NOTES

AMERICAN COURTS AND THE U.N. HIGH COMMISSIONER FOR REFUGEES: A NEED FOR HARMONY IN THE FACE OF A REFUGEE CRISIS

INTRODUCTION

The international refugee regime is one of the most frequently applied bodies of international law in domestic settings worldwide.1 The 1951 Convention Relating to the Status of Refugees2 (Convention) and its subsequent amendment, the 1967 Protocol Relating to the Status of Refugees3 (Protocol) — instruments that are fairly short and drafted broadly, with many important clauses open for interpretation — govern this regime.4 Sometimes differing domestic laws relating to the status of refugees in the 148 states party to the Convention or Protocol5 have proliferated, including in the United States, where the legislature, agencies, and courts have translated language in the Convention into domestic law.

The entity that most resembles a supervisory body of the Convention is the office of the United Nations High Commissioner for Refugees (UNHCR). Not only has the UNHCR promulgated its own interpretations of various provisions of the Convention, but it has also presented its opinions to national courts dealing with specific controversies worldwide. The U.S. Supreme Court’s treatment of the UNHCR’s views has, on the whole, varied from explicitly attending to and ultimately agreeing with the UNHCR’s reasoning all the way to ignoring it or even criticizing considerations of its views by other federal courts; but the current trend is toward less rather than more consideration.

In order to further the goal of a unified treaty regime and provide a more consistent message to the lower courts — and to people applying for asylum in this country and worldwide — the Supreme Court should adopt a more explicit standard of deference to the UNHCR. This Note argues that the UNHCR’s key role in a treaty regime that Congress elected to join, as well as its substantial expertise in interpreting and implementing the Convention, suggest that U.S. courts should presume

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the correctness of the UNHCR’s interpretations of text in U.S. law derived directly from the Convention, unless this interpretation clearly conflicts with other domestic law or the UNHCR’s own positions.

This Note first sets out a brief background about the Convention and the UNHCR. Then, it discusses several of the most important Supreme Court cases involving judicial interaction with the UNHCR to show the current trend of minimal and inconsistent consideration and explains why this state of affairs is problematic. Last, it outlines justifications for deferring to the UNHCR, drawing from existing patterns of deference to domestic agencies and foreign sovereigns.

I. THE NATURE OF THE CONVENTION AND THE UNHCR

The Convention was adopted in 1951 and entered into force in 1954.\(^6\) The Convention provides a definition of the term “refugee”\(^7\) and sets out obligations toward refugees as regards their legal status and various rights,\(^8\) including exemption from penalties for illegally entering a country.\(^9\) It also prohibits expulsion or refoulement (return to the origin country) of refugees under most circumstances.\(^10\) States party to the Convention “undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”\(^11\)

The UNHCR has a mixed supervisory and operational character.\(^12\) Its activities range from promoting accession to the Convention, to processing asylum applications itself in states that are unable or unwilling to do so, to researching and recommending legislation, to providing supplies and cash assistance to refugees, to prototyping aid projects related

\(^{6}\) See Refugee Convention, supra note 2.

\(^{7}\) Id. art. 1.

\(^{8}\) Id. arts. 12–16, 34 (legal status); id. arts. 17–19 (employment); id. arts. 20–24 (public services); id. arts. 26–30 (travel and identity papers).

\(^{9}\) Id. art. 31.

\(^{10}\) Id. arts. 32–33.

\(^{11}\) Id. art. 35(1). The Convention also specifies that any party may refer a dispute as to the interpretation or application of the Convention to the International Court of Justice (ICJ) if that dispute cannot be settled by other means. Id. art. 38. However, neither the UNHCR nor any state has ever actually brought a question related to the Convention before the ICJ. Hathaway et al., supra note 1, at 323–24, perhaps because disputes over the Convention are not often presented as direct controversies between two states.

\(^{12}\) Indeed, it is unique in this regard: the Convention is the only human rights treaty with an “international organization dedicated to its day-to-day implementation,” but is also one of only two human rights treaties without a “system of independent international oversight.” Katie O’Byrne, Is There a Need for Better Supervision of the Refugee Convention?, 26 J. REFUGEE STUD. 330, 331–32 (2013) (emphasis added).
to education and technology. The UNHCR has also consistently provided guidance as to the interpretation of the Convention by publishing an official Handbook and other periodic reports dealing with specific factual situations and legal interpretations, as well as by issuing advisory opinions in specific instances of domestic and regional litigation related to the implementation of the Convention.

The 1951 Convention was amended by its 1967 Protocol, which removes previously existing temporal and geographical restrictions on refugee classification and otherwise incorporates all of the definitions and obligations in the 1951 Convention, replicating that Convention’s language regarding the role of the UNHCR. The United States joined the international refugee regime in 1968 when it acceded to the 1967 Protocol, thereby taking on the Convention’s obligations as well. Prior to joining the international regime, U.S. law demonstrated some similarities to the language in the Convention but in important respects did not require compliance with the Convention and thus with the Protocol.

Just over a decade later, Congress passed the Refugee Act of 1980 (Refugee Act), amending the Immigration and Nationality Act (INA). Among other changes, this Act made it mandatory rather than discretionary for the Attorney General to withhold deportation of a foreign national “to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion” — language very similar to that in the Convention, which defines a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail


\[\text{15 See, e.g., UNITED NATIONS HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN (2015), http://www.unhcr.org/5630f2466.pdf [https://perma.cc/7NWL-YNRM] (addressing the particular situation of women fleeing from El Salvador, Guatemala, Honduras, and Mexico).}\]

\[\text{16 See O’Byrne, supra note 12, at 339.}\]

\[\text{17 Protocol Relating to the Status of Refugees, supra note 3.}\]

\[\text{18 See UNITED NATIONS HIGH COMM’R FOR REFUGEES, supra note 5.}\]

\[\text{19 See Fitzpatrick, supra note 4, at 4.}\]


himself of the protection of that country.”

