96</sup> demonstrated by establishing “that *society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.*”<sup>97</sup>

Persecution on the basis of membership in a protected category is a high bar to meet. US courts understand persecution as “an extreme concept that does not include every sort of treatment our society regards as offensive.”<sup>98</sup> For example, the treatment of feminists in Iran in the early 1990’s did not rise to the level of persecution.<sup>99</sup> Asylum seekers can prove persecution either by showing direct persecution of the individual by their government or by demonstrating that the government is “unable or unwilling” to protect the asylum seeker from persecution by a private party.<sup>100</sup> As a general matter, courts analyze persecution using an objective standard,<sup>101</sup> though they do sometimes allow some leeway for a country’s culture in asylum decisions.<sup>102</sup>

Asylum decisions often turn on particularized facts specific to the applicant at bar. Courts also rely on evidence about the situation in the applicant’s country, though, including materials cited in “country condition reports.”<sup>103</sup> This evidence helps corroborate or rebut applicants’ claims. Asylum officers and immigration judges often “rely heavily” on these reports.<sup>104</sup> Both the applicant and government parties in an asylum case submit country condition reports.<sup>105</sup> Often hundreds of pages long, the reports incorporate documents demonstrating governmental

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<sup>95</sup> *Henriquez-Rivas*, 707 F.3d at 1084.

<sup>96</sup> *Matter of C–A–*, 23 I & N Dec. 951, 957, 960 (BIA 2006).

<sup>97</sup> *Reyes v. Lynch*, 842 F.3d 1125, 1131–32 (9th Cir. 2016) (emphasis in original).

<sup>98</sup> *Ghaly v. I.N.S.*, 58 F.3d 1425, 1431 (9th Cir. 1995) (citations and quotation marks omitted).

<sup>99</sup> *See Fatin v. I.N.S.*, 12 F.3d 1233, 1243 (3d Cir. 1993).

<sup>100</sup> *See, e.g., Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (noting that an applicant failed to show that “the government of Honduras is unable or unwilling to control rape in that country.”).

<sup>101</sup> *See, e.g., Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005) (“We reject the government’s suggestion that female genital mutilation cannot be a basis for a claim of past persecution because it is widely-accepted and widely-practiced.”) (citations and quotation marks omitted).

<sup>102</sup> *See, e.g., Fatin*, 12 F.3d at 1237 (“Rejecting this argument, the Board stated that there was no evidence that [the applicant] would be ‘singled out’ for persecution. . . . [S]he would be ‘subject to the same restrictions and requirements’ as the rest of the population.”) (citations omitted).

<sup>103</sup> *See* 8 C.F.R. § 208.12(a) (“[T]he asylum officer may rely on material provided by the Department of State, other USCIS offices, or other credible sources, such as international organizations”); *Country Conditions Research*, U.S. DEP’T OF JUST. (Feb. 24, 2017), <https://www.justice.gov/eoir/country-conditions-research>.

<sup>104</sup> *See Immigration Court Proceedings*, *supra* note 87.

<sup>105</sup> *See id.*; *I-589 Application for Asylum and for Withholding of Removal*, USCIS (2017), <https://www.uscis.gov/i-589>. (“[The applicant] must attach documents evidencing the general conditions in the country from which you are seeking asylum.”).

behavior and attitude towards protected groups as they relate to the applicant's claim,<sup>106</sup> including research from government and nongovernmental bodies, such as the United States State Department, Human Rights Watch, and Amnesty International.<sup>107</sup> For many human rights abuses, information contained in the reports "carry a great deal of weight" because the adjudicators have little access to the conditions in specific countries.<sup>108</sup>

There are two related areas of law to which the proposal in this Article also generally applies, though it focuses on traditional asylum law. First are withholding of removal cases. An immigration judge can grant a withholding of removal if the applicant demonstrates that he would be eligible for asylum but for narrowly defined exceptions, and he meets other criteria.<sup>109</sup> An applicant can also apply for relief under the UN Convention Against Torture.<sup>110</sup> Both types of cases rely on similar facts as asylum cases, and can interact with treaties in much the same way imagined in this proposal.

## ii. International Human Rights Law and Domestic US Asylum Law Are Uniquely Compatible

Although there are other areas of domestic US law where international human rights law could be imported, asylum law is uniquely suited to integrating with international human rights law.

*a) US Asylum Law Historically Reflects International Law.* Despite resistance to international law in US domestic courts, asylum law is *already* deeply influenced by international law. In fact, the language of US asylum laws is identical to that of similar countries' because all are taken from the 1967 UN Protocol Relating to the Status of Refugees in order to fulfill each country's legal obligations.<sup>111</sup> Domestic US asylum law takes its very phrasing from international human rights treaties.

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<sup>106</sup> See Long Bao Hua v. Holder, 435 F. Appx. 631, 632 (9th Cir. 2011); *Asylum Law & Convention Against Torture: Country Conditions*, CORNELL UNIV. LIBRARY (2017), <http://guides.library.cornell.edu/c.php?g=32278&p=203431>.

<sup>107</sup> See, e.g., Long Bao Hua v. Holder, 435 F. Appx. 631, 632 (9th Cir. 2011); In re Kasinga, 21 I & N Dec 357, 361–62 (BIA 1996) (while considering asylum claim, discussing conditions for women in Togo as a whole, based on evidence from the "FGM Alert" and a State Department report); Kacalniku v. Holder, 407 F. Appx. 182, 184 (9th Cir. 2010) (citing Human Rights Watch report); Garcia v. Holder, 756 F.3d 885, 889 (5th Cir. 2014) (citing Transparency International findings).

<sup>108</sup> *Immigration Court Proceedings*, *supra* note 87.

<sup>109</sup> See 8 U.S.C. § 1157(a)(1) (2012). See also 8 C.F.R. § 208.16; INA § 241(b)(3)(C).

<sup>110</sup> See UNCAT, *supra* note 13. See also 8 C.F.R. §§ 1208.16, 1208.17, 1208.18.

<sup>111</sup> See G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees, at § 1(a)(2) (1967). See also *United States of America – Status of Ratifications Interactive Dashboard*, OHCHR (2014) <http://indicators.ohchr.org/>. (scroll down "Countries" list; select "United States of America").

US courts have acknowledged this connection. In discussing the potential relevance of international law to asylum law, the courts have recognized that, a “primary purpose for which Congress adopted this definition in 1980 was ‘to bring United States refugee law into conformance with the [Refugee Protocol].’”<sup>112</sup> Relevant government agencies, such as USCIS, also incorporate international materials into their directions to their staff working on asylum matters.<sup>113</sup> As such, despite general US resistance to the specter of international rule, asylum law has historically reflected international law. This historic connection suggests that increasing the profile of international law in domestic asylum law should trigger less domestic resistance than would doing the same in an area of law more cordoned off from international influence.

