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Do Human Rights Treaties Help Asylum-Seekers?: Lessons from the United Kingdom

Stephen Meili*

ABSTRACT

This Article analyzes the circumstances under which international human rights treaties have helped or hurt asylum-seekers in the United Kingdom since 1991. Combining a database of nearly two thousand asylum decisions and fifty-one interviews with U.K. refugee lawyers, it identifies several factors which help determine the impact of human rights treaties in individual cases. It focuses on the United Kingdom because that country has ratified or otherwise adopted numerous human rights treaties over the past three decades, and U.K. refugee lawyers regularly invoke those treaties in representing their clients.

This Article fills a gap in the treaty effectiveness literature by addressing the extent to which domestic courts rely on or otherwise reference human rights treaties in asylum litigation. It posits that the impact of such treaties in any given case depends on several factors, including the extent to which the treaty has been incorporated into domestic law and the gender of the applicant. This Article also demonstrates that

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while such treaties help asylum-seekers in some cases, in others they may do more harm than good.

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I. INTRODUCTION

For more than half a century, the primary international law assisting persons fleeing persecution in their home country has been the 1951 Convention relating to the Status of Refugees.¹ In order to obtain relief under the Refugee Convention, a claimant must demonstrate a well-founded fear of persecution in her home country on account of at least one of five enumerated grounds: race, religion, nationality, political opinion, and membership in a particular social group.² In addition to the Refugee Convention, several international human rights treaties offer protection to those who flee harm for reasons that do not fit within one of the Refugee Convention's five enumerated grounds.³ Thus, treaties such as the Convention on the

1. See Convention relating to the Status of Refugees art. I(A)(2), July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; see also Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6233, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (removing certain limits placed on the definition of a refugee in the 1951 Convention).

2. Refugee Convention, *supra* note 1, art. I (A)(2). Article I (A)(2) of the Refugee Convention defines a refugee as a person who: "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." *Id.*; see also 1967 Protocol, *supra* note 1, art. I(2), which removed the phrase "[a]s a result of events occurring before 1 January 1951" from the refugee definition.

3. See generally MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 54–66 (2007) (commenting on the use of international human rights treaties to understand forms of persecution not explicitly included in the Refugee Convention); GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW (2007) (surveying the status of refugees, applications for asylum, and international and domestic standards of protection); JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007) (examining the complementary protection offered to people who are not technically "refugees" under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child); Kate Jastram, *Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution*, in CRITICAL ISSUES IN INTERNATIONAL REFUGEE LAW: STRATEGIES TOWARD INTERPRETATIVE HARMONY 143 (James C. Simeon ed., 2010) (providing a synopsis of the "standards governing economic persecution claims"); Jason M. Pobjoy, *A Child Rights Framework for Assessing the Status of Refugee Children*, in CONTEMPORARY ISSUES IN REFUGEE LAW 91 (Satvinder Singh Juss & Colin Harvey eds., 2013) (discussing the development and implications of the Convention on the Rights of the Child that, unlike the Refugee Convention, explicitly provides protection to children); Deborah E. Anker, *Refugee Law*,

Rights of the Child⁴ and the European Convention on Human Rights⁵ offer complementary or subsidiary protection to noncitizens, providing a source of relief from persecution independent of the protection offered by the Refugee Convention.⁶ Such treaties can assist refugees in at least two other ways: they include procedural protections not available under the Refugee Convention;⁷ and they are used as interpretative aids by courts considering claims under the Refugee Convention.⁸ This Article focuses on the extent to which human rights treaties have provided an independent basis for relief for refugees in the United Kingdom and have assisted UK domestic courts interpreting the Refugee Convention.⁹

Gender, and the Human Rights Paradigm, 15 HARV. HUM. RTS. J. 133, 141–43 (2002) (noting the expansion of refugee law in certain states to include broader human rights issues, particularly gender-based persecution).

4. See generally Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC] (setting out civil, political, economic, social, health, and cultural rights for children internationally).

5. See generally Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (establishing the European Court of Human Rights to protect the individual human rights and fundamental freedoms set forth in the Convention).

6. See, e.g., *ZH (Tanzania) v. Sec’y of State for the Home Dep’t*, [2011] UKSC 4, [23]–[26], [29]–[34] (appeal taken from Eng.) (holding that in deciding whether to return a claimant for relief to her country of origin, government officials must consider the right to family life of all members of the claimant’s family under ECHR article 8, as well as the best interests of the claimant’s children under CRC article 3(1)); see also MCADAM, *supra* note 3 and accompanying text.

7. For example, article 12 of the CRC requires States Parties to afford children “the opportunity to be heard in any judicial and administrative proceedings affecting the child.” CRC, *supra* note 4, art. 12(2).

8. According to what has become known as the human rights approach to refugee law, reference to widely ratified international human rights standards is a reasonable means of interpreting the Refugee Convention. See JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 193–208 (2d ed. 2014); see also Pobjoy, *supra* note 3, at 121–29 (“There is widespread acceptance . . . that the open-textured provisions of the Refugee Convention definition should be interpreted taking into account th[e] broader international human rights framework . . .”). Two recent cases decided by the UK Supreme Court illustrate this interpretive function. In *RT (Zimbabwe) v. Secretary of State for the Home Department*, the Supreme Court invoked the Universal Declaration of Human Rights of 1948 [hereinafter UDHR], the International Convention on Civil and Political Rights [hereinafter ICCPR], and the ECHR in concluding that the right to express—and to not express—a political opinion is sufficiently fundamental to a person’s dignity that persecution resulting from the exercise of that right justifies protection under the Refugee Convention. [2012] UKSC 38, [32]–[34], [36], [39]–[40] (appeal taken from Eng.). Also, in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, the Supreme Court referenced the UDHR in concluding that antidiscrimination was one of the fundamental purposes of the Refugee Convention. [2010] UKSC 31, [14] (appeal taken from Eng.).

9. Although complementary protection offers temporary relief from harm, it does not provide refugee status or those benefits accompanying such status. Thus, it is less attractive than asylum as a form of protection. See MCADAM, *supra* note 3, at 5, 12–13 (“Though a number of States have traditionally respected these additional *non-refoulement* obligations, they have been reluctant to grant beneficiaries a formal legal

There is scant empirical evidence regarding the extent to which domestic courts in various countries rely on or otherwise reference human rights treaties in adjudicating claims for refugee protection.¹⁰ We also know little about how frequently refugee lawyers utilize those treaties in advocating for their clients in domestic courts.¹¹ Indeed, scholars who study the effectiveness of human rights treaties acknowledge that measuring the impact of human rights treaties in the litigation context is challenging because litigation proceeds on a

status analogous to that enjoyed by Convention refugees . . .”); Jean-François Durieux, *Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection 3–4* (Refugee Studies Ctr. Working Paper Series, Paper No. 49, 2008), available at <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp49-salah-sheekh-refugee-2008.pdf> [<http://perma.cc/Y7NS-BAFR>] (archived Oct. 4, 2014). The United Kingdom also offers complementary protection beyond relief from persecution through domestic laws that extend certain benefits to refugees, including access to health care, housing, and public education. See EUR. COUNCIL ON REFUGEES & EXILES, *COMPLEMENTARY PROTECTION IN EUROPE 67–73* (2009), available at <http://www.ecre.org/component/downloads/downloads/129.html> [<http://perma.cc/GK8H-CKXT>] (archived Oct. 14, 2014).

10. For a discussion of how the human rights approach has become increasingly accepted by numerous common and civil law countries, as well as the UN High Commissioner for Refugees and most scholars, see HATHAWAY & FOSTER, *supra* note 8, at 196–97; see also FOSTER, *supra* note 3, at 28–31 (finding that the human rights approach is “generally agreed to be ‘the dominant view’”). One study gauging the impact of human rights treaties in domestic court refugee jurisprudence is Catherine Dauvergne’s analysis of references to such treaties by Canada’s Immigration and Refugee Board (IRB) between 2002 and 2012. See generally Catherine Dauvergne, *International Human Rights in Canadian Immigration Law—the Case of the Immigration and Refugee Board of Canada*, 19 IND. J. GLOBAL LEGAL STUD. 305 (2012). In addition, I analyzed the way in which IRB and appellate court judges in Canada referenced six core human rights treaties from 1990 through 2012. See generally Stephen Meili, *When do Human Rights Treaties Help Asylum-Seekers?: A Study of Theory and Practice in Canadian Jurisprudence Since 1990* (Osgoode Hall Law Sch., Research Paper No. 10/2014), 51 OSGOODE HALL L.J. (625 (2014) [hereinafter Meili, *Canadian Jurisprudence Since 1990*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386327 [<http://perma.cc/W8UX-5VLK>] (archived Oct. 4, 2014). We might expect limited references to human rights treaties as interpretive aids, given the observation in the relevant literature that such treaties only inform the interpretation of “being persecuted” under the Refugee Convention and the causal nexus between a claimant’s fear of persecution and one of the five enumerated Refugee Convention grounds. See HATHAWAY & FOSTER, *supra* note 8, at 194–95; see also Pobjoy, *supra* note 3, at 122–23 (explaining that most domestic courts have used international human rights treaties “primarily in the context of the [Refugee Convention’s] ‘being persecuted’ inquiry,” rather than using the treaties as interpretive guidance for the Refugee Convention more broadly). See generally Michelle Foster, Note, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT’L L. 265 (2002) (analyzing methods of evaluating the causal link between the Refugee Convention’s list of grounds for asylum and “well-founded fear” requirement).

11. My study of the impact of human rights treaties on Canadian asylum jurisprudence and practice includes an analysis of how Canadian refugee lawyers utilize such treaties on behalf of their clients. See Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10, at 14–30.

case-by-case basis with unique facts and procedural postures in each instance.¹²

This Article begins to fill this gap in the treaty effectiveness literature. It utilizes a mixed-method empirical approach that includes analysis of published asylum¹³ decisions by UK tribunals and appellate courts over the past two decades, as well as interviews with UK lawyers who specialize in refugee law. Through this methodology, this Article identifies those circumstances under which human rights treaties have helped refugees obtain asylum or complementary protection in the United Kingdom and when they have been unhelpful and even counterproductive.

The United Kingdom is an ideal site for such an inquiry because of the numerous international human rights instruments it has adopted in one way or another over the past two decades.¹⁴ Most prominent among these is the European Convention on Human Rights (ECHR), which the United Kingdom ratified in 1951 and effectively incorporated into its domestic law through the Human Rights Act¹⁵ in the late 1990s and 2000.¹⁶ The two ECHR provisions

12. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW AND DOMESTIC POLITICS* 133–35 (2009).