This new language also represented a broadening of the bases for persecution that would qualify a person as a refugee to make these bases consistent with the scope of the Convention. Congressional reports in connection with the passage of the Refugee Act explicitly state that the Act was meant to adopt the United Nations definition of refugee and rules withholding deportation. The Supreme Court itself has stated that, in passing the Refugee Act, “one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”

Today, refugee law — including the Refugee Act, with its adoption of the Convention’s language — is regularly implemented in the United States. Adjudication generally begins when a noncitizen files an application for asylum or withholding of removal, either affirmatively with the United States Citizenship and Immigration Services (USCIS), a branch of the Department of Homeland Security, or defensively if the noncitizen is involved in removal proceedings before an immigration judge. USCIS decisions are reviewable by an immigration judge, and immigration judges’ decisions are, in turn, reviewable by the Board of Immigration Appeals (BIA), an administrative body within the Department of Justice’s Executive Office for Immigration Review. Many BIA decisions are unpublished and carry no precedential weight, but some become the Executive’s standard practice, and a limited set are reviewable by the federal courts.

II. THE SUPREME COURT’S TREATMENT OF THE UNHCR TO DATE

The language and history of the Refugee Act make it clear that it was intended to implement the Convention, and it is on this basis that the UNHCR has submitted a number of amicus briefs to U.S. courts.

23 Refugee Convention, supra note 2, art. 1(A)(2) (adding to the definition persons “who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”).
24 S. REP. NO. 96-590, at 20 (1980) (Conf. Rep.) (“The Conference substitute adopts the House provision with the understanding that it is based directly upon the language of the Protocol [Relating to the Status of Refugees] and it is intended that the provision be construed consistent with the Protocol.”).
27 Id. at 1072.
28 Id. at 1072–73.
interpreting the Act. In the nearly four decades since the passage of the Refugee Act, the Supreme Court has bounced between lower and higher levels of regard for the UNHCR’s views. The following section traces this jurisprudence.

A. A Shift Toward Deference

In 1984, shortly after the passage of the Refugee Act, the Court decided *INS v. Stevic*. Stevic, a national of Yugoslavia, appealed a decision to deport him based on the newly mandatory withholding of removal for refugees. Prior to the enactment of the Refugee Act, courts interpreting then-existing immigration law had established an evidentiary standard whereby the applicant for asylum had to show a “clear probability of persecution,” which required presenting “objective evidence” about the likelihood of persecution. The Refugee Act did not explicitly alter the evidentiary standard required of asylum applicants. The circuit court, however, ruled in favor of Stevic, finding that the standard set out by the international Protocol — “well-founded fear of persecution” — required a less stringent showing than “clear probability,” basing its decision in part on the UNHCR Handbook, which had been published several years before. On appeal to the Supreme Court, the UNHCR submitted an amicus brief similarly arguing that Congress intended to adopt the Convention’s definition and that “well-founded fear” in the Convention means only a subjective fear that is reasonable, a lower bar than “clear probability.”

To determine whether Congress intended to change the evidentiary standard, the Court examined the text of the Refugee Act as well as congressional discussion surrounding the United States’s accession to the Protocol. Its analysis relied to some extent on the apparent belief of Congress that accession to the Protocol did not require changes in


30 Professor Joan Fitzpatrick has conducted a detailed analysis of the Court’s treatment of the UNHCR’s views and concluded that it is entirely inconsistent. See Fitzpatrick, supra note 4, at 14–15.


32 Id. at 410–12.

33 Id. at 420 (citations omitted).

34 Id. at 421.


U.S. law governing grants of asylum, and that changes to the relevant provisions of U.S. law effected by the Refugee Act functioned only to "regularize[] and formalize[] the policies and practices that have been followed in recent years." Partly on this basis, the Court overruled the circuit court and held that mandatory withholding of deportation is subject to the “clear probability of persecution” standard, which requires “evidence establishing that it is more likely than not that the alien would be subject to persecution.” The opinion made no mention of the UNHCR’s views to the contrary. Scholars have widely criticized , arguing, for example, that the case “permits prior non-conforming domestic law to operate as an unstated reservation to the Protocol.”

Not quite three years later, however, the Supreme Court abruptly changed course. It returned to the standard of proof issue in INS v. Cardoza-Fonseca. This time, instead of the mandatory withholding of removal discussed in Stevic, the Court dealt with the Refugee Act provision allowing the Attorney General to grant asylum on a discretionary basis. Unlike the former, links the discretionary grant of asylum to status as a refugee under U.S. law, the definition of which uses the same “well-founded fear” language as the international Convention. As it had in Stevic, the UNHCR submitted an amicus brief arguing that Congress had adopted the Convention’s definition, that UNHCR guidelines provide the international standard for interpreting that definition, and that, according to the UNHCR, “well-founded fear” means a reasonably held subjective fear.

38 See id. at 417–18. At the time the Protocol came before the Senate, U.S. law demonstrated some similarities to the language in the Convention, particularly in the INA’s grant to the Attorney General of the discretionary power to withhold deportation of an individual who would be subject to specified types of persecution. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214. Based on this discretionary possibility, officials from the executive branch told the Senate in 1968 that the United States could comply with the international refugee regime without changing any existing U.S. law — which was technically true, but would have required very aggressive use of discretion by the Attorney General; certainly U.S. laws at the time did not require compliance with the Convention and thus with the Protocol. See Fitzpatrick, supra note 4, at 4.

39 Stevic, 467 U.S. at 426 (quoting H.R. REP. NO. 96-608, at 10 (1979)).

40 Id. at 429–30.

41 Fitzpatrick, supra note 4, at 7; see also Farbenblum, supra note 26, at 1086 (describing Stevic as “much-criticized” and characterizing it as having “established a heightened evidentiary standard for withholding of removal based on pre-1986 jurisprudence, rather than on the new ‘well-founded fear of persecution’ standard in the Protocol”).