*b) The Subject Matters of Domestic Asylum and International Human Rights Law Align.* Moreover, asylum law is the ideal area of law through which to integrate international human rights law into the domestic US legal system because their subject matter are indisputably interrelated. The same motivating concern of asylum—to protect non-citizens who are not covered by domestic legal protections but who fear persecution abroad—dovetails with the purpose of international human rights law, to allow people to live “free[ ] from fear.”<sup>114</sup>

The substance of each area of law therefore closely informs the other. Within asylum law, courts question whether individuals have been persecuted on the basis of their race, religion, nationality, membership in a PSG, or political opinion. These inquiries directly track the focus of various treaties. For example, protections owed to the PSG defined as “young female members of a tribe in Togo who had not undergone female genital mutilation and were opposed to the practice”<sup>115</sup> may implicate women’s rights (CEDAW), familial protections (ICESCR), and torture (UNCAT).<sup>116</sup>

### **iii. Adopting This Proposal Will Increase Enforcement of International Human Rights Law**

The parallels between international human rights law and asylum law segue into the reasons why asylum law is a credible additional enforcement mechanism for international law. This proposal capitalizes on the forces that have proven successful in enforcing international law in the past, namely norm internalization and collateral benefits of compliance. Additionally, countries dislike it when their nationals are granted asylum in other countries. If these countries see that

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<sup>112</sup> *Niang v. Gonzales*, 422 F.3d 1187, 1194 (10th Cir. 2005) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987)).

<sup>113</sup> *See, e.g., Lesson Plan Overview: Asylum Officer Basic Training – Female Asylum Applicants and Gender-Related Claims*. USCIS– RAIO – ASYLUM DIVISION 7 (Mar. 12, 2009) (discussing how international law resources can help determine whether women have faced persecution).

<sup>114</sup> ICCPR, *supra* note 10.

<sup>115</sup> *Henriquez-Rivas*, 707 F.3d at 1084.

<sup>116</sup> *See, e.g., CEDAW* § 16; *ICESCR* § 10(3); *UNCAT* § 1.

complying with treaties will decrease such grants of asylum, they will have an increased reason to comply.

*a) Domestic asylum law as an enforcement mechanism builds off the informal enforcement mechanisms that have proven, albeit modest, success in compelling country compliance.*<sup>117</sup> As Koh and Hathaway have shown, successful informal enforcement mechanisms include norm internalization and countries' interest in reaping the collateral gains of respecting human rights. We can expect the increased use of international human rights treaties in domestic asylum law, particularly by the US, to have the same internalization effects as the dissemination of international law in other contexts.

Regarding collateral consequences, countries that are consistently called out as violating their citizens' human rights see reduced foreign aid, military support, and international investment.<sup>118</sup> Asylum cases are one area where countries face this exact form of criticism. If US courts take seriously the status of a country's adoption of a human rights treaty in their analysis, then countries will have added incentive to adopt these treaties. Adopting, and complying with, human rights treaties is an effective way for countries to signal to domestic US courts—as well as investors—that the countries take seriously their citizens' human rights. This, in turn, will lead to fewer findings of persecution, findings that would jeopardize the country's foreign aid and investment. In this way, this proposal encourages countries, for their own self-interest, to comply with these treaties.

*b) Countries do not want their citizens granted asylum, so this proposal creates new impetus for countries to comply with international human rights treaties.*<sup>119</sup> A related argument that raises many of the same issues is that countries care about the results of their citizens' asylum applications abroad. Although no empirical research tests this claim, it holds up theoretically and anecdotally. A finding of persecution in an asylum case shows that the accepting country believes that the asylum seeker's home country is, at best, failing to protect its citizens. Findings for asylum harshly denounce the asylum seeker's home country.<sup>120</sup> Theoretically, applicants' home countries have several reasons why they would not

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<sup>117</sup> See Part I.C.ii of this Article.

<sup>118</sup> See Posner, *supra* note 5, and accompanying text; Simone Dietrich and Amanda Murdie, *Human Rights Shaming Through INGOs and Foreign Aid Delivery*, 12 THE REV. INT'L ORG. 95–100 (2017) (discussing how shaming by international NGOs about countries' human rights records generally reduces aid from foreign governments).

<sup>119</sup> See Part III.B of this Article for a discussion on how this proposal prevents abuse by countries that hope to use the adoption of treaties as a way to curtail findings of persecution without seriously changing their behavior.

<sup>120</sup> See, e.g., *FH-T v. Holder*, 743 F.3d 1077, 1078 (7th Cir. 2014) (discussing the “horrendous conditions” the Eritrean applicant faced after the country's ruling party was not “amused” at his behavior).



want their citizens to be granted asylum abroad. Foreign aid, trade, and investment are in jeopardy; countries also care about their national reputation and image.<sup>121</sup>

Anecdotally, countries bristle at the insult of asylum to their citizens. China is openly upset when countries grant its political dissidents asylum status.<sup>122</sup> Cuba has taken to granting asylum to fleeing US citizens accused of crimes to retaliate against the US's decision to "give[ ] shelter to dozens and dozens of Cuban citizens."<sup>123</sup> The US similarly resents when other countries offer asylum to its citizens. In one case, Costa Rica granted asylum to Chere Lyn Tomayko, a US citizen who fled with her children after facing domestic abuse. Condemning Costa Rica's decision, the US Embassy asserted that Costa Rica was violating its treaty obligations and that it "absolutely disagree[d] with the implied assumption that the U.S. judicial system could not protect Ms. Tomayko."<sup>124</sup> The US has similarly rejected that it would abuse the jurisdiction it holds over its citizens and that it does not serve justice at home, as seen in the Edward Snowden case.<sup>125</sup>

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This proposal does not claim to offer a way to guarantee universal compliance with international human rights law. That logic would, in a way, be circular: individuals would not have to seek asylum if their countries respected their human rights, so why would a country begin respecting those rights just to prevent asylum grants abroad? After all, courts grant asylum every day. Countries already bristle at these grants. Countries can always improve their human rights record to decrease the number of asylum seekers they create.

Instead, this proposal suggests that the current asylum system leaves unfulfilled and underdeveloped its potential to change countries' behavior. Countries do not wish for other countries to consider their citizens "persecuted" for reputational, monetary, and political reasons. Reliance on treaties in asylum determinations should therefore nudge countries towards adopting and complying with treaties. Explicitly bringing international human rights law into asylum cases will officially link compliance with international law to the benefits addressed in this Article, and offer specific steps for countries to take to avoid asylum findings.

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<sup>121</sup> See Part I.C.ii. of this Article.

<sup>122</sup> See, e.g., *No escape? China's crackdown on dissent goes global*, CNN (Feb. 4, 2016), <http://www.cnn.com/2016/02/04/asia/china-dissident-crackdown-goes-global/>.

<sup>123</sup> Michael Weissenstein and Andrea Rodriguez, *Cuba Says It Has a Right to Grant Asylum to US Fugitives*, WASH. TIMES (Dec. 22, 2014), <http://www.washingtontimes.com/news/2014/dec/22/cuba-asylum-for-fugitives-is-legitimate-right/>.

<sup>124</sup> *Response to Tomayko Case*, EMBASSY OF THE U. S, SAN JOSE, COSTA RICA (July 24, 2008), <https://costarica.usembassy.gov/press-releases/2009/-response-to-tomayko-case-july-24th-2008.html>.

