

## BOOK REVIEW

REVIEWING GUY S. GOODWIN-GILL & HÉLÈNE LAMBERT, EDS., *THE LIMITS OF TRANSNATIONAL LAW: REFUGEE LAW, POLICY HARMONIZATION, AND JUDICIAL DIALOGUE IN THE EUROPEAN UNION*. CAMBRIDGE, ENGLAND, CAMBRIDGE UNIVERSITY PRESS 2010. PP 280, HARDBACK ISBN-13: 978-0521198202

By  
Katie Yablonka\*

### INTRODUCTION

Many cite the European Union as the foremost example of the emergence of a new world legal order based on transgovernmental networks which foster the exchange the people, ideas, and commerce.<sup>1</sup> Either through harmonization or delegation of power to Brussels, EU member states have aligned their laws in critical areas such as economic and monetary policy, environmental issues, and transportation. Importantly, EU member states in the Schengen Zone have formed a tight-knit transnational network allowing the free movement of people within the Union.

As those allowed into the EU are free to enter any member state in the Schengen zone, there exists a pressing need to cooperate on issues of immigration, asylum, and refugee law. The EU recognizes this need and began calling for deeper cooperation amongst member states in the Tampere Council of 1999. There, member states agreed to work toward the creation of a Common European Asylum System (CEAS). The first phase of the establishment of CEAS ended in 2005 and consisted of implementing EU-level legislation by adopting four Directives (including the Qualification Directive) and two

---

\* U.C. Berkeley School of Law, J.D. Candidate, 2013.

1. Hélène Lambert, *Transnational Law, Judges, and Refugees in the European Union*, in *THE LIMITS OF TRANSNATIONAL LAW: REFUGEE LAW, POLICY HARMONIZATION, AND JUDICIAL DIALOGUE IN THE EUROPEAN UNION 1* (Guy S. Goodwin-Gill and Hélène Lambert, eds., 2010) [hereinafter *THE LIMITS OF TRANSNATIONAL LAW*].

Regulations pertaining to asylum. The second phase, which calls for deeper harmonization, is set to conclude in 2012.

*The Limits of Transnational Law: Refugee Law, Policy Harmonization, and Judicial Dialogue in the European Union*, edited by Guy S. Goodwin-Gill and Hélène Lambert, examines “the extent to which the ground is prepared for a common asylum system” in the context of the completion of the first phase of CEAS and approaching the completion of the second.<sup>2</sup> The volume, which focuses on refugee law, starts with the premise that judges in EU countries must understand, examine, and incorporate the opinions of judges in other EU countries to successfully establish CEAS. This premise is a sensible starting point because policy harmonization in refugee law is achieved through transnational/horizontal cooperation rather than through supra-national/vertical networks. There is no international court that applies a common interpretation of the Refugee Convention, to which all EU states are members, and the European Court of Justice (ECJ) has a surprisingly limited interpretive role. With little at the supranational level to bind judges’ interpretations of the Refugee Convention and other relevant EU-wide legislation, the extent to which EU member states cooperate in their interpretation of common refugee law legislation is best examined through judges’ use of case law from other member states. The editors acknowledge the presence of “invisible traffic”: the way judges in member states influence one another through participation in conferences membership in transnational organizations, and so forth.<sup>3</sup> The editors observe that this “influence is especially difficult to track and quantify.”<sup>4</sup> However, they maintain that the most effective way of measuring the impact of the EU’s mandate of cooperation is examining the extent to which judges cite each other’s decisions when interpreting common legislation.

Goodwin-Gil and Lambert commissioned case studies of nine EU member states (Belgium, Denmark, Sweden, France, Germany, Ireland, Italy, Spain, and the United Kingdom), each written by a judge or academic who either hails from the country or who boasts considerable experience with the country’s asylum/refugee system, to examine the extent to which each country’s judges use foreign law in their refugee-law decisions. The findings in the articles, in large part, support the editors’ hypothesis: despite the seeming necessity of using foreign case law to achieve harmonization in refugee law, judges in EU member countries rarely cite decisions from other EU countries.