43 Id. at 423.


45 Id. § 1101(a)(42); Refugee Convention, supra note 2, art. I(A)(c).

But in Cardoza-Fonseca, the Court ruled in favor of the foreign national and in line with the UNHCR’s recommendation, holding that the availability of discretionary relief for refugees depended upon a lower standard of proof than that articulated in Stevic. The Cardoza-Fonseca opinion, in fact, contained a lengthy discussion of the meaning of the relevant language specifically as it is in the Convention, and explicitly cited the UNHCR Handbook as a guide in this analysis. Indeed, in a footnote, the Court discussed the role of the Handbook in its jurisprudence, stating that, while not legally binding on American agencies or courts, “the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.”

The Court’s treatment of the Convention and the UNHCR changed markedly from Stevic to Cardoza-Fonseca. Justice Stevens, who wrote the majority opinions in both Stevic and Cardoza-Fonseca, attempted to smooth out this inconsistency by arguing that the provisions at issue in Stevic and Cardoza-Fonseca correspond to different parts of the Convention that employ somewhat different language from one another. That is, Justice Stevens’s argument suggests, the Court was aligning its interpretation of the INA with the Convention in both cases; the UNHCR’s interpretation was just more relevant or correct in the Cardoza-Fonseca question than it was in Stevic. Justice Stevens’s distinction between standards, however, has been criticized by scholars who suggest that there is no international law basis, in UNHCR materials or elsewhere, for suggesting that removal is permitted for refugees who can demonstrate a well-founded fear but not a clear probability of persecution. Nevertheless, Cardoza-Fonseca is heralded as a high point in the Supreme Court’s attention to international norms and the views of the UNHCR in its interpretations of refugee law.

While the holdings of Stevic and Cardoza-Fonseca are not necessarily contradictory because of the different provisions they interpret,

47 See Cardoza-Fonseca, 480 U.S. at 450.
48 See id. at 436–40.
49 Id. at 439 n.22.
50 See id. at 440–41. Indeed, it is notable that Justice Stevens provided in the Cardoza-Fonseca opinion Convention-based analysis of the issue in Stevic, even though Stevic itself contained virtually no analysis of the Convention besides a discussion of the congressional debates surrounding ratification of the Protocol.
51 E.g., Fitzpatrick, supra note 4, at 7–8.
52 See, e.g., id. at 7; Farbenblum, supra note 26, at 1085–87. An interesting addition to the Cardoza-Fonseca data point is Justice Blackmun’s concurring opinion, which stated that the Court’s discussion of Congress’s efforts to align U.S. law with the international Convention (including by matching language in the Refugee Act to that of the Convention) should function as a signal for the INS to look toward international sources as it delineates the meaning of “well-founded fear” through case-by-case adjudication. Cardoza-Fonseca, 480 U.S. at 450–51 (Blackmun, J., concurring).
the cases do differ strikingly in their treatment of UNHCR guidance. Indeed, Professor Joan Fitzpatrick argues that “[w]hile the UNHCR’s convincing interpretations of Article 33 [of the Convention] and the Refugee Act . . . were essentially ignored in Stevic, virtually the same arguments were given a high profile and determinative weight in Cardoza-Fonseca.” It is possible that Cardoza-Fonseca was a retreat from a perceived mistake in Stevic — though the fact that the two opinions were written less than three years apart by the same Justice makes this seem unlikely. Another possible distinction here is between interpretation of language clearly related to the international Convention but not identical to it — as in Stevic — and interpretation of U.S. statutory language that exactly mirrors the Convention — as in Cardoza-Fonseca. Justice Stevens’s claim in Cardoza-Fonseca, however, that Stevic was decided the way it was because of the correspondence of language in the Convention to language interpreted in that case, undermines this possibility, as does the Court’s later dismissal of the views of the UNHCR about essentially identical treaty language in a subsequent case.

The two cases together, then, present an ambiguous picture of the Court’s view of UNHCR guidance. Clearly, though, the trajectory after Cardoza-Fonseca seemed as though it would be one of increasing consideration of the UNHCR’s views and explicit integration of these views into American jurisprudence, although the Court did not set out a specific formula for an analysis of UNHCR materials beyond stating that they provide “significant guidance.”

B. A Shift Away from Deference

The trend suggested by Cardoza-Fonseca, however, did not materialize. Instead, jurisprudence relating to the Convention and implementing legislation took a sharp turn away from deference to the UNHCR. In 1992, the Supreme Court addressed the definition of persecution — critical to the determination of refugee status — in INS v. Elias-Zacarias.

The Convention defines a “refugee” as a person who is outside his or her country of origin and is unwilling or unable to return there “owing to well-founded fear of being persecuted” for specified reasons. The Refugee Act defines refugee in essentially identical language.
Zacarias dealt with what, if any, motive the persecutor of a prospective refugee must have. The UNHCR submitted an amicus brief arguing that status as a refugee depends upon the potential refugee’s state of mind and the reasonableness of his or her fear rather than the motive of the persecutor; that forced recruitment, at issue in the case, is enough of a threat to qualify as persecution; and that resistance of recruitment constitutes the manifestation of a political opinion. The Supreme Court, however, disagreed. Indeed, in ruling against Elias-Zacarias and denying his asylum claim, Justice Scalia’s opinion for the majority did not mention the UNHCR or international law at all. While the dissent did argue many of the views urged by the UNHCR in its amicus brief, it contained only one explicit reference, made in passing, to international law or interpretations generally.