<sup>125</sup> See Isabel Gorst, *Russia gives Edward Snowden asylum for three more years*, L.A. TIMES (Aug. 7, 2014), <http://www.latimes.com/world/europe/la-fg-russia-snowden-asylum-20140807-story.html>.

Lifting asylum decisions out of parochial domestic jurisprudence and into a common language with which applicants' countries are familiar will offer countries a concrete step to take—adopting a treaty—that will affect case outcomes on the margin. And it's okay if countries are only adopting treaties for this calculated purpose. Adoption of a treaty increases norm internalization, gives domestic advocates a new tool to use in driving government policy change, and creates new monetary and reputational incentives for compliance. The interaction of these aspects of international human rights law means that relying on it in asylum cases ought to compel additional country compliance.

### **III. THE PROPOSAL: USING INTERNATIONAL HUMAN RIGHTS TREATIES AS EVIDENCE IN DOMESTIC US ASYLUM CASES**

With this reasoning as background, the discussion can now move on to the proposal itself, namely that parties in asylum cases should integrate treaty adoption and compliance into their arguments. Using current practice in comparator countries as precedent, this Part looks at the lack of reliance on treaties in US asylum cases and demonstrates how this status quo ought to change.

#### **A. Theoretical Uses of Treaties in US Asylum Cases**

There are several ways that parties ought to take advantage of treaty adoption and compliance during the asylum process. The most straightforward arguments for both parties concern the gateway decision of whether a home country adopted a treaty. Asylum seekers can argue that by declining to adopt a relevant treaty, their home country has opted out of the readily available protections afforded by the treaty. Such a choice counsels in favor of a finding of persecution by that country. In addition, remember that countries have the option to sign a treaty, accumulate additional obligations by ratifying it, and even accept the optional protocol.<sup>126</sup> On this spectrum, an applicant has a stronger case when a country has not even signed a treaty, and the weakest case when it has signed on to the optional protocol. Applicants can also point out that their country only adopted the treaty subject to material reservations. These arguments may prove to be particularly relevant when the applicant is arguing for asylum based on private persecution that the government is “unwilling” to prevent. The choice to not adopt protections for those precise individuals directly supports the accusation that a country is unwilling to prevent persecution: the treaty presents an internationally accepted, ready-to-go mechanism by which the country could have committed to protecting those individuals.

For its part, the government can make largely the reverse arguments. Where an asylum seeker's home country *has* ratified a relevant treaty without reservations and particularly when it has accepted the optional protocol, the government can use this country's commitment as evidence that the asylum seeker does not face persecution. If a country is binding itself to adopting specific protections for

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<sup>126</sup> See Part I.A of this Article.

protected groups, how can that same country not be willing to protect that precise group?

A legitimate concern is that allowing the government to use another country's superficial decision to sign on to a treaty undermines legitimate asylum seekers' applications. It is no secret that the "binding" provisions of international human rights treaties are rarely that. A rubberstamp adoption of a treaty by a country that routinely violates human rights is not evidence that the country takes those rights seriously. This is no different from domestic law, however: a country's constitutional and statutory protections are not relevant if it inadequately implements that legislation. The North Korean constitution offers wide-ranging protections.<sup>127</sup> No court would take these alleged protections seriously without looking behind the veil of the flowery constitutional language. The same is true for treaties. For both international and domestic law, it is always necessary to make sure that the adoption of law reflects a true intention to commit to and abide by that law.

Parties can circumvent this concern by looking beyond the gateway adoption of the treaty to demonstrations that the adoption represents a deeper commitment.<sup>128</sup> Treaty committees publish reports on the state of a country's compliance with specific treaties every several years.<sup>129</sup> An official report by the government states what steps it has taken to comply with the treaty; NGO "shadow reports" present the non-profit community's views on the same.<sup>130</sup> These rich reports give parties easy access to understanding whether a treaty adoption reflects a real commitment towards fulfillment of human rights norms. Asylum seekers can point to violations of treaties by their home countries as exposed by these reports. Such violations demonstrate that even where the country has ostensibly pledged to protect a certain group of people, it has failed to take these obligations seriously. This in turn supports applicants' claims by showing that their home countries are aware of the relevant international standards but have still not respected them.

These same considerations are relevant as evidence for an applicant's membership in a particular social group. This proposal is not a significant departure from current practice. Take a Ninth Circuit case that found that membership in a

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<sup>127</sup> See North Korea Const. §§ 8, 45, 74.

<sup>128</sup> See *XXXX (private proceeding)*, RAD File No TB5-03539 ¶ 16 (Can.) (discussing Lebanon's good faith commitment to CEDAW, demonstrated by granting it eminence to domestic laws).

<sup>129</sup> See *Human Rights Bodies*, OHCHR (2017), <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.

<sup>130</sup> See *Treaty Bodies*, OHCHR (2017), <http://www.ohchr.org/EN/Issues/IPeoples/IPeoplesFund/Pages/TreatyBodies.aspx> (offering procedures for shadow and alternative reporting); *Shadow Reporting to UN Treaty Bodies*, INT'L WOMEN'S RTS. ACTION WATCH (2013), <http://hrlibrary.umn.edu/iwraw/reports.html> ("By submitting a shadow report to a UN treaty body committee, NGOs can highlight issues not raised by their governments or point out where the government may be misleading the committee from the real situation.").

gang could plausibly be the basis of a PSG in some countries but not others.<sup>131</sup> In deciding that PSG determination was appropriate on a country-by-country basis, the court recognized that,

[Countries] have used different strategies for combating gang violence. . . . These different local responses to gangs in nations with distinct histories, populations, and government structures, may well result in a different social recognition of social groups.<sup>132</sup>

This analysis shows how a PSG and social visibility determination is closely tuned to the interaction between a country, an alleged PSG, and the country's people, culture, and history.

Treaties lack the nuance of domestic legislation, as they are meant to be applicable internationally. Still, a country's decisions to adopt and comply with treaties can be illuminating when making a PSG determination in the same way its domestic legislation is. Consider the case of "SA," a divorced Bangladeshi woman with an illegitimate child. SA sought asylum in the UK as a member of the PSG "single women with children born out of wedlock."<sup>133</sup> In deciding whether this was a PSG, the court first discussed women in general in Bangladesh. It considered gains women had made recently in the country, including the adoption of CEDAW.<sup>134</sup> Though ultimately decided on other grounds, the court concluded that reservations to CEDAW's requirement of ensuring equal rights between men and women, along with other factors, weighed in favor of recognizing SA as belonging to a cognizable PSG.<sup>135</sup> These reservations to CEDAW specifically allowed for discriminatory family law, including in the "realms of marriage, divorce . . . and child custody."<sup>136</sup> Bangladesh's tailored reservations to the CEDAW provisions implied a desire to protect legislation that hurt women like SA, demonstrating the salience of her PSG.

## **B. Current Use of International Human Rights Treaties in Asylum Law**

To demonstrate the practical viability of this proposal, this Section moves beyond theory and discusses three comparator countries that presently rely on treaties in their asylum analyses. The countries surveyed were Australia, Canada, and the United Kingdom (UK). These countries were chosen for several reasons: they publish decisions in English; they are politically and socially similar to the US; and their asylum laws use identical language to US asylum law.<sup>137</sup> In addition,

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<sup>131</sup> Pirir-Boc v. Holder, 750 F.3d 1077, 1084 (9th Cir. 2014).