The introduction explains the structure of the nine articles. Each begins with an overview of the asylum decision-making process in the country of study, analyzes the extent to which judges use decisions from other EU national courts and the importance given to those decisions, then ends with suggesting rational and cultural reasons as to why judges rarely cite foreign cases. The rational

---

2. Lambert, *supra* note 1, at 6.

3. *Id.* at 6.

4. *Id.* at 8.

reasons the authors considered include language barriers; administrative difficulties, such as ease of access to foreign decisions and extra time spent in researching them; and issues of training and familiarity with the legal systems of other member states. In analyzing cultural reluctance to using foreign judgments, the authors considered the style of judgments as indicative of legal culture, the conceptual legal framework of the judges' country, and role of civil society and popular opinion regarding asylum and refugee law cases.

The volume concludes with an article on methods and examples of treaty and supra-national statute interpretation by Guy S. Goodwin-Gill, founding editor of the *International Journal of Refugee Law* and a leading authority on the subject of asylum and refugee law.<sup>5</sup> His closing words reaffirm that, although the EU is striving for harmonization to create CEAS, interest in using foreign judgments "remains academic at best."<sup>6</sup> He ends by suggesting that the jurisprudence of EU countries can be integrated into the judiciaries of member countries through increasing the role of the United Nations High Commissioner for Refugees.

## CASE STUDIES

### *Belgium*

Jean-Yves Carlier and Dirk Vanheule, respectively law professors in the French and Flemish-speaking parts of Belgium, authored, "Where is the Reference? On the Limited Role of Transnational Dialogue in Belgian Refugee Law."<sup>7</sup> To explore Belgian judges' use of foreign case law, Carlier and Vanheule used every decision from 1999 to 2006 of the Permanent Refugee Appeals Commission (PRAC) and the Council of State, the country's highest level administrative court. They found that 3 percent of the Council of State's decisions and .28 percent of the PRAC's decisions referenced foreign law. Most of these references concerned the interpretation of the definition of "refugee" in the Refugee convention, but other cases referred to similar fact patterns in other countries, applications of civil law questions, and case law from the European Court of Human Rights.<sup>8</sup> The courts referenced case law from EU countries such as England, France, Denmark, the Netherlands, and Germany, but also from non-EU countries such as Canada, New Zealand, Switzerland, and Australia. The authors do not break down what percent of references are from

---

5. Guy S. Goodwin-Gill, *The Search for the One, True Meaning...*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 204.

6. *Id.* at 206.

7. Jean-Yves Carlier and Dirk Vanheule, *Where is the Reference? On the Limited Role of Transnational Dialogue in Belgian Refugee Law*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 17.

8. *Id.* at 25.

EU rather than non-EU jurisdictions.

The authors give both rational and cultural reasons as to what they call “the absence of a transnational dialogue.”<sup>9</sup> The rational reasons include language barriers (judges cited only one case that was not an official language of Belgium or in English), the huge number of files processed yearly, and lawyers’ rare use of foreign case law in their arguments. The primary cultural reason the authors cited for the absence of transnational dialogue was that, because Belgium is a civil law country and because the court has commonly interpreted the definition of “refugee” broadly, Belgian judges write short opinions with little reference to doctrine or case law at all.

### *France*

Hélène Lambert and Janine Silga’s article, “Transnational Refugee Law in the French Courts: Deliberate or Compelled Change in Judicial Attitudes,” records a “slight but noticeable increase in the use of foreign law” by French administrative judges.<sup>10</sup> The authors examined decisions and preparatory documents of plenary sessions of the Refugee Appeals Board from 1993 to 1996, a sample of decisions in the collection (database) of the Refugee Appeals Board, and pertinent Council of State papers available to the Refugee Appeals Board. They found only one decision that referenced foreign law, but quite a few references in preparatory documents used in the plenary sessions for the Refugee Appeals Board. The authors do not cite the overall percentage of the sample size containing references to foreign law, but do say that it “seldom” occurred.<sup>11</sup> Lambert’s interview with Vera Zederman points to the “slight but noticeable increase” in transnational references by noting their use in relation to the EC Qualification Directive and that, in particular, the Refugee Appeals Board gave strong consideration to foreign jurisprudence when drafting a bill to enact the Directive.<sup>12</sup>