Elias-Zacarias dealt a blow to the idea of deference to the UNHCR, but the Supreme Court marginalized the body in a different, and likely more damaging, way the next year in Sale v. Haitian Centers Council, Inc. This case addressed the extraterritoriality of states’ obligations under the Convention. It arose out of a mass exodus from Haiti after a coup in that country, to which President George H.W. Bush responded by instructing the Coast Guard to intercept vessels outside the territorial sea of the United States and return undocumented would-be immigrants to their country of origin or another country. The Convention forbids a state party to “expel or return (‘refouler’) a refugee” to a territory of threat, and the relevant provision of U.S. law contained similarly bifurcated language, mandating that “[t]he Attorney General shall not deport or return any alien” to a country where his or her life or freedom would be threatened. The UNHCR submitted a strongly worded amicus brief arguing that the plain language of the Convention prohibits interception and repatriation of asylum seekers, even those outside the borders of a signatory country. But the Court agreed with the government’s contrary interpretation of the INA. Unlike in Elias-Zacarias,

61 See Elias-Zacarias, 502 U.S. at 479–84.
62 The dissent stated that “[o]ur analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history” supported a relatively more inclusive definition of refugee status. Id. at 487 (Stevens, J., dissenting) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987)).
66 Refugee Convention, supra note 2, art. 33.1.
the Court engaged in a relatively detailed analysis of the Convention itself, even discussing various statements made during the original negotiation of the 1951 Convention suggesting that the prohibition on refusal covered only individuals actually in the territory of a ratifying country — a characterization of the negotiations that the UNHCR discussed and dismissed in its amicus brief. On the basis of this and other analysis, the Court held, contrary to the UNHCR’s view, that the Convention does not apply to refugees located on the high seas.

The UNHCR was publicly disapproving, calling the Sale decision “a setback to modern international refugee law which has been developing for more than forty years.” It is precisely because of Sale’s substantial engagement with the Convention that some commentators worry that its interpretation will affect the understanding of the Convention elsewhere in the world, to the detriment of future individuals intercepted on the way to seeking asylum status. Others go so far as to argue that the decision in Sale was spurred by an active, even “calculated cynicism toward international obligation” — which could make it yet more destructive in undermining the international protection regime.

After Sale, the two most recent Supreme Court cases interpreting the implementation of the Convention pitted the UNHCR against domestic agencies and provided the Court with opportunities to explicitly caution against deference to the UNHCR. The definition of “serious nonpolitical crime” came before the Supreme Court in 1999, in INS v. Aguirre-Aguirre. In this case, the foreign national, Aguirre-Aguirre, feared persecution for political activities in which he had engaged in his native Guatemala, but the BIA determined that his protest activities there had included burning buses, assaulting passengers, and vandalizing private property, which it considered to constitute serious nonpolitical crimes barring him from refugee status.

The UNHCR submitted an amicus brief siding with Aguirre-Aguirre and arguing that, under the Convention, the determination of the political or nonpolitical nature of a crime requires a consideration of the objective of the crime, and that, as the UNHCR Handbook specifies, a

\[69\] Sale, 509 U.S. at 184–88.

\[70\] Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, supra note 68, at 23–28.


\[73\] See Farbenblum, supra note 26, at 1116.

\[74\] Fitzpatrick, supra note 4, at 10.


\[76\] Id. at 418.

crime with political objectives is considered nonpolitical only if the seriousness of the crime is disproportionate to those political objectives.\textsuperscript{78} Further, also citing the \textit{Handbook}, the amicus brief argued that whether a person falls into the serious nonpolitical crime exception depends upon a balancing of the seriousness of the purported refugee’s crime against the seriousness and likelihood of the persecution he or she would face if deported.\textsuperscript{79} The circuit court, in adopting the UNHCR’s preferred narrow construction of the exception, had relied substantially on the \textit{Handbook}, calling it “an authoritative commentary on the Convention and Protocol.”\textsuperscript{80} The Supreme Court, however, disagreed. The circuit court, it found, was wrong as a matter of statutory interpretation to require the BIA to engage in any balancing of Aguirre-Aguirre’s crime against the persecution he might face if returned to Guatemala.\textsuperscript{81} Although it accepted that the statutory language it was interpreting was meant to implement the Convention, the Supreme Court went on to criticize the circuit court’s reliance on the UNHCR \textit{Handbook}.\textsuperscript{82} The Court made no further investigation of international law or standards.\textsuperscript{83} Rather, it held that, because the statute is ambiguous as to the specific definitions at hand, the court below should have deferred to the BIA’s interpretation under \textit{Chevron}.\textsuperscript{84}

The Supreme Court reached a somewhat similar conclusion in its most recent case about refugee law, \textit{Negusie v. Holder}.

\textit{Negusie} dealt with the “persecutor bar” in the Refugee Act, whereby “[t]he term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{85} The statute, however, does not explicitly state whether it includes within its scope such conduct committed under duress. The foreign national in \textit{Negusie} was conscripted into the Eritrean army and, after undergoing torture at the hands of the authorities for two years, was forced to guard prisoners who were themselves being persecuted due to membership in a protected group, until he escaped to the United States by hiding in a shipping container.\textsuperscript{86}