<sup>132</sup> *Id.*

<sup>133</sup> SA v. Sec'y of State for the Home Dep't, CG [2011] UKUT 00254 (IAC) ¶ 42 (UK).

<sup>134</sup> *Id.* at ¶ 56.

<sup>135</sup> *Id.* at ¶¶ 22, 61, 74.

<sup>136</sup> *Id.* at ¶ 40.

<sup>137</sup> See Migration Act 1958 (62th) § 5H (Austl.); Immigration and Refugee Protection Act, S.C. 2001, c. 27 § § 96, 97(1) (Can.); The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525 § 2 (UK). <sup>[L]</sup><sub>SEP</sub>

Professors Stephen Meili and Catherine Dauvergne have analyzed the use of treaties in asylum cases in the UK and Canada.<sup>138</sup> Though Meili's and Dauvergne's research does not look at the effects on the enforcement of international law caused by this phenomenon, their work helps predict how this proposal may play out on the ground.

Each of these comparator countries had numerous examples of asylum cases specifically referencing an asylum seeker's home country's decision to adopt or not adopt a treaty. No country routinely cites international human rights treaties in asylum cases, but the US stands as an outlier by never relying on them. This Section first discusses the current use of international human rights treaties in each country. It then offers explanations for the disparity in the citation rates.

### **i. Precedential Use of International Human Rights Treaties in Comparator Countries**

This Section explores how these comparator countries consider international human rights treaties in asylum cases. The results are not intended to demonstrate statistically significant trends, but, along with Meili's and Dauvergne's related research, to establish that the comparator countries have found treaty evidence helpful in asylum cases. This research relies on publicly available asylum decisions<sup>139</sup> from each country: for the US, the BIA issues appellate decisions; the Refugee Review Tribunal and the Administrative Appeals Tribunal in Australia review decisions by the Department of Immigration and Citizenship;<sup>140</sup> the Immigration and Refugee Board in Canada provides initial decisions on asylum seekers in Canada;<sup>141</sup> and the Upper Tribunal (Immigration and Asylum) is the appellate level of the First-tier Tribunal (Immigration and

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<sup>138</sup> See generally Stephen Meili, *Do Human Rights Treaties Help Asylum-Seekers?: Lessons from the United Kingdom*, 48 VAND. J. TRANSNATIONAL L. 123 (2015); 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 (2014); Catherine Dauvergne, *International Human Rights in Canadian Immigration Law—The Case of the Immigration and Refugee Board of Canada*, 19 IND. J. GLOB. LEGAL STUD. 305 (2012). See also Stephen Meili, *U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law*, 54 BOS. C. L. REV. 1123 (2013) (explaining how treaties have interacted with the UK domestic legal system over the past few decades).

<sup>139</sup> See Dauvergne, *supra* note 138, at 313. Many asylum cases are not made public. In Canada, *e.g.*, Dauvergne estimates that the Immigration and Refugee Board decided over half a million cases but only published about ten thousand between 2002 and 2010.

<sup>140</sup> See *What Happens at the Refugee Review Tribunal (RRT)?*, REFUGEE ADVICE & CASEWORK SERV. (2012), [http://www.racs.org.au/wp-content/uploads/FS4\\_What\\_happens\\_at\\_an\\_RRT\\_hearing\\_\\_print.pdf](http://www.racs.org.au/wp-content/uploads/FS4_What_happens_at_an_RRT_hearing__print.pdf). (On July 1, 2015, the Administrative Appeals Tribunal, which now considers asylum appeals, absorbed the Refugee Review Tribunal. Refugee decisions from the Administrative Appeals Tribunal since July 1, 2015, were included in this survey).

<sup>141</sup> See *Immigration and Refugee Board: About the Board*, IMMIGRATION AND REFUGEE BOARD (2016), <http://www.irb-cisr.gc.ca/Eng/BoaCom/Pages/index.aspx>.

Asylum Chamber) in the UK.<sup>142</sup> The Article relies on appellate level decisions where initial decisions were not available. A “citation” means that a case came up on a search in these databases for the full name of the treaty.<sup>143</sup>

For comparison’s sake, the chart below includes the number of asylum applications received by each country in 2015.<sup>144</sup> The total applicant numbers most helpfully establish the relative number of applicants between countries. Comparisons between total applicants and citations reveal little, since many applicants do not complete their asylum process, do not argue before a court, or do not appeal.<sup>145</sup> In Canada, for example, cases have to have a written opinion only if asylum is denied, meaning publicly available decisions are both a subset of written decisions and a skewed subset of all cases.<sup>146</sup> Meili provides some context about the reliance on treaties in asylum cases for one comparator country: just over eleven percent of Canadian asylum cases since 1990 have referenced treaties.<sup>147</sup>

The following chart shows the frequency of explicit citations to specific international human rights treaties in publicly available asylum cases between January 1, 2010, and May 13, 2017:

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<sup>142</sup> See *Appeal a decision by the immigration and asylum tribunal*, UK GOV’T (2017), <https://www.gov.uk/upper-tribunal-immigration-asylum/overview>.

<sup>143</sup> The survey used the following databased: WESTLAW, <http://next.westlaw.com>; ADMINISTRATIVE APPEALS TRIBUNAL OF AUSTRALIA, <http://www.austlii.edu.au/au/cases/cth/AATA/>; IMMIGRATION AND REFUGEE BOARD OF CANADA, <https://www.canlii.org/en/ca/irb/>; and UN REFUGEE AGENCY, [http://www.refworld.org/publisher/GBR\\_UTIAC.html](http://www.refworld.org/publisher/GBR_UTIAC.html) (UK).

<sup>144</sup> See *Applications for Asylum Received in 2015*, UNHCR (2015), <http://www.unhcr.org/576408cd7>. The UN High Commissioner for Refugees reports these numbers.

<sup>145</sup> See Georgina Sturge et al., *ASYLUM STATISTICS 9* (2017), House of Commons Library SN01403. More precise denominators (such as the number of appeals to the specific tribunals) were not available.

<sup>146</sup> See Dauvergne, *supra* note 138, at 314.

<sup>147</sup> Meili, *Study in Canadian Jurisprudence*, *supra* note 138, at 647, 651 (noting these citation rates peaked in the early 2000s and have since declined, potentially due to a “learning effect” whereby judges internalize human rights standards and do not need to explicitly cite them).