13. There are three different claims a person seeking refugee status can make in attempting “to remain in the UK: an ‘asylum claim’ under the Refugee Convention; a claim for humanitarian protection . . . under complementary protection principles” that fall outside the Refugee Convention; “and/or a ‘human rights claim’ under the [European Convention on Human Rights and the] Human Rights Act.” Maria O’Sullivan, *The Intersection Between the International, the Regional and the Domestic: Seeking Asylum in the UK*, in *REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES* 228, 251 (Susan Kneebone ed., 2009) (footnotes omitted); see also MCADAM, *supra* note 3, at 1–2 (discussing the various legal claims for asylum and humans rights enforcement outside of technical “refugee” status). As a practical matter, in each individual case, the Home Office considers all three of these bases for protection, regardless of which one(s) the claimant actually raises. See O’Sullivan, *supra*. Therefore, for purposes of this Article, unless otherwise noted, all three of these claims will be identified as claims for asylum and those who make them will be identified as asylum-seekers.

14. As a dualist state, the United Kingdom must adopt its international obligations through domestic law. O’Sullivan, *supra* note 13, at 236. The dualist framework creates a complex relationship between incorporated treaties, domestic enforcement, and assessment of compliance. For once a treaty is incorporated, it is, in effect, no different from any other UK domestic law. Whether it is perceived as such by those state and private actors who regularly engage with it (judges, lawyers, and the like) and whether that perception has an impact on enforcement and compliance, is beyond the scope of this Article.

15. See Human Rights Act, 1998, c. 42, § 1 & sch. 1 (U.K.) [hereinafter HRA]; Alice Donald, Jane Gordon & Philip Leach, *The UK and the European Court of Human Rights* 9 (Equal. & Human Rights Comm’n, Research Report 83, 2012) (indicating that the UK ratified the ECHR on March 8, 1951).

16. The United Kingdom effectively incorporated the ECHR into its domestic law when it included it as an appendix to the HRA. See HRA, sch. 1. The HRA requires UK public officials to observe the rights enumerated in the ECHR. For example, Section 6(1) of the HRA states “It is unlawful for a public authority to act in a way

most frequently utilized by UK refugee lawyers in UK domestic courts are articles 3 and 8.¹⁷ Article 3 prohibits torture and other forms of inhuman or degrading treatment or punishment, regardless of the purported justification; that is, the torture need not be tied to one of the five Refugee Convention grounds to justify relief.¹⁸ Article 8 protects the right to family and private life.¹⁹ UK domestic courts have relied on article 8 in granting complementary protection in two situations: the most common is the so-called “times and ties” scenario, where the claimant has established links to the United Kingdom through family or private life.²⁰ The second scenario occurs where article 8 is invoked in relation to conditions in the claimant’s country of origin.²¹

which is incompatible with a[n ECHR] right.” *Id.* § 6(1). The HRA “went into force in Scotland in July 1999 and in England and Wales in October 2000.” Richard Maiman, *Asylum Law Practice in the United Kingdom After the Human Rights Act*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 410, 410 (Austin Sarat & Stuart Scheingold eds., 2005).

17. Both before and after the ECHR was effectively incorporated into UK domestic law, UK lawyers often filed petitions pursuant to it with the European Court of Human Rights in Strasbourg, France. See VAUGHNE MILLER & JULIE GILL, *HOUSE OF COMMONS LIBRARY, SN/IA5611, UK CASES AT THE EUROPEAN COURT OF HUMAN RIGHTS SINCE 1975* (2013), available at <http://www.parliament.uk/briefing-papers/SN05611/uk-cases-at-the-european-court-of-human-rights-since-1975> [<http://perma.cc/UL7F-E23J>] (archived Oct. 18, 2014) (providing a list of UK cases that were filed at the European Court of Human Rights between February 1975 and May 2014). Indeed, “[t]hrough 1996, the European Court of Human Rights had found forty-one violations of the [ECHR] by the [UK], [more than] any [other] Council of Europe member state.” Maiman, *supra* note 16, at 422 n.1 (citing DONALD W. JACKSON, *THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1997)).

18. ECHR article 3 states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” ECHR, *supra* note 5, art. 3. For an example of the way in which article 3 offers broader protection than the Refugee Convention, see *Secretary of State for the Home Department v P (Cameroon)*, [2003] UKIAT 00199 [3], [12.6], [13.4]–[15] (IAT) (indicating that a claim under the Refugee Convention failed because any future detention would not be for a Convention reason, but succeeded under article 3 because of the high likelihood that the claimant would be detained if returned and, in detention, subjected to inhuman/degrading treatment).

19. ECHR article 8 states: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” ECHR, *supra* note 5, art. 8(1)–(2).

20. See, e.g., *Ogundimu v. Sec’y of State for the Home Dep’t*, [2013] UKUT 00060, [29]–[36], [128]–[136] (IAC) (setting aside the decision of the First-tier Tribunal to deport the claimant on several grounds, including that the claimant had lived in the United Kingdom for more than half of his life and his partner and child lived in the United Kingdom).

21. See *EM (Lebanon) v. Sec’y of State for the Home Dep’t* [2008] UKHL 64, [5], [18] (appeal taken from Eng.) (reporting the House of Lords’ ruling that it would be a flagrant denial of the right to respect of family life under article 8 for claimant and her son to be removed to Lebanon, where claimant would automatically lose custody of her son). The European Court of Human Rights requires that claimants establish a

The empirical data gathered for this Article suggest that international human rights treaties like the ECHR have assisted many refugees in obtaining asylum or complementary protection in the United Kingdom. The data also show, however, that other international instruments, including human rights treaties which the United Kingdom has ratified, have had little positive impact on individual asylum claims. Moreover, the extent to which *any* human rights instrument, including the ECHR, has assisted asylum-seekers has declined in the past half-decade.

Why have certain human rights instruments assisted asylum applicants in the United Kingdom while others have not? And why have such instruments generally become less helpful to applicants in recent years? These are the questions this Article analyzes. Part II discusses the inability of the treaty effectiveness scholarship to adequately explain the circumstances under which human rights treaties assist asylum-seekers in the litigation context. Part III provides a summary of the asylum determination process in the United Kingdom. Part IV describes the methodology for this study. Part V analyzes the empirical data, including any statistically significant relationships between the way that treaties are referenced by judges and four variables: gender of the applicant, gender of the judge, level of the adjudication (tribunal or appeals court), and applicant's country of origin. The conclusion draws comparisons between the results of this study and a previous analysis of the impact of human rights treaties on asylum jurisprudence and practice in Canada.²² This comparison leads to a new perspective on human rights treaty effectiveness in the asylum context. It also leads to a series of recommendations for how refugee lawyers—in the United Kingdom and elsewhere—can more effectively utilize human rights treaties on behalf of their clients.

II. THEORETICAL EXPLANATIONS

Substantial scholarship in recent years has probed the related questions of why states comply with human rights treaties and whether such treaties influence state behavior.²³ This literature thus

"flagrant breach" of article 8 rights, which is a difficult standard to meet. See John RWD Jones, *Extradition*, in HUMAN RIGHTS IN THE INVESTIGATION AND PROSECUTION OF CRIME 393 (Madeleine Colvin & Jonathan Cooper eds., 2009).

22. See generally Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10 (analyzing the way in which IRB and appellate court judges in Canada referenced six core human rights treaties from 1990 through 2012).

23. For a helpful summary of this literature, see Alison Brysk & Arturo Jimenez-Bacardi, *The Politics of the Globalization of Law*, in THE POLITICS OF THE GLOBALIZATION OF LAW: GETTING FROM RIGHTS TO JUSTICE 1, 4–10, (Alison Brysk ed., 2013). See generally RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING*

provides possible explanations for trends in how judges have referenced human rights treaties in asylum decisions over the past two decades.²⁴ This section of the Article analyzes these explanations.

The treaty effectiveness literature is aligned along a spectrum from “optimists” to “pessimists”.²⁵ Those on the “optimistic” end of that spectrum believe that treaty ratification has a consistently salutary effect on state behavior. Those on the “pessimistic” end argue that treaty ratification often provides cover to states that engage in more human rights violations than would otherwise have been the case.²⁶ Most of this scholarship focuses on contingencies: factors which influence treaty effectiveness. The factor most relevant to this Article is the presence of domestic actors and institutions that encourage the enforcement of treaties. For example, Oona Hathaway concludes that “[w]here powerful actors can hold the government to account, international legal commitments are more meaningful” and “human rights treaties are most likely to be effective where there is

HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013) (examining how material inducement, persuasion, and acculturation influence states’ decisions); Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in TORTURE: A COLLECTION 199 (Sanford Levinson ed., 2004) (analyzing how a state’s rationale for signing a treaty might influence the state’s implementation of that treaty and suggesting that consideration of state rationales for signing treaties can be used to create more enforceable, and thereby more effective, treaties in the future); Oona A. Hathaway, *Do Human Rights Make a Difference?*, 111 YALE L.J. 1935 (2002) (analyzing the impact of signing international human rights treaties on domestic policies and finding that “the current treaty system may create opportunities for countries to use treaty ratification to displace pressure for real change in practices”); Pamela Quinn Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. INT’L L. & POL. 97 (2012) (providing an overview of enforcement mechanisms in human rights treaties and arguing that reporting requirements can be an effective part of an integrated approach to enforcement).

24. See *infra* Part I. For the balance of this Article, unless otherwise noted, the terms “judicial,” “judge,” or “judges” refer to judges and/or judicial decisions at both the tribunal and appellate court levels.

25. See Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 932 tbl.1 (2005). Neumayer identifies the following six theories of expectations about the impact of human rights treaty ratification:

- (Neo)realism. Pessimism: No effect on state behavior and potentially even negative effect;
- Institutionalism. Pessimism: No effect on state behavior;
- Regime theory. Cautious optimism: Possibly long-term positive effects;
- Transnational legal process. Optimism: Positive effects;
- Liberalism. Contingent optimism: Positive effect dependent on degree of democracy;
- Transnational human rights advocacy networks. Contingent optimism: Positive effect dependent on strength of human rights civil society with international linkages.

26. See *id.* at 927–32 (explaining in more detail the expectations of pessimistic and optimistic theories of international human rights treaties).

domestic legal enforcement of treaty commitments.”²⁷ Similarly, Eric Neumayer finds a positive relationship between the efficacy of ratified treaties and the extent of democracy and the strength of civil society: “In most cases, for treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and perhaps pressure governments into translating the formal promise of better human rights protection into actual reality.”²⁸ Wayne Sandholtz finds “that the constitutional status of treaty law and the independence of courts influence the level of human rights protections” within a given country.²⁹ He concludes that human rights treaties provide an additional tool for domestic and international activists to put pressure on governments that commit or tolerate human rights abuses.³⁰ Beth Simmons’ take is a bit different; while she says that treaties are likely to have more of an impact where “conditions exist to gain significant domestic political traction,” she emphasizes those situations where governmental institutions are less stable and thus more likely to be influenced by domestic forces that mobilize and petition for enforcement of human rights protections.³¹

Applying these conclusions to the UK asylum adjudication system, one would hypothesize that UK courts are extremely receptive to human rights-based arguments in the asylum context. First, lawyers are the kind of influential actors who can pressure governments to abide by their treaty obligations. Indeed, UK refugee lawyers have for decades utilized human rights treaties in domestic

27. Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 593 (2007).