\textsuperscript{78} See id. at 27–28 (citing UNHCR HANDBOOK, supra note 14, ¶ 152).
\textsuperscript{79} See id. at 16 (citing UNHCR HANDBOOK, supra note 14, ¶¶ 156, 161).
\textsuperscript{80} Aguirre-Aguirre v. INS, 121 F.3d 521, 523 (9th Cir. 1997).
\textsuperscript{81} Aguirre-Aguirre, 526 U.S. at 425–26.
\textsuperscript{82} “The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts.” \textit{Id.} at 427.
\textsuperscript{83} See Farbenblum, supra note 26, at 1090.
\textsuperscript{85} 555 U.S. 511 (2009).
\textsuperscript{87} \textit{Negusie}, 555 U.S. at 514–15.
In its amicus brief to the Supreme Court, the UNHCR argued that Congress intended for the relevant provision of the Refugee Act to be interpreted in alignment with the Convention’s exclusion from the definition of refugee those who have “committed a crime against peace, a war crime, or a crime against humanity.”88 Advocating for Negusie, the UNHCR set out its position, as demonstrated in several of its publications, that for the persecutor bar to apply the foreign national must be found individually responsible for the conduct at issue,89 and that such a finding cannot be made if any defenses against criminal responsibility apply, including the defense of duress.90 Instead, however, the Supreme Court found that the Refugee Act is ambiguous with regard to situations of persecution committed under duress, and therefore courts owe deference to the BIA’s interpretation just as in Aguirre-Aguirre.91 The majority did not directly mention the UNHCR or its views. And yet hints of the importance of the UNHCR remained: Justice Stevens’s partial concurrence and partial dissent favorably cited the UNHCR Handbook and noted that the Court has historically looked to the Handbook for guidance, further noting that other signatory countries have adopted interpretations similar to the UNHCR’s with regard to the persecutor bar.92

The Supreme Court’s jurisprudence, then, evidences a shift from no consideration of the UNHCR’s views in Stevic, to significant consideration in Cardoza-Fonseca, back to no particular consideration in Elias-Zacarias, Sale, and Negusie (even when the Court analyzed the Convention directly), and words of caution against reliance on the UNHCR’s views in Aguirre-Aguirre. As of Negusie, in 2009, the Court appears to have come to rest on a vague doctrine of minimal regard for the UNHCR’s views, although another abrupt pivot like that between Stevic and Cardoza-Fonseca is certainly possible, if only because the Court has yet to articulate a clear and consistently applied posture toward the UNHCR.

C. The Problems with Inconsistency

The lack of a clear standard for engagement with the UNHCR is concerning for two major reasons. It undermines the international unity

88 Refugee Convention, supra note 2, art. I(F)(a); see also Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner at 8–9, Negusie, 555 U.S. 511 (No. 07-499), 2008 WL 2550609.


90 Id. at 15.

91 See Negusie, 555 U.S. at 516–17. The Court ultimately remanded the case back to the BIA, finding that the BIA had yet to actually exercise its discretion under Chevron due to its mistaken finding that another case was controlling. Id. at 516.

92 See id. at 536–37 (Stevens, J., concurring in part and dissenting in part).
of the treaty regime, which is bad both for the displaced individuals this regime aims to serve and for implementing countries. It also creates confusion among domestic courts, as well as executive enforcement agencies.

First, the Convention itself is premised on the need for harmonization, with the preamble noting the belief of the contracting parties “that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.”93 Refugee crises are inherently an international problem, involving the flow of people across borders. People fleeing for their lives should not be expected to make calculations about which direction to run based on the differential treatment they will receive in different countries. Indeed, people in conflict zones or facing other situations of persecution rarely have the resources and information necessary to make informed decisions about where to go. Further, burden sharing between countries is important to the functioning of the refugee regime as a whole,94 which is clearly made more difficult when different countries apply different interpretations to their supposedly standardized obligations.

Second, not only does a lack of clarity in U.S. jurisprudence undermine the unity of the treaty regime on an international level, but it also leaves U.S. courts in a position of continued uncertainty as to the proper role of the UNHCR in their adjudication of refugee cases and has yielded significantly differing interpretations of the treaty. Some courts focus on the deference the Supreme Court has given to the UNHCR and its persuasive reasons for doing so95 and have directly used the UNHCR’s interpretations to formulate their own jurisprudence.96 Others, meanwhile, have ignored the UNHCR’s views,97 emphasized their

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93 Refugee Convention, supra note 2, pmbl.

94 See Alex Catalán Flores, Reconceiving Burden Sharing in International Refugee Law, 7 KING’S STUDENT L. REV. 40, 50 (2016).

95 See M.A. A26851622 v. INS, 858 F.2d 210, 214 (4th Cir. 1988) (“[W]e follow the lead of other courts in recognizing that the [UNHCR] Handbook provides significant guidance in interpreting the Refugee Act.”).


97 See Garcia v. Sessions, 856 F.3d 27, 29–43 (1st Cir. 2017) (majority ignoring the UNHCR’s view, but dissent emphasizing that “the views of the [UNHCR] have been cited by the Supreme Court for interpretive guidance given that office’s expertise and responsibilities for monitoring refugee issues,” id. at 35 n.31 (Stahl, J., dissenting)).
nonbinding nature,98 and even criticized other entities such as the BIA for relying too much on the UNHCR’s interpretations.99

Executive agencies, including the BIA, struggle to find an appropriate level of deference to the UNHCR. USCIS’s officer-training materials state that immigration officials “should seek guidance from the UNHCR Handbook. However, the guidance in the UNHCR Handbook does not have the force of law and may not be followed where it is inconsistent with U.S. law.”100 The BIA often specifically considers and approves of the UNHCR’s views in its decisions.101 Nevertheless, as discussed above, the BIA is often at odds with the UNHCR in its interpretation of critical language in the Convention and INA. Scholarly observers have pointed out these inconsistencies in the case of both the federal courts and the BIA.102 The greater these inconsistencies within domestic jurisprudence, the more difficult it will be for officials enforcing refugee law on the ground — and asylum seekers considering filing claims — to know where to turn in attempts to understand the law.