*Citations to International Human Rights Treaties (2010 to 2017)*

	<b>United States</b>	<b>Australia</b>	<b>Canada</b>	<b>United Kingdom</b>
<b>Total Applicants (2015)</b>	135,964	16,117	19,511	53,345
<b>ICERD</b>	0	2	3	1
<b>ICCPR</b>	0	126	22	14
<b>ICESCR</b>	0	5	5	5
<b>CEDAW</b>	0	17	22	8
<b>CAT</b>	39	19	13	3
<b>CRC</b>	1	52	60	21
<b>ICMW</b>	0	0	0	0
<b>CPED</b>	0	0	0	1
<b>CRPD</b>	0	7	3	2

This chart demonstrates that all of the comparator countries cite the surveyed treaties occasionally, with citations varying from treaty to treaty<sup>148</sup> and country to country. The US did not.<sup>149</sup> A few caveats: For one, the chart understates the reliance on treaties in at least the UK. Meili found that 85 percent of treaty citations in asylum cases between 1991 and 2012 were to the European Convention of Human Rights (ECHR).<sup>150</sup> This Article excluded the ECHR because it is a regional treaty, but it enshrines rights similar to those of other human rights treaties.<sup>151</sup> Furthermore, parties in US cases have occasionally tried to bring treaties into their arguments. For example, in their appeal, applicants in a Fifth Circuit case invoked Russia’s decision not to ratify the CRPD as evidence in favor of a Russian with mental disabilities.<sup>152</sup> In denying the application for asylum, the court did not mention the treaty.<sup>153</sup> Other than the UNCAT citations, no US court explicitly cited to one of the international human rights treaties except for one BIA decision that mentioned but did not rely on the CRC.<sup>154</sup>

<sup>148</sup> See Meili, *Lessons from the United Kingdom*, *supra* note 138, at 176. The lack of citations to the ICMW and CPED are not surprising, given the distance between their substance and asylum law. Meili did not even include these treaties in his research.

<sup>149</sup> US courts cite to the UNCAT because the mechanism for receiving asylum is different when an applicant invokes the treaty, for which the US has set up a parallel route to asylum, as explained in Part II.B.i of this Article. See, e.g., *In re Miguel Anibal Rosales-Rivera*, 2016 WL 8468278, at \*1 (BIA Dec. 8, 2016).

<sup>150</sup> See Meili, *Lessons from the United Kingdom*, *supra* note 138, at 151.

<sup>151</sup> See European Convention of Human Rights, Rome, 4.XI (1950).

<sup>152</sup> See Amicus Curiae Brief in Support of Petitioners and Urging Reversal, *Korneenkov v Mukasey*, No. 07-60712, 2008 WL 7404474, at \*17 (5th Cir. Feb. 20, 2008).

<sup>153</sup> See generally, *Korneenkov v. Holder*, 347 F. Appx. 93, 96 (5th Cir. 2009).

<sup>154</sup> See *In re Luis Rodolfo Ramos-Mariscal*, WL 5865139, at \*1 (BIA Nov. 4, 2011) (“On appeal, the respondent renews his argument that he is eligible for unspecified relief from removal . . . based on customary international law as reflected in the Convention on the Rights of the Child.”). There were a handful of similarly cursory citations to some of the treaties from prior to 2010. See, e.g., *In re Ramon Garza-Arevalo*, 2006 WL 1558844, at \*2 (BIA Apr. 18, 2006).

Looking closer at the reasons for which treaties were cited in comparator countries, many considered claims by applicants that a country not signing a treaty evidenced persecution. A case from the UK considered whether three Zimbabwean nationals had a well-founded fear of persecution due to, among other factors, their disability (all were HIV-positive).<sup>155</sup> The applicants relied on the fact that “Zimbabwe has neither signed nor ratified the [Convention on the Rights of Persons with Disabilities].”<sup>156</sup> The court considered this as relevant evidence, though it ultimately determined that the situation in Zimbabwe did not give rise to a “legal obligation” for the UK.<sup>157</sup>

Asylum courts also weighed in favor of the government evidence that the applicant’s home country had adopted, and complied with, human rights treaties. Considering an application for asylum by an applicant with mental illness, an Australian court emphasized that “[s]ources indicate that the situation for persons with mental illness in Ghana is improving. . . . In July 2012 Ghana [ ] ratified the Convention on the Rights of Persons with Disabilities.”<sup>158</sup> In a Canadian case brought by a female applicant from Lebanon, the court found an insufficient amount of evidence to rise to the level of persecution, in part because Lebanon not only ratified CEDAW but “published CEDAW in the official Gazette, giving it primacy over national laws.”<sup>159</sup> A UK decision dismissed the argument that China did not persecute an applicant based on religion due to its adoption of the ICCPR, since “China’s existing laws did not fully ratify or apply the Convention’s legal framework, particularly freedom of religion or belief.”<sup>160</sup>

Courts also considered whether countries made reservations to treaties. The UK case concerning SA, the divorced Bangladeshi woman with an illegitimate child, took this approach.<sup>161</sup> When considering “the attitude of police towards allegations of [domestic] violence”—relevant to whether the country’s officials were willing to prevent persecution of the applicant—the court concluded that, “the Bangladeshi state had acceded to [CEDAW] in 1984 and ratified the optional protocol on the Convention in 2000” but that “reservations against specific CEDAW articles allowed discriminatory ‘personal laws’ . . . to persist.”<sup>162</sup> The

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<sup>155</sup> See *RS, EC and BR v. Sec’y of State for the Home Dep’t, CG* [2010] UKUT 363 (IAC) ¶ 285 (UK).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at ¶ 286.

<sup>158</sup> *Case No. 1219395* [2013] RRTA 633 (June 26, 2013) ¶ 27. See also *Case No. 1005852* [2010] RRTA 921 (Oct. 22, 2010) ¶¶ 67, 75 (Austl.) (invoking the ratification of CEDAW and domestic legislation, “the Tribunal is satisfied on the country information that state protection is available to women and children.”).

<sup>159</sup> *XXXX (private proceeding)*, *supra* note 128, at ¶ 16.

<sup>160</sup> *QH v Sec’y of State for the Home Dep’t, CG* [2014] UKUT 0086 (IAC) ¶ 10 (UK).

<sup>161</sup> See *SA*, *supra* note 133, at ¶ 40.

<sup>162</sup> See *id.*



court ultimately allowed the applicant to stay in the country, under the “human rights grounds” of the ECHR.<sup>163</sup>

Many citations in these cases show courts looking for guidance from the treaties about how to define or understand the responsibilities of signatories.<sup>164</sup> These citations do not specifically establish a precedent for this Article’s proposal. They are relevant, though, as they demonstrate a willingness by the comparator countries to rely on international human rights treaties. These cases show that each of these comparator countries have found countries’ ratification of international human rights treaties to be helpful in determining asylum cases. The US stands as an outlier.

## ii. Explaining the Variation in Citation Rates in Comparator Countries

This Section explores why these disparate citation rates may exist. Negative US feelings, ranging from ambivalence to antipathy, toward international law likely drives much of the difference between the US and the other countries. This correlates with the other likely reason for the lower level of treaty citations in US asylum cases: the US itself is not a party to these treaties. The country has not ratified six of the nine core human rights treaties, including the CRC and CEDAW.<sup>165</sup> This does not prevent the US from referencing treaties as evidence: one country’s decision to not ratify one does not change another’s obligations under it.<sup>166</sup> Still, a US court may find it counterintuitive to cite to a treaty that the US has not itself adopted. Supporting this conclusion, countries like the UK and Canada saw an uptick in treaty citations in asylum cases after formally incorporating specific treaties into their domestic law.<sup>167</sup> A treaty might have less legitimacy to a judge if the US has not given it a seal of approval. The judge also may be afraid of casting aspersions onto the US, by holding that not ratifying the same treaty the US has not ratified proves a country’s persecution. Part II.B.ii discussed counterarguments to these fears; Part III.C.i discusses how this proposal minimizes these concerns.