In explaining why France does not cite jurisprudence from EU member states more frequently, the authors note that language does not seem to be the primary rational obstacle, but rather they point to issues concerning training (French refugee law judges are not trained in foreign law) and efficiency (French judges, especially at the first instance, are required to decide quickly). Cultural reasons that the authors believe contribute to a lack of explicit references include the following observations: that the French style of judicial opinion is typically short and formulaic, and rarely cites foreign case law; that there is no rule of precedent in France; and that the types of organizations that

---

9. *Id.* at 30.

10. Hélène Lambert and Janine Silga, *Transnational Refugee Law in The French Courts: Deliberate or Compelled Change in Judicial Attitudes?*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 56.

11. *Id.* at 44.

12. *Id.* at 48.

file refugees' petitions are just starting to use foreign law with greater frequency. Although the study yielded low numbers of explicit references to foreign jurisprudence, the extent to which French decisions consider foreign law is likely greater than the raw numbers suggest because French judicial "dialogue" considers the European Court of Justice, the European Court of Human Rights, and the highest courts of other countries.<sup>13</sup>

#### *Italy and Spain*

Francesco Messineo, author of "The Solipsistic Legal Monologue of Italian Authorities," did not find any cases in either the administrative authorities or the judicial authorities competent to make asylum decisions that referenced legal arguments from foreign case law.<sup>14</sup> Messineo's task was difficult; decisions from the Administrative Commissions are not publically available, and he was unable to gather an appropriate sample size of decisions. Additionally, relatively few cases from judicial authorities (seventy six from the Court of Cassation and fifty from the Council of State) dealt directly with asylum and refugee law. Likewise, María-Teresa Gil-Bazo, author of "'Thou Shalt not Judge' . . . Spanish Judicial Decision-Making on Asylum and the Role of Judges in Interpreting the Law," found no Spanish case in her research sample that made reference to foreign case law and knows of just one case outside of the research sample that examines transnational law.<sup>15</sup>

Messineo and Gil-Gazo researched the cultural reasons for the lack of foreign references in their respective countries' case law by conducting personal interviews. Messineo's research uncovered two key points. First, Italy's closed, civil law tradition makes "foreign law and doctrine structurally irrelevant to the Italian legal order."<sup>16</sup> Judges are constitutionally bound to reason wholly within Italian law. Second, Italy's asylum system is so "young" that it does not have consistent case law on asylum and has few lawyers or academics who are experts in asylum law, rendering Italy ill-equipped to engage in a transnational dialogue.<sup>17</sup> Gil-Bazo's research led to three key reasons that prevent Spain from utilizing foreign jurisprudence more often. First, asylum decisions turn not on interpretation of law, but rather on credibility issues. Second, judges do not have the time and training to consult foreign case law because they are not experts in the field. Third, judges are not forced to confront foreign case law because lawyers rarely use it in their arguments.

---

13. *Id.* at 35-36, 52.

14. Francesco Messineo, *The Solipsistic Monologue of Italian Authorities*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 99, 102-03.

15. María-Teresa Gil-Bazo, 'Thou Shalt Not Judge'... *Spanish Judicial Decision-Making on Asylum and the Role of Judges in Interpreting the Law*, in *The Limits of Transnational Law*, *supra* note 1, at 120-21.

16. Messineo, *supra* note 14, at 87.

17. *Id.* at 87, 105-06.