III. A NEW MODEL OF CONSIDERATION

This Note proposes an improvement to the current fractured state of deference to the UNHCR, one that balances the obligations of the American judiciary to faithfully interpret American law with the obligations the United States took on when it joined the international refugee regime. Consideration of UNHCR interpretations is an appropriate way to move toward solving the problems of domestic and international inconsistency while remaining faithful to the U.S. court system’s fundamental grounding in domestic law and the American political structure. The Supreme Court, and by extension other federal courts, should always explicitly consider the UNHCR’s views in one specific type of case: when the UNHCR interprets text in the INA, placed there via the Refugee Act, which directly corresponds to text in the Convention. Such

98 See Rivera-Barrientos v. Holder, 666 F.3d 641, 649–50 (10th Cir. 2012) (discussing the UNHCR’s interpretation but emphasizing that it is nonbinding and functionally giving it no weight as against the BIA’s differing interpretation).
101 See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:5, Westlaw (April 2017 update).
102 See id. (“Although not consistent, one of the most noteworthy developments in U.S. asylum law has been the weight given by U.S. authorities — including the USCIS Asylum Office, the Board, and the federal courts — to the UNHCR’s interpretation of the refugee definition . . . .”); Fitzpatrick, supra note 4, at 15–20 (cataloging a wide range of cases from the circuit courts and the BIA demonstrating inconsistency in the use of norms from elsewhere in international law in determining what type of conduct constitutes persecution for the purpose of refugee status determination).
A view is supported by both textual and prudential considerations, including the UNHCR’s subject matter expertise, its ability to harmonize the international refugee regime, and Congress’s intent in passing implementing legislation. This Part first outlines how such a system of deference would work, then expands upon each of the reasons supporting its adoption.

A. Establishing a Presumption of Deference to the UNHCR

When the Supreme Court or other federal courts hear a case involving interpretation of language in U.S. law that incorporates verbatim or closely tracks language in the Convention, the default presumption should be acceptance of the UNHCR’s views, unless they come into conflict with other U.S. law or unless the UNHCR’s views themselves are internally inconsistent. Such an analysis should be conducted, in the first instance, by the BIA, given its authority to administer and enforce the INA. When the courts review a determination based on language from the Convention, however, they should take the UNHCR’s interpretation into consideration as an initial matter at Chevron’s first step — that is, when examining whether the statutory language is ambiguous. Regardless of any BIA decision to the contrary, a qualifying UNHCR interpretation renders a potentially ambiguous statute unambiguous by clarifying the interpretation of the international regime that the statute implements. The courts would then not move on to an examination of whether the BIA’s interpretation was reasonable, preventing any direct conflict with Chevron deference to the BIA.

The different results this proposed form of deference would produce are particularly apparent in a comparison with the Court’s reasoning in Aguirre-Aguirre. If it had been in effect, the standard articulated above would have clearly applied to that case because the U.S. statutory language being interpreted — “serious nonpolitical crime” — appears verbatim in the Convention. Having concluded on this basis that the statute qualifies for presuming the correctness of the UNHCR’s view, the Court should have considered the UNHCR’s interpretation of the relevant language as it appeared in the Handbook as well as the UNHCR’s amicus brief to the Court in that case. The appearance of the same interpretation in both of these sources in turn suggests internal

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103 The last step addresses the concerns of scholars who question the internal consistency of UNHCR guidance. See O’Byrne, supra note 12, at 340–41.

104 This conflict would not, however, be avoided under the template of those scholars who reject the traditional two-step model of Chevron. See Matthew C. Stephenson & Adrian Vermeule, Chevron Has Only One Step, 95 Va. L. Rev. 597, 597 (2009). Under this alternative model, for the reasons discussed below, the UNHCR’s qualifying and valid interpretations should be given strong weight as against the BIA’s.

consistency in the views of the UNHCR. The Court should then have inquired whether an application of the UNHCR’s views would be clearly contrary to other controlling U.S. law. If this inquiry were answered in the negative, then the Court should have held that the UNHCR’s interpretation rendered the statutory language unambiguous and thus not moved on to defer to the BIA in *Chevron*’s second step — contrary to the Court’s implicit finding in *Aguirre-Aguirre* that the UNHCR’s view does not render a statute unambiguous.106

Such a process fits easily into other U.S. case law regarding consideration of the views of international entities. U.S. courts often defer to amicus briefs submitted by foreign governments, and Professor Kristen Eichensehr has recently set out a study of the types of cases in which such deference occurs.107 She concludes that deference to foreign sovereigns is particularly strongly justified — similar to how deference to the U.S. executive branch is justified — when the relevant foreign sovereign is acting as a lawmaker (as in the case of its own domestic laws or international law regimes it helped create) or has particular expertise related to the case at bar.108 Not only do Eichensehr’s findings demonstrate that there is no fundamental incompatibility between the U.S. legal system and the idea of deferring, in certain cases regarding certain questions, to international entities, but they also illustrate clear parallels to the UNHCR’s place in the international regime and highlight the reasons for and qualifications to deference that this Note proposes. The UNHCR was one of the lawmakers of the Convention, given its participation in the drafting conference resulting in the final version,109 and thus a direct contributor to the language of the Refugee Act in U.S. law. And, in questions related to the implementation of the Convention, the UNHCR certainly has particular expertise, as discussed below. As to the qualifications, U.S. courts often examine consistency of views when evaluating the input of generally highly authoritative amici, for example in *Skidmore* deference to domestic agencies.110 Eichensehr suggests a similar inquiry for courts evaluating foreign sovereign amicus briefs, as a way to assess whether those briefs represent longstanding, established views of the foreign sovereign as opposed to one-time support for a particular party in the case.111 This same rationale applies to the UNHCR — even more so because adoption of positions that represent a consistent

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106 See id. at 424, 427.


108 See id. at 365. Eichensehr also finds *Chevron* deference specifically to be inappropriate in the context of foreign sovereigns because there cannot possibly be any implied delegation of authority to them from Congress. Id. at 327. As discussed previously, the exact opposite is true of the UNHCR.


111 Eichensehr, supra note 107, at 364.
interpretation is what furthers the goal of harmony in the international regime as a whole.