The reasons for differences in citation rates between and within the comparator countries are harder to precisely identify. These differences are likely, in part, just noise: the raw number of citations are relatively low, so apparent differences likely partially driven by random variance. Citations also vary based on

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<sup>163</sup> See *id.* at ¶ 130.

<sup>164</sup> See, e.g., *Case No 1218534* [2013] RRTA 717 (Oct. 31, 2013) ¶ 46 (Austl.).

<sup>165</sup> See *United States of America – Status of Ratification Interactive Dashboard*, OHCHR (2014), <http://indicators.ohchr.org/>.

<sup>166</sup> See Vienna Convention, *supra* note 18, at § 60(5).

<sup>167</sup> See Meili, *Lessons from the United Kingdom*, *supra* note 138, at 134; Meili, *Study in Canadian Jurisprudence*, *supra* note 138, at 659.

which treaties each country has incorporated into its law.<sup>168</sup> Different people also seek asylum from different countries. Since countries persecute their citizens in different ways, different treaties will therefore apply to these cases.

Variance in citation rates between treaties within countries likely demonstrates that some treaties are more relevant to and persuasive in asylum cases than others. Take the ICESCR and CRC. Few applicants rely on ICESCR. The treaty concerns ambitious rights that are not even accepted as “rights” by many countries.<sup>169</sup> In rejecting the treaty, President Ronald Reagan’s administration criticized the inclusion of economic and social rights as blurring “the vital core of human rights.”<sup>170</sup> Even among those countries that have accepted the treaty, few have obtained meaningful compliance. This fact is recognized by the treaty’s “progressive realization” principle, under which countries only need to be moving towards realization of the treaty.<sup>171</sup> It would be hard for asylum seekers to claim persecution based on the controversial and difficult-to-fulfill ICESCR rights. On the other hand, courts cite the CRC much more frequently. The treaty supports rights for children that are much less controversial, making claims of persecution by applicants more feasible.

### C. How This Proposal Works on the Ground

Drawing inspiration from the application of treaty reliance observed in asylum law in other countries, this Section outlines how the Article proposes integrating treaties into asylum law and applies the proposal to recent trends in US asylum cases.

#### i. Technical Application of Proposal

At base, treaty adoption should be relied on in country condition reports, incorporated into arguments by both parties, and then weighed on a case-by-case basis by asylum officers and judges. This will affect both stages of the asylum process: the initial non-adversarial review by the asylum officer and the adversarial proceedings before an immigration judge, as well as subsequent appeals.

*a) All parties should be directed to rely on international human rights law.* Meili’s and Dauvergne’s research, as well as the survey provided in this Article, shows that the comparator countries all cite treaties in a minority of asylum cases. This is not surprising; the citations in these countries are ad hoc. For this Article’s proposal to affect countries’ incentives to follow international law as imagined in Part II, asylum decisions must rely on this evidence more consistently. To that end, the asylum process should require that applicants report on their I-589 application

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<sup>168</sup> See Meili, *Lessons from the United Kingdom*, *supra* note 138, at 134; Meili, *Study in Canadian Jurisprudence*, *supra* note 138, at 659.

<sup>169</sup> See ICESCR, *supra* note 11, at §§ 7, 12, 13.

<sup>170</sup> Alston, *supra* note 30, at 122.

<sup>171</sup> See ICESCR, *supra* note 11, at § 2.

for asylum<sup>172</sup> and country condition reports the status of treaty adoption for relevant treaties.<sup>173</sup> Government attorneys should likewise include the relevant evidence in their reports. Asylum officers and immigration judges should rely on the same (even if just to say that the international law is inapposite). All parties should also be directed to ask questions about the relevance of treaty adoption during the asylum hearing.

This proposal should not prove overly burdensome on any party. Asylum hearings take several hours; the addition of several questions regarding treaty compliance will not make them significantly longer. Evidence from other countries also suggests that judges demonstrated a “learning effect” as they familiarized themselves with these rights.<sup>174</sup> Although this proposal might be difficult to initially implement, the small body of relevant treaties means it should not create a long-term increase in time spent on asylum cases as all parties become familiar with the international law landscape.

Beyond increasing the visibility of international human rights law within domestic US asylum law, this directive will also avoid a pitfall noted in the UK and Canadian case studies. In each, advocates faced judges skeptical of—or blatantly hostile towards—international law.<sup>175</sup> Judges sometimes indicated they believed the advocates cited to international law as a last-ditch resort for a “weak case.”<sup>176</sup> Making citations mandatory would remove the potential adverse consequences of such citations. This advice also builds off of Meili’s research, which suggests that courts more often rely on international law where the domestic law has officially incorporated it.<sup>177</sup> To be sure, the US is unlikely to take the path of the UK and officially incorporate international human rights treaties into its legal system. Officially requiring these references in cases attempts to more modestly address Meili’s findings by increasing the status of treaties as officially required evidence.

*b) Different pieces of evidence should be weighed differently, on a case-by-case basis.* This Article has discussed several relevant aspects of international human rights treaties. Some of these are easier for busy attorneys to analyze and overworked immigration judges to consider, such as the black-and-white facts of whether a country has adopted a treaty. The more probative evidence requires more effort: the significance of the reservations made, the reasons why a country did not adopt a treaty, the nuances of treaty compliance. In addition, treaties will have varying levels of relevance across cases. ICERD intuitively relates to asylum applicants claiming persecution based on race. For a disabled, female, minority

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<sup>172</sup> See I-589, *supra* note 105.

<sup>173</sup> This directive may be relaxed for pro se asylum seekers, who have less capacity to undertake this research.

<sup>174</sup> See Dauvergne, *supra* note 138, at 323.

<sup>175</sup> See Meili, *Study in Canadian Jurisprudence*, *supra* note 138, at 651; Meili, *Lessons from the United Kingdom*, *supra* note 138, at 162–63.

<sup>176</sup> See Meili, *Lessons from the United Kingdom*, *supra* note 138, at 173; Meili, *Study in Canadian Jurisprudence*, *supra* note 138, at 655–56.

<sup>177</sup> See Meili, *Lessons from the United Kingdom*, *supra* note 138, at 174.

applicant claiming asylum based on a PSG, it takes more effort to understand how the CRPD, CEDAW, and ICERD interact.

It would help the simplicity of this proposal if the Article offered suggestions on precisely how a court should weigh of these pieces of evidence. That is, unfortunately, not possible. Each data point interacts differently with different cases and in different contexts.<sup>178</sup> Still, some general guidance applies.

For one, adoption of a relevant treaty should create a presumption that the country respects the rights enshrined therein. Affirmative evidence that a country respects a right works against a finding of persecution, but a country can—of course—both respect a right and violate it. An applicant can rebut this presumption by showing that the adoption of a treaty constitutes merely low-cost posturing, rather than substantive commitment to the relevant rights.