*Germany*

“The Use of Foreign Asylum Jurisprudence in The German Administrative Courts,” by Paul Tiedemann, a judge at the Administrative Court of Frankfurt am Main for over thirty years, concluded that just 0.23 percent of refugee law decisions referred to foreign decisions.<sup>18</sup> The most common foreign court cited was not one from an EU country, but rather from Switzerland. Tiedemann conducted his research through keyword searches in French, English, and German in the most extensive judicial database in the country, covering more than 5,500 decisions as of March 31, 2007. With the exception of the administrative court in Cologne, which knowingly bucks general German practice by using transnational and international jurisprudence to interpret the Refugee Convention in a way that is more in line with international norms, Tiedemann concludes that most German courts are not genuinely interested in foreign decisions. Tiedemann discounts the theory of “invisible traffic” because German opinions must lay out the judge’s reasoning; citing a foreign opinion would thus render a German court’s reasoning more persuasive.<sup>19</sup>

To examine the rational and cultural reasons behind the lack of foreign citations in asylum decisions, Tiedemann sent out a survey, to which twenty-two percent of the German administrative judiciary responded. Between this survey and his own personal experience, Tiedemann concludes that the most important reasons why foreign law is not more often cited are German judges’ lack of internet knowledge to research foreign databases, the judges’ heavy workloads, and the “Two Worlds Doctrine,” under which most administrative judges deal with treaty provisions and statutes applicable in all EU countries as they are enacted within German national law rather than through the original language of the provision itself.<sup>20</sup>

*Denmark*

Jens Vedsted-Hansen, law professor and former member of the Danish Refugee Appeals Board, authored “The Absence of Foreign Law in Danish Asylum Decisions – Quasi-Judicial Monologue With Domestic Policy Focus.”<sup>21</sup> He recalled one case from his experience on the Board in which a lawyer referenced a foreign judicial practice, but in his search of the annual reports of the Board from 2002–2006, no decision used foreign case law directly related to asylum or refugee law.

---

18. Paul Tiedemann, *The Use of Foreign Asylum Jurisprudence in the German Administrative Courts*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 72.

19. *Id.* at 73.

20. *Id.* at 78-80.

21. Jens Vedsted-Hansen, *The Absence of Foreign Law in Danish Asylum Decisions – Quasi-Judicial Monologue With Domestic Policy Focus*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 170.

Two reasons, unique to the Danish legal landscape, explain the obstacles to referencing foreign case law. First, much of the substantive EC legislation applicable to other EU member states, such as the Qualification Directive, are not applicable in Denmark because of Danish resistance to EU-level harmonization. Second, there is no judicial review from decisions of the Refugee Appeals Board, which stifles the use of foreign case law because the Board is only a quasi-judicial body that is simply not designed to engage in a transnational dialogue.

#### *Sweden*

In “Foreign Law in Swedish Judicial Decision-Making: Playing a Limited Role in Refugee Law Cases,” author Rebecca Stern found that, although Swedish judges often refer to materials from EU countries and case law from international courts, references to case law from another EU country in a Swedish asylum/refugee law decision could not be found.<sup>22</sup> Her study included relevant case law from the now defunct Aliens Appeals Board, the Migration Court of Appeal, and a “representative selection” from the Migration Courts.<sup>23</sup>

Stern concludes that cultural, rather than rational, reasons explain Swedish judges’ reluctance to use foreign case law in their decisions. The Swedish judiciary does not see its role as “interpreting the law in the light of morals or values,” but rather to “execute the political intentions codified in the legislature.”<sup>24</sup> Additionally, Swedish judges are hesitant to use case law from other EU countries because they likely consider their reasons to be of only limited use because of the varying asylum procedures from country to country.

#### *United Kingdom*

Hélène Lambert and Raza Husain’s article, “The British Judiciary and the Search for Reciprocal Relations with its Continental Partners,” considers every published court decision from England and Scotland until January 2008 to conclude that although the British judiciary frequently cites decisions from other common law countries in asylum and refugee law decisions, citations to continental European cases are considerably rarer.<sup>25</sup> However, various judicial authorities do cite to the general practices and approaches of continental European countries and consider foreign law as persuasive authority.