28. Neumayer, *supra* note 25, at 950. For additional insights on the ability of mobilized advocates to compel enforcement of human right norms, see generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998). For references to that strain of the democratic institutions school of thought, which focuses on majoritarian influence over state actors, see Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT’L STUD. Q. 149, 151–52, 166 (2009).

29. Wayne Sandholtz, *Treaties, Constitutions and Courts: The Critical Combination*, in *THE POLITICS OF THE GLOBALIZATION OF LAW: GETTING FROM RIGHTS TO JUSTICE*, *supra* note 23, at 29, 37–38. Elkins, Ginsburg, and Simmons reach a similar conclusion in their study of the effectiveness of the International Convention on Civil and Political Rights and the Universal Declaration of Human Rights. See Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61, 91–92 (2013). According to these authors, the adoption of human rights norms into treaties and domestic constitutions “provides multiple monitors and alternative fora in which to challenge government behavior.” *Id.* at 92.

30. Sandholtz, *supra* note 29, at 38.

31. See SIMMONS, *supra* note 12, at 16–17.

courts and at the European Court of Human Rights.³² Second, the United Kingdom is the kind of highly functioning democratic state with a strong civil society that increases the likelihood of adherence to treaty norms.³³ And third, the United Kingdom has an independent judiciary, which has been associated with respect for human rights.³⁴ These factors support the hypothesis that human rights treaties have a strong influence on UK domestic courts.

Another hypothesis justified by the treaty effectiveness literature is that certain treaties will be more helpful to refugees than others. In his study of three human rights treaties, Daniel Hill concludes that treaty efficacy is related to the substantive right being protected.³⁵ He found that states were more likely to comply with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³⁶ than either the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)³⁷ or the International Covenant on Civil and Political Rights (ICCPR).³⁸ His explanation is that states are more threatened by political dissidents (whose freedom of expression is protected by ICCPR and CAT) than by women who claim gender-based discrimination (whose

32. See Maiman, *supra* note 16, at 417–18; Susan Sterett, *Caring About Individual Cases: Immigration Lawyering in Britain*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 293, 293–316 (Austin Sarat & Stuart Scheingold eds., 1998); see also MILLER & GILL, *supra* note 17 (listing a large quantity of UK human rights cases brought before the European Court of Human Rights from 1975 to 2014 and noting which articles of the ECHR were at issue in each case).

33. The United Kingdom has consistently received the highest ranking from Freedom House on a scale measuring a variety of political rights and civil liberties in countries around the world. *Freedom in the World: United Kingdom*, FREEDOM HOUSE, <http://freedomhouse.org/report/freedom-world/2014/united-kingdom-0#.VESQUFaRfGA> [<http://perma.cc/ZJ7N-BGWP>] (archived Oct. 19, 2014 9. The Freedom House website includes issues of *Freedom in the World* from 1999 to 2014, available at <http://www.freedomhouse.org/reports> [<http://perma.cc/CXL6-UBXH>] (archived Oct. 5, 2014).

34. See Sandholtz, *supra* note 29, at 36–37 & tbl.2.3. An independent judiciary is one of the indicia by which Freedom House ranks the countries of the world. See, e.g., *Freedom in the World: United Kingdom*, *supra* note 33.

35. See Daniel W. Hill, Jr., *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 J. POL. 1161, 1169–73 (2010).

36. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW].

37. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. Doc. A/RES/39/51 (Dec. 10, 1984) [hereinafter CAT].

38. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966) [hereinafter ICCPR]; see Hill, *supra* note 35, at 1172 (“CEDAW shows a promise for improving state behavior,” but “the CAT and . . . CCPR seems to actually be associated with worse practices . . .”).

rights are protected by CEDAW).³⁹ One thus could hypothesize that the treaties most helpful to asylum-seekers in UK domestic courts are those which protect rights least threatening to the government. In addition to CEDAW, this would include the Convention on the Rights of the Child (CRC), which is designed to protect children, a particularly sympathetic and nonthreatening group.

The hypotheses outlined above are only partially borne out by the data analyzed in this Article. For example, despite the presence in the United Kingdom of many of the indicia for treaty effectiveness set forth in the relevant literature, references to ratified human rights treaties rarely appeared in published UK tribunal and appeals court opinions prior to the passage of the Human Rights Act in 1998,⁴⁰ which, as noted above, effectively incorporated the ECHR into UK domestic law.⁴¹ This surge in utilization of treaties after passage of the Human Rights Act demonstrates that incorporation is one of the strongest factors influencing the effectiveness (or at least the use) of human rights treaties.

The link between treaty incorporation and effectiveness in the United Kingdom is not a surprise, given that it is a dualist country; that is, international treaties only have the force of law if they have been adopted by the House of Commons in the form of a law.⁴² However, what is more puzzling is that the frequency of treaty references in published UK judicial decisions has lessened over the past ten years.⁴³ Moreover, the proportion of such references which help refugees obtain relief has also declined within that period.⁴⁴ Finally, the most effective treaties are not necessarily those which help nonthreatening asylum-seekers.⁴⁵

39. See Hill, *supra* note 35, at 1169, 1172.

40. See HRA, *supra* note 15, § 3 (“[P]rimary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [ECHR] rights.”); *infra* Graph 1 and accompanying text.

41. See *supra* note 16 and accompanying text.

42. See ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 306 (2012); Fisnik Korenica & Dren Doli, *The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice*, 24 PACE INT’L L. REV. 92, 96 (2012). In contrast, in monist systems, ratified treaties are “directly incorporated [into domestic law] and [are] often directly applied at the national level.” Korenica & Doli, *supra*, at 94. The United States is a mixed monist-dualist system. While Article VI of the U.S. Constitution states that treaties made by the United States are the supreme law of the land, some treaties are not self-executing and must be incorporated into domestic law through statute. See *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008).

43. See *infra* Graph 1 (showing a drop from about 300 total citations in 2004 to less than 150 in 2012).

44. See *infra* Graph 3 (depicting a drop in helpful treaty references from over 40 percent in 2007 to roughly 20 percent in 2012).

45. See *infra* Table 2 (noting that the treaties with the highest percentages of helpful references are CEDAW, ICCPR, and CAT, none of which are primarily focused on protecting asylum seekers).

For a number of reasons, the treaty effectiveness literature fails to fully explain trends in how UK judges reference human rights treaties in asylum cases. First, that literature measures treaty effectiveness through state policies and practices rather than judicial opinions.⁴⁶ When judges consider human rights-based arguments in refugee protection cases, they are usually not creating official state policy. Rather, they are deciding, among other things, whether a human rights treaty applies to a particular set of facts. As a result, the impact of treaties in the domestic court context may be driven by factors different from those identified in the literature on treaty effectiveness.

Moreover, the treaty effectiveness literature measures policies and practices directed toward a state's own citizens (for example, does the state torture them, discriminate against them, or deny them basic civil and political rights?). In the asylum context, by contrast, domestic courts are determining the rights of non-citizens. States generally afford fewer rights to non-citizens than their own nationals.⁴⁷ This differential—and detrimental—treatment is the result of factors that include concerns over national security, xenophobia, and scapegoating for domestic ills.⁴⁸ Thus, even though the treaties examined in this Article protect citizens and non-citizens alike, an entirely different set of factors may determine the effectiveness of those treaties when they are applied to each group.

In a similar vein, the treaty effectiveness literature does not account for governmental and public attitudes toward the intended beneficiaries of those treaties; in this case, asylum-seekers. Those attitudes may impact state actors—including judges hearing asylum

46. See *supra* literature referenced in notes 23, 25–31, 35, 42.

47. See David Weissbrodt & Stephen Meili, *Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?*, 28 REFUGEE SURV. Q. 34, 47–53 (2009) (finding that, despite efforts to protect the rights of non-citizens, many states continue “to deny non-citizens the rights they are guaranteed by international law, leaving them subject to harassment and abuse by political parties, officials, the media, and society at large”). In some cases, such as in the Israeli Occupied Territories and the U.S. Naval Station at Guantánamo Bay, nations create entirely different legal systems for non-citizens, placing them beyond the protections of domestic law. See generally DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002) (studying the unique body of law developed by the Supreme Court of Israel as it reviewed the military's authority in the Occupied Territories of Israel); Daryl L. Hecht, *Controlling the Executive's Power to Detain Aliens Offshore: What Process is Due the Guantánamo Prisoners?*, 50 S.D. L. REV. 78 (2005) (analyzing the legal status and rights of detainees at Camp Delta on Guantánamo Bay); Peter Jan Honigsberg, *Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. & FOREIGN AFF. 1 (2007) (discussing the development of the label “enemy combatant” as distinct from “unlawful combatant” and arguing that the enemy combatant label is used to “circumvent the Geneva Conventions”).

48. See Weissbrodt & Meili, *supra* note 47.

claims—who are charged with implementing or interpreting human rights norms. For example, over the past twenty years, UK policy toward asylum-seekers and refugees has become increasingly hostile.⁴⁹ The government has adopted measures that include detention of many asylum-seekers, limitations on appeal rights, “fast-tracking” of many asylum claims, heavy fines against those who transport undocumented persons into the United Kingdom, and drastic cuts in legal aid funding for lawyers who represent refugees.⁵⁰ A recently scrapped UK Home Office policy featured vans driving through ethnically diverse London neighborhoods adorned with posters telling undocumented immigrants to either return home or face arrest.⁵¹ And while the Home Office website claims that the United Kingdom “has a proud tradition of providing a place of safety for genuine refugees,” it hastens to add that “we are determined to refuse protection to those who do not need it, and we will take steps to remove those who have no valid grounds to stay here.”⁵² Moreover, it was recently revealed that the Home Office provides incentives, including gift certificates from local merchants, to hearing officers

49. Animosity towards asylum-seekers in the United Kingdom has a long historical tradition. See DALLAL STEVENS, *UK ASYLUM LAW AND POLICY: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 1–32 (2004) (providing a historical account of xenophobia in the United Kingdom beginning in the twelfth century).