Relatedly, non-adoption of a treaty ought to be more probative evidence than adoption. This Article has acknowledged how even antisocial regimes like North Korea opt into some treaties, how Saudi Arabia is a signatory to CEDAW despite its abysmal record on women's rights. Where treaty adoption appears at times the default option, the route that allows a country to slip under the radar, non-adoption shows a more deliberate refusal to recognize certain norms. Of course non-adoption of a specific treaty must be considered in its context: countries like the US broadly do not adopt treaties for reasons that speak little to its respect of the rights contained within the treaty.

Finally, the evidence that comes after the adoption of a treaty will often prove more probative than the initial adoption. The reports by the treaty committees, the signatory country, and the NGOs concerning treaty compliance all contain especially probative evidence, as these are investigative reports with country-specific conclusions. Reservations, as seen in the case of SA, the divorced Bangladeshi asylum seeker, and optional protocols both demonstrate a country tailoring a boilerplate treaty to its domestic context. Of course, weighing reservations more heavily than treaty adoption does have the potential for adverse consequences: a country might just opt out of the treaty entirely. This possibility should not outweigh the probative nature of the reservations. It in fact reflects an ongoing discussion about the wisdom of treaty reservations, and whether they allow countries to have their cake and eat it, too (by both signaling adoption of popular rights and eschewing real obligations).<sup>179</sup>

## ii. Applying Potential Treaty Uses to US Asylum Trends

This Section makes this proposal concrete by applying the proposal to asylum trends in the US. There are six countries that this Section considers: the top

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<sup>178</sup> These case-by-case variations militated against a more extreme proposal, such as using treaty adoption to shift the burden of proof in asylum cases.

<sup>179</sup> See generally Daniel W. Hill, Jr., *Avoiding Obligation: Reservations to Human Rights Treaties*, 60 J. CONFLICT RESOL. 1129 (2016).

countries, based on 2015 numbers, in terms of refugee arrivals in the US<sup>180</sup> and granted applications for asylum.<sup>181</sup> In 2015, 69,933 refugees arrived in the US. The top three countries for refugee arrival were Myanmar (Burma) (18,386), Iraq (12,676), and Somalia (8,858). From 135,964 total asylum seekers, of those applicants whose asylum was granted, the plurality was from a different slate of countries: China (6,192), El Salvador (2,173), and Guatemala (2,082).<sup>182</sup>

The next inquiry is the countries' adoption status of the relevant international human rights treaties. These six countries have adopted the major human rights treaties listed as shown in the chart below.<sup>183</sup> Green signifies that a treaty has been adopted; yellow, that it has been signed or ratified but with reservations; and red, that it has not been adopted (neither signed nor ratified).

*The Adoption Status of International Human Rights Treaties by Asylum Seekers' Home Countries*

	Myanmar	Iraq	Somalia	China	El Salvador	Guatemala
<b>ICERD</b>	Red	Yellow	Green	Yellow	Green	Green
<b>ICCPR</b>	Red	Yellow	Green	Green	Green	Green
<b>ICESCR</b>	Green	Yellow	Green	Yellow	Green	Green
<b>CEDAW</b>	Yellow	Yellow	Red	Yellow	Yellow	Green
<b>CAT</b>	Red	Green	Green	Yellow	Green	Green
<b>CRC</b>	Green	Yellow	Green	Yellow	Green	Green
<b>ICMW</b>	Red	Red	Red	Red	Yellow	Green
<b>CPED</b>	Red	Green	Red	Red	Red	Green
<b>CRPD</b>	Green	Green	Red	Green	Yellow	Green

This chart suggests several potential routes that hypothetical asylum parties could take to strengthen their arguments using international human rights treaties. Take the countries that have adopted treaties subject to reservations. Iraq adopted CEDAW, the treaty protecting women from discrimination, subject to extensive reservations, including to Article 2(f) and (g).<sup>184</sup> These sections pledge a country to “take all appropriate measures, including legislation, to modify or abolish existing

<sup>180</sup> These are individuals who received refugee status abroad. See note 81 for the difference between an asylum seeker and a refugee. This Section includes refugees to add diversity to the countries considered.

<sup>181</sup> The breakdown of total asylum seekers by country (regardless of ultimate success) was not available.

<sup>182</sup> See *Refugees and Asylees*, DEP'T OF HOMELAND SEC. (2016), <https://www.dhs.gov/immigration-statistics/refugees-asylees>.

<sup>183</sup> See *Status of Ratification Interactive Dashboard*, OHCHR (2014), <http://indicators.ohchr.org/>.

<sup>184</sup> See *Iraq – Status of Ratification Interactive Dashboard*, OHCHR (2014), <http://indicators.ohchr.org/>.

laws, regulations, customs and practices which constitute discrimination against women” and to “repeal all national penal provisions which constitute discrimination against women.”<sup>185</sup> Reservations to these substantive provisions could be compelling evidence for an Iraqi asylum seeker claiming that her home government is unwilling to prevent persecution on the basis of a PSG that is related to her sex. Iraq has specifically opted out of amending its laws to eliminate gender discrimination; the country has not shown itself as willing to prevent discrimination.<sup>186</sup>

Courts can also look to overall trends in adopting treaties. Consider a Guatemalan applicant with disabilities claiming persecution on the basis of a PSG grounded in that disability status. The government party might point to Guatemala’s consistent history of fully adopting human rights treaties. It could cite the UN’s most recent report on Guatemala’s compliance with the CRPD, where it “congratulate[d]” the state on its efforts to comply with the CRPD,” including adopting domestic laws and programs.<sup>187</sup> In response, the applicant could point to the Commission’s acknowledgement of ongoing discrimination and poor implementation of domestic laws.<sup>188</sup> The applicant could cite to related NGO shadow reports to demonstrate the flaws with implementation of the CRPD as observed by civil society.<sup>189</sup> Bringing in these reports and discussions over the import of Guatemala’s adoption of the CRPD would add additional nuance to this asylum case.

In contrast with Guatemala, Somalia and Myanmar both stand out as countries that have refrained from adopting many important human rights treaties. This trend could also be relevant in asylum cases: a male Myanmar migrant worker basing his application on race could show that Myanmar’s decision not to adopt ICERD, coupled with its failure to adopt ICCPR, CAT, ICMW, and CPED shows the government is not willing to prevent persecution on the basis of an alleged PSG of which he is a member. That the country *has* signed on to some other human rights treaties shows that it cannot justify its decision to not sign these treaties merely based on an absolute aversion to involvement in the international system. These hypotheticals of course would all hinge on the specifics of an applicant’s

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<sup>185</sup> CEDAW, *supra* note 12, at § 2(f)–(g).

<sup>186</sup> See *El Salvador – Status of Ratification Interactive Dashboard*, OHCHR (2014), <http://indicators.ohchr.org/>. Some reservations are less useful. El Salvador adopted the CRPD “to the extent that its provisions do not prejudice or violate the provisions of any of the precepts, principles and norms enshrined in the Constitution of the Republic of El Salvador.” This generic reservation does not necessarily suggest the country is attempting to avert treaty obligations.