---

22. Rebecca Stern, *Foreign Law in Swedish Judicial Decision-Making: Playing a Limited Role in Refugee Law Cases*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 197.

23. *Id.* at 191-92.

24. *Id.* at 200.

25. Hélène Lambert and Raza Husain, *The British Judiciary and the Search for Reciprocal Relations with its Continental Partners*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 126, 148.

Lambert and Husain found the primary rational reasons preventing British judges from using continental decisions frequently concerned: language barriers (few continental decisions are translated into English); the availability and accessibility of foreign decisions, as continental countries often do not make their decisions available to the public; and training, as judges, not educated in comparative systems of law, conduct foreign research only out of intellectual curiosity. The primary cultural reasons relate to a judicial premium on reciprocity and flexibility. British judges are more likely to reference decisions from other common law countries that also allow for references to foreign judgments, and the preference of citing to decisions seen conducive to flexibility and dialogue, which tends to not include continental European decisions.

### *Ireland*

As seen through Siobhán Mullally's article, "Speaking Across Borders: the Limits and Potential of Transnational Dialogue on Refugee Law in Ireland," Ireland appears as the partial exception to the hypothesis of this book, relying considerably on transnational dialogue in the context of asylum and refugee law.<sup>26</sup> Judges frequently cite decisions from the UK and other common law countries, but only occasionally cite the decisions of civil EU countries. Additionally, as Ireland's body of case law on asylum issues grows, the references to foreign case law appear to be decreasing. Although Mullally's sample size is small (only twenty decisions of Refugee Decisions Tribunal were published at the time of her research), the practice of citing foreign decisions was pervasive enough for her to conduct effective research.

Irish judges infrequently cite continental European decisions because, although the judges have a firm grasp on comparative law, their education takes place within the common law system, promoting a sense of unfamiliarity with regard to continental civil systems. Additionally, language barriers and different styles of judicial reasoning present obstacles to more transnational dialogue with continental Europe.

## DISCUSSION

Lambert and Goodwin-Gill take an impressive first step in answering the question of just how harmonized EU member states' asylum and refugee systems are in preparation for CEAS. Their task was difficult; they commissioned research in nine countries—many with different asylum procedures, styles of judgment, and varying public availability of decisions. Additionally, because the EU Qualification Directive was adopted as part of the first stage of CEAS in 2004 and the authors conducted their research using cases

---

26. Siobhán Mullally, *Speaking Across Borders: the Limits and Potential of Transnational Dialogue on Refugee Law in Ireland*, in *THE LIMITS OF TRANSNATIONAL LAW*, *supra* note 1, at 150.

published no later than 2008, only four years of case research relating to EU-specific law supporting harmonization of asylum and refugee law were available to the authors.

Given the difficulties of conducting this research, Lambert and Goodwin-Gill present convincing evidence that, by and large, EU member countries are not commonly using decisions of other member states in interpreting either the Refugee Convention or the Qualification Directive. The strength of the volume lies in its successful reliance on the expertise of each article writer on their country's asylum process and on their unique insights, either as a native or a long-time resident of the countries about which they write. The best example of this is the Belgian article, co-written by professors teaching in French and Flemish speaking areas of the country, presumably for the purpose of obtaining a holistic perspective. Many of the authors use their extensive networks in their respective countries to provide a first-hand account of the relevance of foreign case law, or lack thereof, in each country's judicial culture. María Teresa Gil-Bazo and Francisco Messineo, for example, conducted interviews with important actors in the asylum decision-making process in order to understand better why Spain and Italy's judiciaries do not cite foreign case law in their decisions. Jean Vested-Hansen's article also benefits from his experience and expertise. His experience on the Danish Refugee Appeals Board renders his conclusion that Danish decision makers almost never cite foreign case law more convincing than it would be if it came from another author. Additionally, his personal experience was necessary in reaching this conclusion, because only one practitioner, out of the over one hundred practitioners contacted, responded to his survey on why the use of foreign case law is so limited in Denmark. Paul Tiedemann's article on German use of foreign law is the best example of the book's reliance on the strength of the individual authors' expertise. As an administrative law judge for over thirty years and a lecturer in asylum law, he was able to not only conduct an extensive and statistically meaningful survey; he also was able to interpret the seemingly contradictory results in a way that best explained the results of his study.