50. See DETENTION ACTION, *FAST TRACK TO DESPAIR: THE UNNECESSARY DETENTION OF ASYLUM-SEEKERS* (2011), available at <http://detentionaction.org.uk/wordpress/wp-content/uploads/2011/10/FastTracktoDespair.pdf> [perma.cc/6WB8-UTAP] (archived Sept. 29, 2014); STEVENS, *supra* note 49, at 241–48; DANIEL WILSHER, *IMMIGRATION DETENTION: LAW, HISTORY, POLITICS* 91–94 (2012) (studying the role of detention in the current state of immigration in the United Kingdom); Stephen Meili, *U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law*, 54 B.C. INT’L & COMP. L. REV. 1123, 1134–39 (2013) [hereinafter Meili, *U.K. Refugee Lawyers*] (discussing the United Kingdom’s efforts to limit the number of asylum seekers in the country); O’Sullivan, *supra* note 13, at 232–35. See generally Maiman, *supra* note 16, at 412–14 (discussing the United Kingdom’s efforts to speed up the asylum application process such as establishing a process for “fast-tracking” certain cases and “merging the two tiers of asylum appeals tribunals”). Although the latest round of legal aid cuts exempt lawyers who represent asylum-seekers, many such lawyers finance their asylum work by representing immigrants in other matters, such as visas, employment, and housing. These other areas of legal work on behalf of immigrants are affected by the cuts. Moreover, the cuts do not exempt lawyers who assert claims on behalf of refugees under article 8 of the ECHR. See Meili, *U.K. Refugee Lawyers*, *supra*, at 1136–39.

51. See Kristin Knight, ‘Go Home’ Illegal Immigrant Van Scheme to Be Scrapped, *Theresa May Admits*, METRO (U.K.) (Oct. 22, 2013, 2:09 PM), <http://metro.co.uk/2013/10/22/go-home-illegal-immigrant-van-scheme-to-be-scrapped-theresa-may-admits-4156572/> [<http://perma.cc/6KLF-CH84>] (archived Sept. 29, 2014).

52. UK Home Office, *Claim Asylum in the UK*, GOV.UK, <http://www.ukba.homeoffice.gov.uk/asylum/claimingasylum/> (last updated Sept. 3, 2014) [<http://perma.cc/PW7K-4EHR>] (archived Sept. 30, 2014).

whose asylum claim rejection rate exceeds the government's target of 70 percent.⁵³

This hostile attitude toward refugees is reflected in, and perhaps driven by, anti-immigrant attitudes among the public and the media.⁵⁴ In polls conducted regularly since 1989, over 50 percent of Britons have agreed or strongly agreed with the statement that "[t]here are too many immigrants in Britain."⁵⁵ This anti-immigrant sentiment appears to have escalated over the past decade: while 54 percent of respondents felt there were too many immigrants in the United Kingdom in January 2001, 70 percent felt that way in early 2012, the most recent time that question was included in the same poll.⁵⁶ And in a February 2003 poll, "78 per cent of [Britons] agreed with the statement that 'It is right in principle for Britain to accept genuine asylum seekers but we have accepted our fair share and cannot take any more.'"⁵⁷

The UK media have fomented these sentiments. In the first two weeks of January 2014 alone, headlines in tabloids, as well as so-

53. See Diane Taylor & Rowena Mason, *Home Office Staff Rewarded with Gift Vouchers for Fighting Off Asylum Cases*, Guardian (U.K.) (Jan. 15, 2014, 3:26 PM), <http://www.theguardian.com/uk-news/2014/jan/14/home-office-asylum-seekers-gift-vouchers> [<http://perma.cc/CHU6-3AAM>] (archived Sept. 30, 2014). If the intent of these policies was to reduce the number of asylum-seekers in the United Kingdom, it has been realized: the number of asylum applications in the United Kingdom dropped from a high of approximately 84,130 in 2003 to 23,507 in 2013. See SCOTT BLINDER, THE MIGRATION OBSERVATORY AT THE UNIV. OF OXFORD, *MIGRATION TO THE U.K.: ASYLUM 3 & fig.1* (2014); UK Home Office, *Immigration Statistics, October to December 2013*, GOV.UK (Feb. 27, 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285031/immigration-q4-2013snr.pdf [<http://perma.cc/5YGK-4UJH>] (archived Oct. 17, 2014) (reporting 23,507 asylum applications for 2013). In another measure of the UK government's attitude toward immigrants generally, the Migration Policy Institute rated the United Kingdom's success in integrating immigrants into civil society as "halfway favourable" on a scale ranging from "critically unfavourable" to "favourable." THOMAS HUDDLESTON, JAN NIESSEN, EADAIOIN NI CHAOIMH & EMILIE WHITE, *MIGRANT INTEGRATION POLICY INDEX III* 19 (3d ed. 2011). The same study ranked the United Kingdom 12th out of thirty-one countries in Europe and North America on a multifaceted scale measuring such integration. Sweden ranked 1st and Latvia ranked last. *Id.* at 11.

54. The strong showing of the United Kingdom Independence Party (UKIP) in the May, 2014 European Parliament elections is further evidence of an increased anti-immigrant sentiment in the United Kingdom. See Andrew Osborn & Guy Faulconbridge, *UKIP Poised for Victory in Europe Vote*, REUTERS (U.K.) (May 25, 2014, 11:34 PM), <http://uk.reuters.com/article/2014/05/25/uk-eu-elections-britain-idUKKBN0E50PP20140525> [<http://perma.cc/3YQP-KSZ8>] (archived Sept. 30, 2014).

55. BOBBY DUFFY & TOM FRERE-SMITH, IPSOS MORI, *PERCEPTIONS AND REALITY: PUBLIC ATTITUDES TO IMMIGRATION 12-13* (2014), available at https://www.ipsos-mori.com/DownloadPublication/1634_sri-perceptions-and-reality-immigration-report-2013.pdf [<http://perma.cc/J4D-Z7DY>] (archived Oct. 9, 2014).

56. *Id.*

57. Shamit Saggar, *Immigration and the Politics of Public Opinion*, 74 POL. Q., no. 4, supp. 1, 2003, at 178, 182.

called broadsheets, which are usually considered more moderate, included the following:

- Asylum seekers cost taxpayers £100,000 a DAY: 2,000 refugees with no right to remain in Britain have been claiming handouts and free housing for more than a year.⁵⁸
- ‘Destitute’ asylum seekers had iPads and luxury goods, says report by government auditors.⁵⁹
- More asylum seeker chaos of foreign athletes after our Olympic legacy - Britain is facing an asylum hangover from the Olympics with dozens of foreign athletes refusing to leave.⁶⁰

Most of the lawyers interviewed for this Article feel that the demonization of asylum-seekers influences judicial decision making.⁶¹ While the extent of such influence is difficult to measure (and this Article does not attempt to do so), the treaty effectiveness literature does not account for it.⁶²

Given the failure of either of the theories described above to thoroughly explain the impact of human rights treaties in the UK asylum and litigation context, this Article develops an alternative explanation. It is based on several factors which influence whether—and in what way—judges reference human rights treaties in the refugee litigation context. These factors include the extent to which the treaty has been incorporated into domestic law, the gender of the applicant, and public hostility toward refugees. Because this new

58. Hugo Gye, *Asylum Seekers Cost Taxpayer £100,000 a Day: 2,000 Refugees With No Right to Remain in Britain Have Been Claiming Handouts and Free Housing for More Than a Year*, MAIL ONLINE (U.K.) (Jan. 14, 2014, 4:39 AM), <http://www.dailymail.co.uk/news/article-2539082/Asylum-seekers-cost-taxpayer-100-000-DAY-2-000-refugees-no-right-remain-Britain-claiming-handouts-free-housing-year.html> (subscription required) [<http://perma.cc/EE8Z-YZZ5>] (archived Sept. 30, 2014).

59. David Barrett, *‘Destitute’ Asylum Seekers Had iPads and Luxury Goods, Says Report by Government Auditors*, TELEGRAPH (U.K.) (Jan. 10, 2014, 12:01 AM), <http://www.telegraph.co.uk/news/uknews/immigration/10561239/Destitute-asylum-seekers-had-iPads-and-luxury-goods-says-report-by-government-auditors.html> (subscription required) [<http://perma.cc/ZAW-52HB>] (archived Sept. 30, 2014).

60. Anil Dawar, *More Asylum Seeker Chaos of Foreign Athletes After Our Olympic Legacy*, EXPRESS (U.K.) (Jan. 9, 2014), <http://www.express.co.uk/news/uk/452805/More-asylum-seeker-chaos-of-foreign-athletes-after-our-Olympic-legacy> [<http://perma.cc/W7YC-554N>] (archived Sept. 30, 2014).

61. See *infra* notes 159–61 and accompanying text (indicating that the interviewed lawyers believed that the media’s negative portrayal of refugees influenced judicial decisions).

62. An extensive literature analyzes the impact of public opinion on government policy, with conflicting conclusions. For a summary of this literature in the U.S. context, see Jeff Manza & Fay Lomax Cox, *A Democratic Polity?: Three Views of Policy Responsiveness to Public Opinion in the United States*, 30 AM. POL. RES. 630 (2002).

approach is based on UK refugee law and practice, it is necessary to briefly review the UK asylum adjudication process.

III. THE UK ASYLUM ADJUDICATION

What follows is a simplified description of the asylum application and adjudication processes in the United Kingdom.⁶³

The decision whether to grant asylum in the United Kingdom is a hybrid administrative and legal process. An initial determination is made by UK Visa and Immigration (formerly the UK Border Agency), which is part of the Home Office.⁶⁴ If the asylum claim is rejected by the Home Office, the claimant may appeal the denial to the Immigration and Asylum Chamber of the Tribunal Service (IAT), a two-tier administrative court system created in 2008 that makes its own findings of fact.⁶⁵ Approximately 70 percent of asylum claimants who are unsuccessful at the Home Office Stage file appeals.⁶⁶ Appeals

63. For a more detailed description of these processes, see ROBERT THOMAS, ADMINISTRATIVE JUSTICE AND ASYLUM APPEALS: A STUDY OF TRIBUNAL ADJUDICATION 16–25 (2011) [hereinafter THOMAS, ADMINISTRATIVE JUSTICE]. Thomas describes the many changes within the asylum adjudication process over the past two decades. See also STEVENS, *supra* note 49, at 163–220 (providing a detailed summary of modern asylum law in the United Kingdom); O'Sullivan, *supra* note 13, at 236–39 (noting that the United Kingdom has passed numerous laws regulating asylum and immigration since the 1990s which has resulted in a complex body of law). For a detailed analysis of the impact of recent legislative reforms on appellate rights within the asylum adjudication process, see Sarah Craig & Maria Fletcher, *The Supervision of Immigration and Asylum Appeals in the UK – Taking Stock*, 24 INT'L J. REFUGEE L. 1, 60 (2012).

64. This is the stage of the process where the government has adopted a target rejection rate of 70 percent and offered financial incentives for those officers who exceed it. See Taylor & Mason, *supra* note 53.

65. The IAT is one part of the extensive UK administrative decision making apparatus that is divided into discrete subject matters relating to numerous aspects of British life, including “social security, tax, education, transport, mental health, and immigration and asylum.” THOMAS, ADMINISTRATIVE JUSTICE, *supra* note 63, at 1. In recent years, the United Kingdom has sought to systematize what had been a disorganized array of individual decision systems. See *id.* at 3. The result, codified in the Tribunals, Courts and Enforcement Act 2007 (and updated in the Tribunals, Courts and Enforcement Act 2014), is a uniform framework that includes a two-level decision making apparatus, known as the First-tier and the Upper Tribunal. See *id.* See generally Tribunals Courts and Enforcement Act, 2007, c. 15 (U.K.); Tribunals Courts and Enforcement Act 2007 (Consequential, Transitional and Saving Provision) Order 2014, 2014, S.I. 2014/600 (U.K.).