<sup>187</sup> CRPD, *supra* note 17, at § II.6.

<sup>188</sup> *Id.* at § III.13.

<sup>189</sup> See generally, e.g., *Disability Rights in Guatemala*, SIDA (Nov. 2014), <http://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/disability/rights-of-persons-with-disabilities-guatemala.pdf>. See also note **Error! Bookmark not defined.** and accompanying text.

situation, but these examples demonstrate a few manifestations of how treaties could be drawn into common US asylum cases.

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This proposal originates in the natural connection between international and asylum law. Courts already look at the general situation of the home country when determining persecution. For each case, the parties submit country condition reports that present an overview of the relevant aspects of a country. A country's adoption of, reservations to, and compliance with international human rights treaties provide additional nuance to this analysis.

The examples in this Section bring the Article back to its driving motivation: adoption of the proposal will pressure countries to comply with international human rights law. The hypothetical parties just discussed each play a small part in encouraging compliance with international law. The mere references to treaties increases the visibility of international law and norm internalization. Furthermore, Iraq may have seen CEDAW reservations as costless decisions that let it appear to respect women's rights without adapting its behavior. Using that reservation to demonstrate persecution adds cost to those decisions. The same is true for Guatemala: its adoption of treaties will be outweighed by evidence that it does not respect its substantive obligations under the treaties. Myanmar has not even taken the gateway step of signing many treaties. As a democratizing country trying to integrate into the international community,<sup>190</sup> asylum cases that explicitly cite to its failure to adopt these treaties will be an impetus for it to adopt them. These effects may be marginal, but they tip the scale a bit more towards incentivizing compliance with international human rights laws.

#### **D. Responses to Potential Counterarguments and Repercussions**

This Section addresses several additional concerns that may arise from this proposal. One might claim that this proposal does not improve asylum cases enough for the change to be worthwhile. Critics could also argue that this proposal will be more difficult to implement than this Article suggests. Moreover, if the proposal is implemented, people might fear its repercussions: some countries may actually *want* other countries to accept their citizens as refugees, and this proposal will dissuade countries from taking international obligations seriously. A final concern is that using treaties in this way will allow receiving countries like the US to more easily reject refugees.

Meili's research contradicts the first concern: he found that treaty citations in the UK and Canada were helpful in about a third to half of cases in which they were cited.<sup>191</sup> Other reports and assessments included in the country condition

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<sup>190</sup> See *Myanmar wants foreign investment to create jobs*, BBC (Nov. 21, 2016), <http://www.bbc.com/news/av/business-30139678/myanmar-investment-will-create-jobs>.

<sup>191</sup> See Meili, *Lessons from the United Kingdom*, *supra* note 138, at 158–59; Meili, *Study in Canadian Jurisprudence*, *supra* note 138, at 657. “Helpful” citations mean the treaty was the

reports (such as reports by Human Rights Watch and the State Department) also rarely turn the decision in asylum cases. But they provide some on-point, relevant, unique information, and parties thus still include them in country reports. The parties ought to consider a country's approach to international law for the same reasons. For example, in an asylum case where Australia considered the state of persons with mental illness in Ghana, the deciding court had little access to reliable information on the topic. The court's decision to consider Ghana's recent adoption of a relevant international human rights treaty was valuable in assessing whether the country was serious about protecting these asylum seekers.<sup>192</sup>

As mentioned in Part II.B, immigration judges are infamous for being, at best, overworked. This may mean that this proposal, if implemented, will be implemented poorly. Evidence from the UK minimizes this concern. Immigration judges hearing these cases were "professional" in their analysis of human rights-based claims, especially as these citations became more frequent.<sup>193</sup> To be sure, if a judge is already going to give little serious consideration to an applicant's argument then that judge will not overcome that approach because of a country's compliance with CEDAW. Just because the system is imperfect does not mean that there are not judges who carefully ponder the entirety of an application. This proposal does not require much of a shift in immigration court proceedings, either in terms of time or content. It does require a new type of intellectual engagement with the facts, but just because some judges may be unwilling to truly engage in this exercise should not stymie the proposal.

Next, this proposal should not inadvertently dissuade countries from adopting human rights treaties. There may indeed be refugees that home countries are happy for other countries to accept, but the types of applicants that this proposal implicates are not the same type as those fleeing the ongoing conflict in Syria, for instance. Many of those individuals, fleeing death, violence, and a dearth of opportunities, are not actually "refugees" as contemplated under the Refugee Convention. They have not faced specific persecution; they have faced war. Countries accepting these refugees do so under different, often ad hoc agreements.<sup>194</sup> Grants of the types of asylum status contemplated in this proposal cast judgment on the asylum seeker's government's actions, and as discussed in Part II.B.iii, countries appear to avoid such grants. In the rare instances where the country does want another nation to accept its nationals as refugees, norm internalization and reputational shaming will pressure countries against rejecting treaties solely *for the purpose* of generating refugees.

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basis for the court's grant of asylum; that it supported another argument; or that it was cited in explaining the applicants' home country's conditions.

<sup>192</sup> See *Case No. 1219395*, *supra* note 158, at ¶ 27.

<sup>193</sup> See Meili, *Lessons from the United Kingdom*, *supra* note 138, at 169.

<sup>194</sup> See *Implementing the EU-Turkey Statement – Questions and Answers*, EU COMM'N (June 15, 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-1664\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1664_en.htm). Countries in Europe, *e.g.*, have adopted particular protocols about accepting refugees fleeing from Syria.



A final concern—that this proposal may in fact make it easier for receiving countries to reject potential applicants applying for asylum—is more complex. This concern gets to a baseline normative assumption: that it is better for countries to accept more asylum seekers. At base, this proposal is orthogonal to this issue, as it concerns helping countries accept the *correct* applicants, without reference to the number of applicants to accept. To the extent anti-asylum proponents might use the proposal as a weapon against applicants, empirical evidence from Canada suggests they would fail. Cases referencing international law more frequently led to the approval of asylum, even with judges demonstrating skepticism towards international law.<sup>195</sup> And, of course, this proposal does not intend to revolutionize domestic or international law, and, on a micro level, should not revolutionize individual cases. This does not mean that citing to treaties is negligible, or just extra pages to throw into a long report. As has been argued throughout this Article, the effects on specific cases may be marginal but the broader implications significant.

For these reasons, the potential negative side effects of the use of treaties in asylum law appear minimal, and this proposal ought not scare parties because it brings new facts to light in any given case. Facts about treaty adoption and compliance add new angles to asylum cases, and added nuance to any legal case should be embraced, rather than spurned.

## Conclusion

For the reasons offered above, we should integrate treaties into domestic US asylum law in the manner proposed in this Article. The use of treaties in this way, for which there is a precedent in comparator countries' asylum law, will create a new enforcement mechanism for international human rights law. Reliance on international human rights treaties in domestic asylum law will capitalize on both proven informal enforcement mechanisms and aspects unique to asylum law to add a new weight to the scale when countries are facing the choice of whether to violate international human rights law, making them just a bit more likely to choose compliance.

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<sup>195</sup> See Dauvergne, *supra* note 138, at 318.