B. The UNHCR’s Expertise Advantage

The more robust form of consideration proposed by this Note would leverage the UNHCR’s unique institutional capacity to develop expertise. Because the organization has significant subject-matter expertise, its interpretations are more likely to yield accurate interpretive results and desirable policy than are those of other bodies whose views the courts might consider. The UNHCR statute sets out a wide range of functions for the office, including “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, [and] supervising their application and proposing amendments thereto,” as well as assisting with governments’ efforts to both help refugees and reduce the number of refugees, promoting the admission of refugees into states’ territories, obtaining information about national refugee situations, and assisting with the efforts of private organizations concerned with refugees’ welfare.112 And indeed, today the organization is present on the ground in 470 locations in 128 countries.113 The UNHCR estimates that, of the world’s 17.2 million refugees in 2016, it provided some form of assistance to 12.9 million.114 It is the UNHCR that identifies refugees for possible resettlement to the United States, provides initial screening of these individuals based on the Convention’s criteria, and refers them to U.S. authorities.115 This is a service the agency provides worldwide, and in 2016 the UNHCR made 162,500 refugee resettlement submissions globally.116

The Supreme Court has noted the importance of expertise in giving strong consideration to agency views, most notably in the context of Chevron deference to domestic agencies, where the Court in setting out the doctrine emphasized agencies’ technical competence in their areas of focus.117 In both its role implementing the Convention globally and its direct integration into the U.S. refugee program, the UNHCR is functionally similar to a domestic agency, except its expertise is on a much broader global scale. In fact, given its extensive role in the daily implementation of the Convention, the UNHCR’s expertise in this specific area is deeper than the BIA’s.

114 Id. at 17.
One argument against deference to the UNHCR is based on the infrequent updating of the *Handbook* and purported lack of grounding of UNHCR guidance in day-to-day application of refugee law domestically.\(^\text{118}\) But the UNHCR's amicus briefs function as real-time updates to its views applied to specific cases while a steady source of law such as the *Handbook* provides predictability. Domestic application of refugee law is not the point — the point is international harmonization, and a grounding in domestic law is not the main value added by the UNHCR. Further, many scholars and even federal judges have leveled equally, if not more serious, criticisms at the BIA, arguing that its decisions lack reasoning and are inconsistent with one another,\(^\text{119}\) underscoring the fact that some such periodic flaws may be inevitable in any decisionmaking body — and can be mitigated by thoughtful qualifications to deference.

### C. Promoting International Consistency

The fact that the UNHCR is deeply involved with the implementation of the worldwide refugee regime also militates in favor of greater deference to its interpretations for the sake of international consistency. Displaced people seeking refugee status often come into contact with both the UNHCR and U.S. authorities during the long process of application adjudication and eventual resettlement; it makes little sense that they should have to face different interpretations of the language defining their rights and legal status at different points in the process.

The UNHCR is also in a better position to harmonize the international regime than individual states are. It has a robust history of submitting its views to courts around the world, and is at times even approached directly by courts with requests for its interpretations.\(^\text{120}\) Some countries have viewed the UNHCR's views as highly persuasive,\(^\text{121}\) although there is inconsistency between different national regimes of deference and within some of them, as in the United States.\(^\text{122}\) Professor Fatma Marouf, however, argues that deference to the UNHCR cannot take the place of consideration of other states’ interpretations of the Convention (although even she agrees that U.S. courts should clarify

\(^{118}\) See O’Byrne, *supra* note 12, at 340.

\(^{119}\) See Anker, *supra* note 101, § 14.


their jurisprudence about the role of the UNHCR). While Marouf sets out detailed criteria for choosing amongst the divergent array of states’ views, this is certainly a more complex standard to apply than that proposed above, undermining somewhat the benefits of predictability and consistency.

In contrast to this multiplicity of states’ views, the UNHCR is in a position to distill multiple countries’, including the United States’, views of the Convention into one coherent body of law. After all, the UNHCR is governed in part by its Executive Committee, a subsidiary organ of the U.N. General Assembly made up of representatives of member states that advise the UNHCR and review its funds and programs. Marouf dismisses the UNHCR by arguing alternately that its views do not always reflect existing state practice and that treating the UNHCR like a state in the enforcement and interpretation regime encourages states to shirk their responsibilities to enforce the Convention. But the first of these points is no weakness, because, as discussed above, one advantage of the UNHCR’s views is the unique expertise that the agency brings; and further, there is no way that the UNHCR could perfectly reflect state practice because, as Marouf admits, not all states have the same practice. And, to the second point, because only states have the territory in which refugees are to be resettled, they could never be cut out of the refugee regime entirely — and if states, including the United States, scaled back on the practice of promulgating different interpretations of the Convention rather than deferring to the UNHCR, that, this Note argues, would be for the best.

D. Aligning with Congressional Intent

There is also reason to believe that Congress intended some level of consideration of the UNHCR’s views. As an initial matter, it is reasonable to presume that, in ratifying the 1967 Protocol, Congress intended to join an international regime governing the recognition and rights of refugees. To assume otherwise would be to ascribe to Congress intentional disingenuousness in the international arena, an idea that is both

123 See Marouf, supra note 121, at 479.

124 See id. at 452–66.

125 Executive Committee, UNHCR, http://www.unhcr.org/en-us/executive-committee.html. Some scholars argue that this strong connection to states parties is a weakness because it renders the UNHCR’s judgments not impartial or because it inhibits consensus within the UNHCR. See O’Byrne, supra note 12, at 341. But, given a goal of consensus among states, the UNHCR’s close connection to states could be an asset.