66. See THOMAS, ADMINISTRATIVE JUSTICE, *supra* note 63, at 22. The IAT replaced the “single-tier Asylum and Immigration Tribunal,” which came into existence in 2005. MARK SYMES & PETER JORRO, ASYLUM LAW AND PRACTICE 875 (2010). The AIT, in turn, replaced the prior system of appeal comprised of the Immigration Appellate Authority and the Immigration Appellate Appeal Tribunal, which had been created in 1993. See THOMAS, ADMINISTRATIVE JUSTICE, *supra* note 63,

to the First-tier Tribunal “are heard by one or more Judges.”⁶⁷ First-tier Tribunal decisions (called “determinations”) can be appealed to the Upper Tribunal, whose judges hear cases individually or in panels of two or three, depending on the scope and importance of the case.⁶⁸ It hears about 6,000 cases per year.⁶⁹ The Upper Tribunal may uphold or set aside the First-tier Tribunal determination and either issue a new decision in the Upper Tribunal or remit it to the First-tier Tribunal to be remade there.⁷⁰ If the claimant is unsuccessful at the Tribunal level, she can seek permission to appeal to the Court of Appeal in England, Wales, and Northern Ireland, or the Court of Session Inner House in Scotland.⁷¹ All appeals from those courts are heard by the United Kingdom Supreme Court, which assumed the judicial functions of the House of Lords in 2009.⁷² Appeals beyond the Tribunal (that is, to court) are limited to errors of law.⁷³

While First-tier Tribunal judges are required to issue written decisions, these are not generally published.⁷⁴ Moreover, the Upper Tribunal only publishes decisions which fall into two categories: (1) cases of “general significance and utility in the development of [Upper Tribunal] law [that are] sufficiently well-reasoned and . . . consistent

at 17–20; see also O’Sullivan, *supra* note 13, at 252–53 (describing the process of appealing an asylum application to the AIT).

67. HM Courts & Tribunals Serv., *Immigration and Asylum Tribunal Guidance*, GOV.UK, <http://www.justice.gov.uk/tribunals/immigration-asylum> (last updated Aug. 26, 2014) [<http://perma.cc/39ME-JFBR>] (archived Sept. 30, 2014).

68. See Robert Thomas, *Refugee Roulette: A UK Perspective*, in REFUGEES ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 164, 164 (Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag eds., 2009) (indicating that asylum decisions are made by the Home Office and that appeals can be made to the AIT). See generally SYMES & JORRO, *supra* note 66, at 875–1112 (describing the procedural and evidentiary rules of the new tribunal).

69. See UPPER TRIBUNAL IMMIGRATION & ASYLUM CHAMBER, GUIDANCE NOTE 2011 No. 2, REPORTING DECISIONS OF THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER 1, ¶ 1 (2011) (amended February 2012, September 2013, and March 2014) [hereinafter GUIDANCE NOTE], available at <https://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/upper/guidance-note-no2-reporting-decisions-of-the-utiac.pdf> [<http://perma.cc/WKX2-JWD6>] (archived Sept. 30, 2014).

70. See HM Courts & Tribunals Serv., *Upper Tribunal Immigration and Asylum Chamber*, GOV.UK, <http://www.justice.gov.uk/tribunals/immigration-asylum-upper> (last updated July 8, 2014) [<http://perma.cc/MJH9-B4D3>].

71. See HM Courts & Tribunals Serv., *Immigration and Asylum (Upper Tribunal) Guidance*, GOV.UK, <http://www.justice.gov.uk/tribunals/immigration-asylum-upper/appeals> (last updated Mar. 14, 2014) [<http://perma.cc/3X8D-R3S5>] (archived Sept. 30, 2014).

72. See *A guide to bringing a case to The Supreme Court*, U.K. SUPREME CT. ¶ 1.1–1.3, <http://supremecourt.uk/docs/a-guide-to-bringing-a-case-to-the-uksc.pdf> (last visited Oct. 1, 2014) [<http://perma.cc/7X9Z-W69V>] (archived Oct. 1, 2014); see also *Appeals to the Supreme Court*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/a_to_c/appeals_to_the_supreme_court/ (last visited Oct. 10, 2014) [<http://perma.cc/JPQ2-79LD>] (archived Oct. 1, 2014) (assisting readers with understanding the steps in an appeal process).

73. See SYMES & JORRO, *supra* note 66, at 1038–39.

74. *Id.* at 980.

with binding statutory provisions or precedent of the senior courts,”⁷⁵ and (2) “country guidance” decisions, which describe conditions within the applicant’s country of origin relevant to the issue of whether the applicant’s forced return would violate the UK’s obligations under international law.⁷⁶

These criteria for publishing decisions assist this study’s analysis because a disproportionately large share of decisions referencing human rights treaties is likely to be deemed as having value as legal precedent. Therefore, Upper Tribunal decisions in which human rights treaties are referenced are likely to be overrepresented in the database for this study.

75. GUIDANCE NOTE, *supra* note 69, at 4, ¶ 2(a). According to the Upper Tribunal’s stated policies, published opinions must “have at least one, and normally more than one, of the following features:

- (a) the Tribunal has considered previous decisions on the issue or issues and has had sufficient argument on them;
- (b) the decision considers a novel point of law, construction, procedure and practice, or develops previous decisions in the same area;
- (c) the decision gives guidance likely to be of general assistance to judges, the parties or practitioners;
- (d) the decision contains an assessment of facts of a kind that others ought to be aware of, because it is likely to be of assistance in other cases; or
- (e) there is some other compelling reason why the decision ought to be reported.”

Id. ¶ 3(a)–(e). These criteria went into effect on February 15, 2010. *See* SYMES & JORRO, *supra* note 66, at 1078. Between 2003 and February 2010, senior members of the immigration judiciary decided which determinations were reportable. *See id.* Prior to May 2003, Upper Tribunal determinations were universally disseminated. *Id.*

76. *See* Nicholas Blake, *Luxembourg, Strasbourg and the National Court: the Emergence of a Country Guidance System for Refugee and Human Rights Protection*, 25 INT’L. J. REFUGEE L. 354–57 (2013). “Country Guidance case[s] will usually consist of one or more appeals heard together where the case has been identified at a case management hearing as suitable for giving of guidance. Such guidance will normally involve an intense examination of country of origin information including expert reports and the [sic] any advice given by UNHCR. Guidance is given on issues that are considered to be of general assistance to judges of the [First Tier] and the parties because the issues regularly arise.” *Id.* at 354. There were ten Country Guidance decisions in 2012, thirteen in 2011, eight in 2010, and nineteen in 2009. *See Immigration and Asylum Chamber: Decisions on Appeals to the Upper Tribunal*, TRIBUNAL DECISIONS (U.K.), https://tribunalsdecisions.service.gov.uk/utiac?page=1&search%5Bclaimant%5D=&search%5Bcountry%5D=&search%5Bcountry_guideline%5D=1&search%5Bjudge%5D=&search%5Bquery%5D=&search%5Breported%5D=all&utf8=✓ (in left hand column check the “Used as country guidance” box; then press “Refine search”) (last visited Oct. 11, 2014) [<http://perma.cc/9EYC-2ZPY>] (archived Oct. 11, 2014) (listing the cases reported for country guidance); *see also* GUIDANCE NOTE, *supra* note 69, at 2, ¶ 11.

IV. METHODOLOGY

The research for this Article employed a mixed-methods empirical approach, featuring both quantitative and qualitative data. Each aspect of this approach is described below.

A. *Quantitative Data: Case Law Database*

The quantitative database for this Article consists of 1,767 published decisions by administrative tribunals and appellate courts in the United Kingdom either granting or denying asylum or complementary protection between 1991 and 2012.⁷⁷ While there were many more published decisions in asylum cases during that time, the cases selected for the database were those containing references to one or more of the following human rights instruments:

- the International Convention on Civil and Political Rights;⁷⁸
- the Convention on the Rights of the Child;⁷⁹
- the Convention on the Elimination of all forms of Discrimination Against Women;⁸⁰
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;⁸¹
- Articles 2, 3, 6 and 8 of the European Convention on Human Rights;⁸²
- Articles 15 and 23 of the 2004 E.U. Qualification Directive on Asylum.⁸³

77. The specific tribunals and courts whose published decisions are included in the database for this study are the following: the Upper Tribunal of the current Immigration and Asylum Chamber (2010-present); the UK Asylum and Immigration Tribunal (2005-2010); the UK Immigration Appellate Authority (1993-2005); the Court of Appeal Civil Division (EWCA Civ); the High Court of Justice Queen's Bench Division Administrative Division (EWHC); the UK House of Lords (UKHL); and the UK Supreme Court (UKSC), which assumed judicial functions from the UKHL in 2009.

78. ICCPR, *supra* note 38.

79. CRC, *supra* note 4.

80. CEDAW, *supra* note 36.

81. CAT, *supra* note 37.

82. ECHR, *supra* notes 5, 18–19 and accompanying text. Article 2 protects the right to life. *Id.* art. 2. Article 6 protects the right to a fair trial. *Id.* art. 6.

83. See Council Directive 2004/83/EC, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, arts. 15, 23, 2004 O.J. (L304) 19, 20 (EU) [hereinafter 2004 Qualification Directive]. The 2004 EU Qualification Directive, by which the United Kingdom agreed to be bound in 2006, is not a treaty. Home Affairs Committee, *The Assessment of Credibility of Women, . . . Victims of Torture . . . Within the Decision Making Process and Whether this is Reflected in Appeal Outcomes*, PARLIAMENT.UK (Oct. 11, 2013), <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/>

These particular instruments were selected for analysis because they were cited in more than ten published asylum decisions in the United Kingdom over the past two decades.⁸⁴ Noticeably absent from this list is the 1951 Refugee Convention.⁸⁵ It was excluded because its explicit aim is to assist asylum-seekers and is thus analyzed in nearly every case in which asylum is sought.⁸⁶ On the other hand, the ten

71/71vw32008_HC71_01_VIRT_HomeAffairs_ASY-35.htm [http://perma.cc/W5CY-ZMJK] (archived Oct. 11, 2014) (recognizing that under European Union law, established by the Qualification Directive, “the United Kingdom ha[s] a positive obligation to recognize asylum claims . . . pursuant to” the Qualification Directive) (footnotes omitted). It, like other EU qualification directives, seeks harmonization in state policies across the European Union. See KLAUS-DIETER BORCHARDT, *THE ABC OF EUROPEAN UNION LAW* 89 (2010), available at http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf [http://perma.cc/TE6P-WE4Y] (archived Oct. 1, 2014) (noting that while EU regulations are designed to unify the law, EU directives are intended to harmonize the law). It requires EU Member States to offer protection to claimants who fear persecution and serious harm in their home countries and to ensure the maintenance of family unity. See generally 2004 Qualification Directive, *supra* (outlining the minimum standards of protection members of the European Union should offer). Article 15 defines “serious harm” as:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Id. art. 15. Article 23 states, in relevant part: “[m]ember States shall ensure that family unity can be maintained.” *Id.* art. 23.