That a different author pens each article is perhaps one of the book's greatest weaknesses. Methodologies differ from article to article, making it difficult to compare the findings of judicial use of foreign law from one article to the next. It would be impossible and likely imprudent for the editors or authors to have completely harmonized the methodologies, given the different processes of asylum in each country and the quantity and availability of decisions for each author's research. However, when sample sizes range from twenty to thousands—some databases keyword searched, and other decisions randomly selected for analysis—it makes reading for the same information in each article somewhat difficult.

Additionally, given that each author is coming from a different frame of reference, the qualitative analysis of the findings is also difficult to compare. For example, Belgian judges seem to cite foreign materials from more EU member

countries than any other nation included in the study, but the overall percentage of opinions citing such materials was low, and presumably because the authors did not have access to the other articles while writing, their qualitative analysis focuses entirely on the perceived lack of judicial willingness to cite case law from other EU countries. Relative to the other civil law countries, especially Italy and Spain, Belgium cites foreign case law far more frequently. These weaknesses could have perhaps been compensated for with either a more robust introduction or a conclusion that spent more time synthesizing the findings.

Another consequence of an edited volume with so many contributors, and also likely a consequence of writing a book whose thesis involves the absence, rather than presence, of foreign case law, is that the text is often not completely on-point. Perhaps because references to decisions by judges from EU countries were so infrequent, most of the articles spent considerable time discussing references to case law in countries outside of the EU (Canada, New Zealand, and Switzerland, for example), or to references to international treaties or case law. While interesting and illustrative, discussing these references alongside references to decisions by judges in EU countries made focusing on the purpose of the book difficult. To avoid confusion and keep the purpose of the book clear, each article could have perhaps devoted a section specifically to analyzing the frequency of, and reasoning behind, when decisions of judges of EU member countries are used. The difficulty in commenting on the absence of the use of case law from other EU states in domestic decision-making is perhaps best seen in Goodwin-Gill's conclusion. After a few short pages of synthesis, he moves to a detailed discussion of tools of interpretation and a case study involving the UK's use of interpretive strategies to incorporate international and transnational materials into their judgments. The article is well-written and well-supported, but seems to be beyond the scope of the book. The space could have been better used perhaps for a more detailed section on suggestions to improving the dearth of references to foreign case law or giving the reader his opinion on how we should interpret the findings of the nine contributors.

#### CONCLUSION

Ultimately, the book's greatest success is that the editors have opened the door for far more research on this subject as the study makes its way into the general discussion on harmonization in EU refugee law. As the steps undertaken to implement CEAS continue, this book raises awareness of the limits of its implementation on a national level. Reading this study will be useful to actors at all stages of the asylum decision-making process in EU countries, particularly for those with "young" asylum systems, such as Italy and Spain, and for former eastern bloc countries that have recently acceded to the European Union. While Lambert and Goodwin-Gill were unable to examine the former eastern bloc countries' asylum practices, because they had so recently acceded at the time of writing and because of issues with availability of data, their study here will

2011]

*BOOK REVIEW*

755

hopefully pave the way for similar studies that incorporate information from these countries. My own hypothesis is that the future for harmonization in EU refugee law lies in the path these new EU member states will take. As many of these countries have not historically had to develop a robust tradition of refugee and asylum law and must now, at a quick rate, prepare for CEAS while likely receiving much higher numbers of asylum applications, it is logical that they will look to the decisions of older member states for guidance in interpreting the Refugee Convention and especially the Qualification Directive.