126 See Marouf, supra note 121, at 475–78.

127 None of this, of course, is to say that U.S. courts should not consider the views of other signatory countries, just that they should not do this instead of affording the UNHCR a structured role in the interpretation of the Convention.
uncomfortable on its face and out of alignment with the historical conception of our government and its place in the world.\textsuperscript{128} Of course, the international obligations created by treaties are not always fulfilled automatically, and the Convention and Protocol, like many modern treaties, have generally been regarded as not self-executing in domestic law.\textsuperscript{129} But the text of the Refugee Act demonstrates a purpose to conform U.S. law to the international regime. Much of the language in the Act is identical or almost identical to corresponding language in the Protocol, representing a marked and deliberate change from the previous state of domestic law. The Court explicitly acknowledged this intention of the Refugee Act as recently as 2009 in \textit{Negusie}.\textsuperscript{130}

The UNHCR has been part of the international refugee regime from the start. In fact, the UNHCR predates the Convention, and their formations are closely linked. In December 1950, the U.N. General Assembly passed a resolution establishing the UNHCR and setting out its Statute of Office.\textsuperscript{131} The immediately following resolution, passed the same day, convened a conference of states and the newly formed UNHCR to complete the drafting of the Convention.\textsuperscript{132}

In turn, the Convention and the Protocol require states parties to “undertake to co-operate with the [UNHCR]” and “facilitate its duty of supervising the application of the provisions of [the] Convention.”\textsuperscript{133} In its amicus briefs filed with the U.S. Supreme Court, the UNHCR has asserted its authority based on the “undertake to cooperate” language in the 1967 Protocol and its functions as set out in its statute.\textsuperscript{134} It has also pointed to its mandate to facilitate the continued harmonization of the Convention regime at the international level,\textsuperscript{135} a goal that the United

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\item\textsuperscript{128} Alexander Hamilton, arguing in favor of constitutional provisions dividing treaty-making power between Congress and the President, noted that international treaties “are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith.” \textit{The Federalist No. 75}, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 2003); \textit{see also} Garcia v. Sessions, 856 F.3d 27, 54 (1st Cir. 2017) (Stahl, J., dissenting) (“A treaty, ultimately, ‘depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it,’ and there is no reason why the judiciary, as a co-equal branch of government, should interpret a statute in such a way that would violate a treaty, absent a clear showing by Congress that it desires this result.” (quoting Medellín v. Texas, 552 U.S. 491, 505 (2008))).

\item\textsuperscript{129} \textit{See Legal Obligations of the U.S. Under Article 33 of the Refugee Convention, 15 Op. O.L.C. 86, 87 (1991)}.

\item\textsuperscript{130} \textit{Negusie v. Holder}, 555 U.S. 511, 520 (2009).

\item\textsuperscript{131} G.A. Res. 428(V), \textit{supra} note 112.

\item\textsuperscript{132} G.A. Res. 429(V), \textit{supra} note 109, at 48.

\item\textsuperscript{133} \textit{Refugee Convention}, \textit{supra} note 2, art. 35(1); \textit{Protocol Relating to the Status of Refugees, supra} note 3, art. 2.

\item\textsuperscript{134} \textit{See, e.g., Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondent, supra} note 60, at 1–2 (Elias-Zacharias).

\item\textsuperscript{135} “In furtherance of its core mandate, UNHCR seeks to promote a common approach to the application of the 1951 Convention and 1967 Protocol . . . thus providing consistency and predicta-
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States, given its adherence to this regime, presumably shares. The Vienna Convention on the Law of Treaties, much of which the United States considers to be binding customary international law, requires as its general rule of interpretation that terms in treaties be given effect “in their context and in the light of [the treaty’s] object and purpose.” Not only the goal of harmonization of the international refugee regime, but also the UNHCR itself, is part of the context of the Convention.

The UNHCR was already bound up in the Convention’s regime when the United States signed on. Congress’s actions in implementing the Convention and Protocol make it clear that it intended U.S. domestic law to comply with the treaty. And the treaty’s language requires, even by its most conservative interpretation, that states party to the Convention make some effort to cooperate with the UNHCR. Taken together, these facts suggest a congressional intent to at least take notice of the UNHCR and its interpretations of the Convention and Protocol in U.S. domestic adjudication, particularly given that the UNHCR was already engaged in monitoring and interpretive activities at the time that the United States joined the international refugee regime by signing the Protocol. Indeed, the Department of Justice has itself expressed an assumption “that Congress was aware of the criteria articulated in the [UNHCR] Handbook when it passed the [Refugee] Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act.” The UNHCR’s critical role in the refugee regime to which Congress signed on supports the idea that consideration of the UNHCR’s views should come before any implementation of Chevron deference to the BIA — as Justice Stevens argued in Negusie, “Congress’ effort to conform United States law to the standard set forth in the U.N. Convention and Protocol . . . underscores that Congress did not delegate the question [of the interpretation of the Convention] to the agency.”

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CONCLUSION

The U.S. refugee regime is characterized by overlapping authorities, and the UNHCR’s place in this scheme has long been unclear. This Note has argued that the UNHCR has particular claims to authority in interpreting the text of the Convention, and thus the text of U.S. law implementing the Convention. An explicitly stated standard presuming that the UNHCR’s interpretation of Convention language transposed into U.S. law is correct would go some way — even if not all the way — toward harmonizing the international refugee regime and clarifying the UNHCR’s role in domestic jurisprudence. This Note has argued that movement in this direction is desirable. Perhaps other countries would even follow the American example, leading to further international consistency and thus better safeguards for asylum seekers and immigration enforcement agents alike.140

As global refugee crises continue to command publicity, and the American President and Congress consider potentially sweeping changes to refugee law, the Supreme Court may soon have another opportunity to develop its position on the UNHCR and the connection of American law to the international regime it implements. Now could be a key moment for the Court to add clarity to this field of law and reaffirm the commitment Congress made to a global solution to the needs of refugees.

140 See Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondent, supra note 77, at 2 (Aguirre-Aguirre) (suggesting that the U.S. Supreme Court’s decision may impact the ways in which other countries interpret the Convention).