The European Commission (the executive body of the European Union) can bring Member States before the Court of Justice of the European Union for non-compliance with EU qualification directives. See BORCHARDT, *supra* at 64 (describing the various responsibilities of the European Commission and indicating that the European Commission can “refer [infringement of EU law] to the Court of Justice”). Member States which fail to comply with directives can be subject to monetary damages. See *id.* at 92 (“In its judgments in *Franovich* and *Bonifaci* in 1991, the Court of Justice held that Member States are liable to pay damages where loss is sustained by reason of failure to transpose a directive in whole or in part.”). As a result of such potential consequences, the incentives to comply with qualification directives differ considerably from human rights treaties. Nevertheless, and even though not a treaty, the 2004 Qualification Directive is included in this study because several lawyers mentioned that they sometimes invoke it (particularly articles 15 and 23) on behalf of their clients. Therefore, for purposes of this Article, the 2004 Qualification Directive will be considered a human rights instrument.

84. Based on our analysis of cases when we word-searched the various treaties.

85. Also noticeably absent from this list are two other treaties generally recognized as belonging to the core of international human rights protection: the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966), and the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/RES/20/2106 (Dec. 21, 1965). Neither of these treaties was referenced frequently enough to justify inclusion in this study, demonstrating their lack of impact on asylum jurisprudence in the United Kingdom.

86. While the consensus is that the United Kingdom has never formally incorporated the Refugee Convention into domestic law, the UK’s Asylum and Immigration Appeals Act 1993 requires the Secretary of State “to act in accordance with the [Refugee Convention with respect to] . . . immigration rules, administrative

instruments selected for this study provide complementary protection to refugees, enhancing the potential for relief when an applicant cannot establish a well-founded fear of persecution based on Refugee Convention grounds.⁸⁷

This study covers a twenty-two year period for two major reasons. First, four of the six instruments included in it were ratified or acceded to by the United Kingdom as of December 1991.⁸⁸ The other two instruments were adopted by the United Kingdom during the 2000s.⁸⁹ Second, a twenty-two year period creates a database of judicial opinions sufficiently large to reveal any patterns of change in the way these treaties have been referenced over time and any statistically significant factors that may be related to those patterns.

In order to fully gauge the prevalence of treaties in refugee jurisprudence, we counted as references not only specific mentions of the treaty itself (that is, direct references) but also references to seminal cases that invoked the treaty and certain key words and phrases included in the treaty (that is, indirect references).⁹⁰ The Convention on the Rights of the Child and *ZH (Tanzania) v. Secretary of State for the Home Department*,⁹¹ a 2011 UK Supreme Court decision, exemplify this method. Article 3 of the CRC states: "In all

practices, and procedures." SYMES & JORRO, *supra* note 66, at 4–5. According to section 2 of that Act, which is entitled *Primacy of Convention*, "Nothing in the immigration rules . . . shall lay down any practice which would be contrary to the [Refugee] Convention." Moreover, in section 1 of the Act, "claim for asylum" is defined as "a claim made by a person . . . that it would be contrary to the United Kingdom's obligations under the [Refugee] Convention for him to be removed from, or required to leave, the United Kingdom." Refugee Convention, *supra* note 1.

87. See MCADAM, *supra* note 3, at 21–23. Although refugees often warrant protection from removal under both the Refugee Convention and complementary protection under the European Convention on Human Rights, UK courts are legally required by the 2004 European Qualification Directive on Asylum to consider a claim under the Refugee Convention first. If such a claim is successful, the court need not also consider the complementary protection claim, as the relief provided by the Refugee Convention (i.e., refugee status) is more durable than that available under complementary protection. See Durieux, *supra* note 9, at 7.

88. The UK ratified ICCPR on 20 May 1976, CEDAW on 7 April 1986, CAT on 8 December 1988, and CRC on 16 December 1991. *Ratification of International Human Rights Treaties – United Kingdom of Great Britain and Northern Ireland*, U. MINN. HUM. RTS. LIBR., <http://www1.umn.edu/humanrts/research/ratification-greatbritain.html> (last visited Oct. 19, 2014) [<http://perma.cc/W4DQ-VNQL>] (archived Oct. 1, 2014).

89. See *supra* notes 16, 83 and accompanying text regarding the effective incorporation of the ECHR and transposition of the 2004 Qualification Directive, respectively; see also *Ratification of International Human Rights Treaties – United Kingdom of Great Britain and Northern Ireland*, *supra* note 89 (indicating that the ECHR was ratified in 1951).

90. If a treaty was referred to both directly and indirectly in the same opinion, it was counted as one reference to the treaty.

91. *ZH (Tanzania) v. Sec'y of State for the Home Dep't*, *supra* note 6, [23], [28], [30]–[37] (finding that the United Kingdom has an obligation to consider the best interests of the child under the CRC and indicating how that obligation can be fulfilled).

actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁹² *ZH (Tanzania)* referenced the CRC in holding that UK government authorities must consider the best interests of the child in cases involving the removal of non-citizens, including asylum-seekers.⁹³ Some cases decided since *ZH (Tanzania)* have cited that decision, but not the CRC, in holding that the best interests of the child must be taken into account in any decision regarding the removal of a child’s parents.⁹⁴ Therefore, the relevant terms which constitute a reference to the CRC for purposes of this study’s coding system are: (1) the CRC, (2) *ZH (Tanzania)*, and (3) the phrase “the best interests of the child.” By including within the scope of treaty references relevant words and phrases from treaties, as well as seminal cases that reference those treaties, this study accounts for those situations where a judge may have relied on the legal principle enshrined in a particular treaty without specifically referring to that treaty by name.⁹⁵ The tallying of direct and indirect references was accomplished through word search functions in four online case law databases.⁹⁶

A small number of cases included references to two or more of the treaties. Hence, while the total number of direct and indirect treaty references in the database is 1,973, the number of published decisions in the database is 1,767.⁹⁷ References were split nearly

92. CRC, *supra* note 4, art. 3(1).

93. See *ZH (Tanzania) v. Sec’y of State for the Home Dep’t*, *supra* note 6, [22]–[23], [26]–[30], [33]. In addition to the CRC, the decision in *ZH (Tanzania)* was based on section 55 of the UK Borders, Citizenship, and Immigration Act of 2009, which requires the Secretary of State’s duties to be discharged in ways that safeguard and promote the welfare of children in the United Kingdom. See *id.* [12], [23].

94. See, e.g., *JW (China) v. Sec’y of State for the Home Dep’t*, [2013] EWCA (Civ) 1526 [21]–[22] (Eng.) (citing to *ZH (Tanzania)* in lieu of the CRC for the requirement “that the best interests of the child must be considered first”); *MR AA (AP) v. Sec’y of State for the Home Dep’t*, [2014] CSIH 35 [14] (Scot.) (citing *ZH (Tanzania)* as justification for treating “the best interests of the child as a primary consideration” without mentioning the CRC).

95. A list of the relevant words, phrases, and cases, which constitute indirect treaty references for purposes of this study, appears at Appendix B.

96. The case law reporting services consulted in order to identify and code treaty references were WestLaw, Bailii, Lawtel, and the website of the Upper Tribunal.

97. See *id.* There are two groups of references to treaties not included in the database. The first consists of fifty-two references in decisions where the court or tribunal mentioned a treaty but granted relief on other grounds, typically the Refugee Convention. These references were not included in the database because the purpose of this study is to analyze treaty references that either assisted or did not assist an applicant in obtaining relief. Those fifty-two references neither helped nor hurt the applicant in obtaining relief, given that UK courts are required to consider claims under the Refugee Convention before they consider claims for complementary protection under other human rights treaties. See Durieux, *supra* note 9, at 7. Thus, it

equally between decisions by appellate courts (1,009) and the Upper Tribunal (977).

Because one of the main purposes of this study is to determine how frequently and in what manner courts reference treaties in asylum adjudications, each of the treaty references was coded according to the way that the judge referenced the treaty. The following seven coding categories were used, each of which is followed by an illustration from a specific case:

- **The treaty was the basis for the court's grant of asylum.** In *SM v. Secretary of State for the Home Department*,⁹⁸ the Court of Appeal upheld the decision of an immigration judge granting relief on ECHR Article 3 grounds.
- **The court rejected the treaty-based argument and denied asylum.** In *BM v. Secretary of State for the Home Department*,⁹⁹ the Tribunal found the admittedly harsh humanitarian conditions the appellant would encounter upon return to his country of origin did not rise to the level of breach of ECHR Article 3. The court relied on the fact that the UNHCR had not advised against return of failed asylum seekers in making its decision.
- **The court used the treaty to buttress a grant of asylum it reached on other grounds.**¹⁰⁰ In *B v. Secretary of State for the Home Department*,¹⁰¹ the Court of Appeal referenced the use of article 3 in a previous case to establish the starting point for determining risk on return. The failure of the immigration judge to consider that previous case led to the court allowing the appeal.
- **The court cited the applicant's home country's violation of the treaty in its description of conditions within that**

is impossible to determine whether the treaty mentioned by the court might have constituted an additional basis for relief. The second group of references not in the database consists of one reference that appeared in a dissenting opinion in an appeals court case. That reference was not included in the database because this study focuses on treaty references in opinions that either granted or denied refugee protection.

98. See *SM (Afghanistan) v. Sec'y of State for the Home Dep't*, [2011] EWCA (Civ) 573, [2], [9], [38] (Eng.).

99. See *BM v. Sec'y of State of the Home Dep't*, [2003] UKIAT 00051, [11.8], [11.12]–[11.13], [11.15], [11.20], [12], [15.3]–[15.4] (U.K.).

100. References in this category include those situations where the judge utilized the treaty in order to interpret other laws affecting the status of refugees, most notably the Refugee Convention. See *Pobjoy*, *supra* note 3, at 128 (“[D]ecision-makers are likely to be more comfortable grounding an interpretation of the [Refugee] Convention definition in standards that states themselves have agreed to.”) (footnote omitted).

101. See *Becerikli v. Sec'y of State for the Home Dep't*, [2006] EWCA (Civ) 693, [9], (Eng.).

country. In *MA Eritrea CG*,¹⁰² the Tribunal referenced an Amnesty International report noting that the ICCPR established “the right to liberty and security of the person and the right not to be subjected to arbitrary arrest or detention,” which were being infringed by arrests in the claimant’s country of origin.

- **The court rejected the treaty-based argument but granted relief on other grounds.** In *Darji v. Secretary of State for the Home Department*,¹⁰³ the Court of Appeal restored an adjudicator’s decision that the appellant had a well-founded fear of future persecution. The court noted that the adjudicator’s decision on article 8 had not been well-reasoned but that did not matter because the decision was sustainable on “orthodox persecution grounds.”
- **The court referenced the treaty either directly or indirectly but did not analyze it in denying asylum.** In *Djali v. Immigration Appeal Tribunal*,¹⁰⁴ the Court of Appeal considered an article 8 claim based on mental health. The court referenced article 3 in relation to article 8’s threshold but focused solely on article 8 in dismissing the case.

Intercoder checks were conducted throughout the data gathering and coding processes in order to verify the accuracy of the coding system.¹⁰⁵ After the coding was completed, bivariate chi-square tests were conducted in order to identify any statistically significant relationships between the nature of the references to particular human rights instruments and four variables: gender of the applicant, gender of the judge, level of adjudication (Upper Tribunal or appeals court), and applicant’s country of origin.¹⁰⁶

102. See *MA v. Sec’y of State for the Home Dep’t*, [2007] UKAIT 00059 [207] (U.K.).

103. See *Darji v. Sec’y of State for the Home Dep’t*, [2004] EWCA (Civ) 1419 [36] (Eng.).

104. See *Djali v. Immigration Appeal Tribunal*, [2003] EWCA (Civ) 1371 (Eng.).

105. The database of 1,973 treaty references and the coding categories which they were assigned is available through the Inter-university Consortium for Political and Social Science Research (ICPSR) at <http://www.icpsr.umich.edu/cgi-bin/ddf2?key=O6Fph5VKVGV8zji8NFOAmjr9YnoWJaaRaH1KEZ5I&page=suppl> (Deposit Number 35410) [<http://perma.cc/MS69-GK9E>] (archived Oct. 1, 2014).

106. These variables were selected either because of previous studies regarding their impact on the result in asylum adjudications or because UK refugee lawyers indicated during interviews that they influence judicial receptiveness to human rights-based arguments in asylum adjudications. The statistical tests were conducted with the publicly available online statistical software package R. See *The Comprehensive R Archive Network*, THE R PROJECT FOR STATISTICAL COMPUTING, <http://cran.r-project.org> (last visited Oct. 19, 2014) [<http://perma.cc/4QSQ-JZ7Q>] (archived Oct. 1, 2014). We also ran multivariate logistic regressions, which produced results essentially the same as the bivariate results. For purposes of simplicity, I am including only the bivariate results in this Article.

B. Qualitative Data: Lawyer Interviews

In order to better understand and illustrate the statistical patterns revealed by the quantitative data, fifty-one semi-structured, open-ended interviews were conducted with UK lawyers who have regularly represented asylum-seekers or the government in asylum adjudications for at least five years. Key informants in the United Kingdom helped identify lawyers who fit these criteria. These interviews were conducted between June 2010 and January 2014 in person or via telephone or Skype with lawyers practicing in eight cities within the United Kingdom.¹⁰⁷ Twenty-eight of the lawyers were barristers and twenty-three were solicitors. Thirty-five were men and sixteen were women. Forty-six exclusively represent refugees, while three represent both refugees and the government in different cases, and two exclusively represent the government.¹⁰⁸ Most interviews lasted between thirty and sixty minutes.¹⁰⁹

Lawyer interviews were included in this study because UK refugee lawyers have been the driving force in asserting international human rights arguments on behalf of refugees in UK domestic courts and the European Court of Human Rights for several decades.¹¹⁰ Through litigation, they encourage state actors (here, primarily judges) to comply with a state's treaty-based obligations. Their views about the ways that judges respond to human rights-based arguments thus contextualize the quantitative data in the study. Because the population of lawyers that the study examines is homogeneous in specialization and extent of professional expertise, fifty-one interviews is sufficient to reach thematic saturation: the point at which no new themes are likely to emerge.¹¹¹ It is therefore

107. The interviewees practice in Belfast, Birmingham, Cardiff, Edinburgh, Glasgow, London, Manchester, and Oxford.

108. The Home Office normally hires barristers to argue cases at the Upper Tribunal and above. Many lawyers interviewed for this Article noted that it has become increasingly rare for the same lawyer to represent both asylum-seekers and the government in different cases, reflecting the hardening of opinions about asylum within the United Kingdom generally. Lawyers who represent refugees were far more accessible for interviews than lawyers who represent the government.

109. One interview lasted approximately two hours.

110. See Maiman, *supra* note 16, at 414–18 (illustrating refugee lawyers' reliance on the Human Rights Act and international human rights treaties in advocating for their clients); Sterret, *supra* note 32, at 293–316 (describing particular British lawyers as being politically committed to challenge restrictive immigration rules); MILLER & GILL, *supra* note 17.

111. See Greg Guest, Arwen Bunce & Laura Johnson, *How Many Interviews Are Enough?: An Experiment with Data Saturation and Variability*, 18 *FIELD METHODS* 59, 64–65 (2006) (defining “[t]heoretical saturation” as the point at which “all of the main variations of the phenomenon have been identified and incorporated into the emerging theory”). Guest et al. conclude that for studies with a high level of homogeneity among

unlikely that these interviews will misrepresent the broader community of experienced UK refugee lawyers.

The interviews proceeded as follows: lawyers were first asked to describe, in general terms, a case where they had represented an asylum-seeker before the Upper Tribunal or an appellate court. Depending on the depth of the response, follow-up questions were asked regarding the particular facts of the case and the nature of the legal arguments made to the judge. If a lawyer mentioned a human rights treaty (other than the Refugee Convention) spontaneously during the initial response, the lawyer was asked why it was used in that case and whether the lawyer thought it had any impact on the result. Lawyers were then asked more general questions about the frequency with which they make explicit reference to international human rights law in refugee cases, the circumstances under which they do so, and whether they think it has any impact on the results.

If a lawyer failed to mention any human rights treaties (again, other than the Refugee Convention) during the initial response, the lawyer was asked whether such treaties came up in the course of that case. Lawyers were then asked the more general questions about the frequency with which they explicitly invoke human rights treaties in refugee cases. Lawyers were also asked questions about the circumstances under which invoking human rights treaties on behalf of a client might be detrimental to the client's interests, whether it has become easier or more difficult to obtain asylum in the United Kingdom during the time that they have been representing refugees, and whether they feel that judges are influenced by negative attitudes towards asylum-seekers in the media and among the public generally.

Interviews were tape recorded.¹¹² Transcripts of lawyer interviews were coded according to the responses to the questions described in the previous paragraph.¹¹³

There is risk of bias in the decision to only interview those lawyers who regularly represent refugees, rather than those who do so only occasionally. "Repeat players" are more likely to be familiar with international human rights law and therefore to invoke it on behalf of their clients. And yet, it is precisely because of this familiarity that their views are likely to contextualize patterns gleaned from the study's quantitative data. Moreover, during interviews they were able to discuss the risks of invoking international human rights treaties in a given case. Their analysis of

the studied population, a sample of as few as six interviews may suffice to enable development of meaningful themes and useful interpretations. *Id.* at 78.

112. Tape recordings of interviews are on file with the author.

113. Interview transcripts are on file with the author. A coding summary of the interviews is available through the Inter-university Consortium for Political and Social Science Research (ICPSR). See ICPSR, *supra* note 105.

such risks provides insight into some of the circumstances under which treaties may weaken refugee claims. Such circumstances are unlikely to be revealed through quantitative data analysis.

By employing the combination of statistical analysis of nearly 2,000 treaty references in over two decades of UK asylum jurisprudence and open-ended interviews with refugee lawyers, this Article provides clues to the question of why human rights treaties have not been as helpful to asylum-seekers in the United Kingdom as the treaty effectiveness literature would suggest. It also begins to fill the gap in that literature identified by Simmons; that is, measuring the effectiveness of treaties in the litigation context.¹¹⁴ Because of the large number of cases involved, as well as the insights of lawyers who work within the asylum litigation system on a regular basis, this Article makes possible predictions about the circumstances under which human rights treaties are more likely to assist asylum-seekers in domestic courts in the United Kingdom and elsewhere.

V. QUANTITATIVE DATA ANALYSIS

A. *Descriptive Findings*

The quantitative data gathered for this study confirms both a pessimistic and optimistic view of the extent to which human rights treaties assist applicants in obtaining relief.¹¹⁵ Each of these perspectives is described in the findings reported below.

1. The only treaty provisions regularly referenced by UK judges are those which have been effectively incorporated into UK domestic law. Treaties not incorporated are rarely referenced.

As Table 1 illustrates, the only treaty provisions which UK judges have regularly referenced in published asylum decisions over the past two decades are articles 3 and 8 of the ECHR. They constitute 85 percent of all treaty references during that period.

114. See SIMMONS, *supra* note 12, at 129–34, 150 (arguing that litigation can be a mechanism for effecting domestic politics concerning treaty law and that empirical research would be expected to demonstrate this).

115. See Neumeyer, *supra* note 25, at 927–32 (describing the spectrum of theoretical expectations for the effectiveness of human rights treaties from pessimistic to optimistic).

Table 1: Total UK Treaty References, 1991-2012

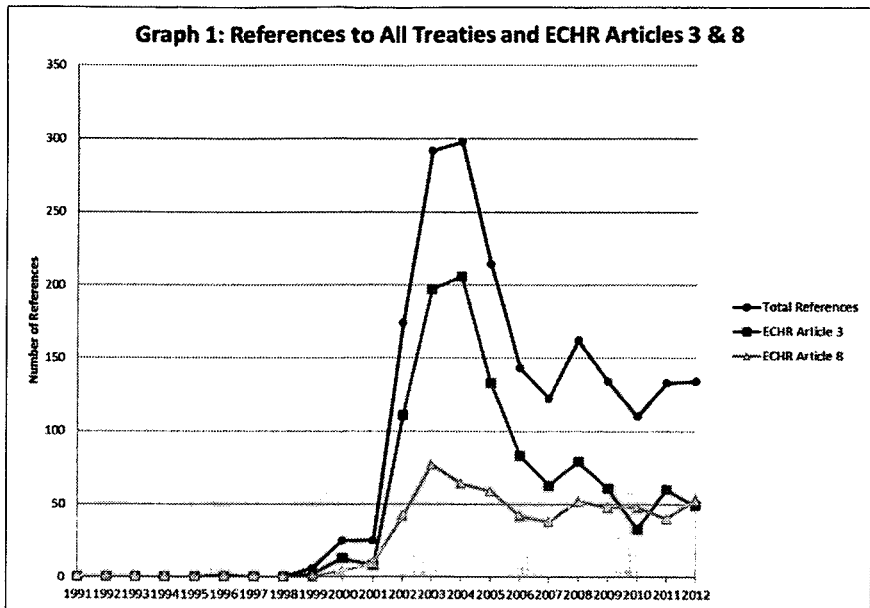
Treaty	References (% of All Treaty References)
ECHR Article 3	1098 (55.7%)
ECHR Article 8	577 (29.2%)
ECHR Article 2	85 (4.3%)
ECHR Article 6	47 (2.4%)
CRC	46 (2.3%)
QD Article 15	42 (2.1%)
ICOPR	39 (2.0%)
QD Article 23	15 (0.8%)
CEDAW	14 (0.7%)
CAT	12 (0.6%)
ALL TREATIES	1973

Given that the ECHR is the only treaty in this study to be effectively incorporated into UK domestic law, these data highlight the importance of the incorporation of treaties as a factor determining the impact of treaties on domestic jurisprudence.¹¹⁶ On the other hand, incorporation does not guarantee impact, as the other ECHR articles included in this study (articles 2 and 6) were referenced only occasionally. One can assume that they were not as germane to as many asylum cases as articles 3 and 8.¹¹⁷

Viewing references over time demonstrates even more graphically the importance of incorporation in determining the prevalence of treaties in domestic court refugee jurisprudence. Graph 1, below, tracks the number of domestic court references to all of the treaties in this study, as well as to ECHR articles 3 and 8 (by far the two most referenced treaty provisions) since the early 1990s.

116. As noted above, interpretive references to unincorporated human rights treaties are relatively rare because those treaties speak to a limited set of issues relevant to the Refugee Convention. See Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10, at 28 (noting that, in Canada, the likelihood a judge would refer to a treaty “in the refugee litigation context” was influenced by “the extent to which that treaty ha[d] been integrated into domestic law”); see also HATHAWAY & FOSTER, *supra* note 8, at 194–95 (discussing human rights primarily in the context of “being persecuted”); Pobjoy, *supra* note 3, at 128.

117. Article 2, which protects the right to life, was most likely referenced relatively infrequently because it is duplicative of other complementary protection measures and will only be invoked when there is a realistic danger that the claimant will be killed if returned to her home country. See STEVENS, *supra* note 49, at 153 (“[D]eath must be an almost certain consequence of return, and this may be too high a threshold in many cases . . .”). Article 3, in contrast, can be invoked when the claimant fears a variety of harms that fall short of causing death. See ECHR, *supra* note 5, art. 3. Article 6, which includes a variety of protections related to a fair trial, will usually be invoked only when the claimant is likely to be subjected to judicial proceedings (such as for disloyalty to the regime) upon return to her home country. See *id.* art. 6.



The data in Graph 1 and Chart 1 are consistent with comments from lawyers interviewed for this Article. Nearly all indicated that they routinely invoke the ECHR, particularly articles 3 and 8, in their submission to the tribunals and appeals courts. The following interview excerpts illustrate this strategy:

- The European Convention is [the] bedrock of submissions. It would be very rare that I would ever run a case in the First-tier Tribunal which . . . doesn't rely on Article 8 at the very least and routinely Article 3 as well.¹¹⁸
- [W]e have always used the ECHR, always. . . [I]t's relatively easy to incorporate the ECHR because it's now part of British law so you know it's easy.¹¹⁹

Moreover, as Graph 1 vividly demonstrates, prior to 2000 (when the HRA had become effective throughout the UK¹²⁰) references to human rights treaties were virtually nonexistent.¹²¹ The following comments from lawyers confirm this phenomenon:

118. Interview with Interviewee UK-137, in London, Eng. (Jan. 28, 2013).

119. Interview with Interviewee UK-135, in London, Eng. (Jan. 28, 2013).

120. See Maiman, *supra* note 16, at 410.

121. As noted above, however, human rights treaties were referenced in decisions by the European Court of Human Rights affecting UK-based refugees well before 1990. See MILLER & GILL, *supra* note 17.

- There is no doubt that if you think back before the HRA there would be a lot of diffidence about engaging with human rights law. That has changed. Judges are much more open than they would have been 20 years ago.¹²²
- [B]efore 1998, there were two schools of thought: . . . they both . . . felt that our common law was capable of delivering the same principles without tying us down to a particular treaty.¹²³

These reflections on judicial attitudes demonstrate why lawyers rarely invoked the ECHR, or any other human rights treaty, in UK domestic courts prior to enactment of the HRA and, conversely, why the ECHR has become commonplace since then. They also reinforce the findings from the quantitative data (reflected in Table 1 and Chart 1) about the importance of incorporation in determining the frequency with which treaties are referenced in published asylum decisions.

2. References to treaties increased sharply in the first half of the 2000s and have gradually declined since.

As Graph 1 illustrates, the early 2000s saw a tremendous increase in treaty references in published Upper Tribunal and appeals court decisions, followed by a precipitous decline that has leveled off somewhat in the last few years. This pattern is mostly attributable to ECHR Articles 3 and 8, which followed a similar pattern of a sharp increase early in the decade followed by a steady decline through 2012, although article 8's was not as dramatic in either its rise or fall.¹²⁴

This pattern is likely attributable to a combination of factors. Most obvious, the tremendous spike in references to articles 3 and 8 followed the promulgation of the HRA in the early 2000s. As noted above, since that time lawyers have regularly invoked the ECHR, which has forced judges to apply it to the facts of the case and, thus, reference it in their decisions.

The steady decline in treaty references in the latter part of the 2000s is a bit more puzzling. One possible explanation is a decrease in refugee protection claims, which would presumably result in a declining number of treaty references in published decisions. However, although the number of asylum claims has, indeed, declined over the past decade, there is no indication that the annual number of

122. Interview with Interviewee UK-136, in London, Eng. (Jan. 28, 2013).

123. Interview with Interviewee UK-105, in London, Eng. (Sept. 10, 2012).

124. References to article 8 for purposes of this study were limited to those which appeared in cases where the applicant asserted article 8 as part of an asylum claim. Article 8 is frequently invoked by refugees and other immigrants who have never claimed asylum. Such cases are outside the scope of this study.

published opinions, from which the data for this study were collected, has experienced a similar decline.¹²⁵

Another possible explanation is what I have referred to elsewhere as judicial fatigue with human rights-based arguments.¹²⁶ Several lawyers noted that judges become exasperated by repeated invocations of treaty-based arguments and see them as signs of desperate attempts to obfuscate a weak case:

- People feel they have to throw everything in . . . I've sat at the back of the court lots of times and watched judges say 'What does this add to your argument?' Why be put in that position?¹²⁷
- One sign of a weak advocate is to fail to distinguish between strong points and weak points. It's not unusual for weak advocates to make barnstorming arguments based on human rights, which just irritate the judge, which means that the judge will be distracted from stronger arguments.¹²⁸
- There are some article 3 and 8 arguments that are bad points. They are fall back points. . . Those arguments don't work and diminish the force of their real argument. It undermines your good points.¹²⁹
- [Judges are] weary. They've had it up to there with article 8 in particular. It is overused in weak cases, with people desperate not to be removed.¹³⁰
- [Judges can get impatient about being told to read very soft law in producing a hard answer. Kind of the classic advocate's difficulty that you miss, you divert attention from the crunch point on which you might well win.¹³¹

These comments suggest that refugee lawyers in the United Kingdom (and elsewhere) should use human rights-based arguments judiciously, lest they alienate the judge.¹³² They also suggest that

125. As noted above, the number of asylum claims submitted in the United Kingdom decreased from approximately 84,130 in 2003 to 23,507 in 2013. BLINDER, *supra* note 53.

126. See Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10, at 19.

127. Interview with Interviewee UK-120, in London, Eng. (Nov. 6, 2013).

128. Interview with Interviewee UK-139, in London, Eng. (Apr. 25, 2013).

129. Telephone Interview with Interviewee UK-142 (May 13, 2013).

130. Interview with Interviewee UK-149, in Glasgow, Scot. (Dec. 20, 2013). This comment, most likely refers to "time and ties" article 8 cases, which have been the most prevalent form of article 8 claims in the asylum context. See, e.g., *Ogundimu v. Sec'y of State for the Home Dep't*, *supra* note 20, [29]–[36], [128]–[136].

131. Interview with Interviewee UK-136, *supra* note 122.

132. Many lawyers whom I interviewed for my study of the impact of human rights treaties on asylum jurisprudence and practice in Canada made similar

judges inclined to view treaty-based arguments as simply superfluous add-ons, as “overegging the pudding” (as one lawyer put it¹³³), might be inclined to ignore them in their decisions. As a result, fewer references to treaties are likely to appear in judicial decisions over time.

An additional possible explanation for the decline in references to treaties over the past decade is what Catherine Dauvergne describes as a “learning effect” among judges.¹³⁴ Writing about a decline in treaty references in published tribunal decisions over the past decade in Canada, Dauvergne argues “that decision makers are more likely to discuss international norms when the norms are newly relevant.”¹³⁵ As time passes, these decision makers may feel less of a need to reference norms that have become an accepted part of asylum jurisprudence.¹³⁶ Moreover, as the judiciary in general becomes more comfortable interpreting a particular treaty, the decisions in which it is referenced may meet the criteria for publication (for example, a novel argument) less often.¹³⁷

A related explanation is that the spike in references in the early 2000s reflects the lack of domestic case law on various treaty-related points to help guide the First-tier Tribunal. Once the Upper Tribunal and appellate courts had established precedent regarding how the treaties should be applied, there was most likely a decreased need for appellate review.¹³⁸ This is a generally common pattern: when a law changes or a new type of case emerges, there is an increase in appeals as courts determine the meaning and scope. Once the law is clarified, the number of appellate cases in that area drops off.¹³⁹

A final possible explanation for the decline in references is the more sophisticated use of treaty-based arguments by refugee lawyers over time. Whereas lawyers might have been inclined to “overegg the pudding” soon after the HRA came into effect, they may have learned

comments about judicial resistance toward overused human rights-based arguments. See Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10, at 19–20.

133. Telephone Interview with Interviewee UK-134 (Jan. 15, 2013).

134. See Dauvergne, *supra* note 10, at 317.

135. *Id.* at 323.

136. See *id.* at 323–24.

137. As noted above, two of the criteria for publication of Upper Tribunal decisions are cases of general significance and utility in the development of Upper Tribunal law and novel points of law. See GUIDANCE REPORT, *supra* note 69, at 4, ¶ 3.

138. My thanks to Herbert Kritzer of the University of Minnesota for this insight.

139. See generally Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977) (examining the relationship between American social and business developments and trends in the types of cases heard by state supreme courts); Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978) (finding that state supreme courts are increasingly focused on “smaller numbers of opinions and greater case-selecting discretion”).

to invoke those treaties a bit more discreetly. For example, one barrister told me that because of the government's efforts to limit its scope, he considers article 8 to be "dead."¹⁴⁰ Others noted that it was unnecessary to invoke article 3 in a case strong enough to succeed on Refugee Convention grounds alone.¹⁴¹ A more selective use of article 3, in particular, would help to explain the overall decline in treaty references, given that it is the treaty most responsible for the steep drop in references overall in the latter half of the 2000s.¹⁴²

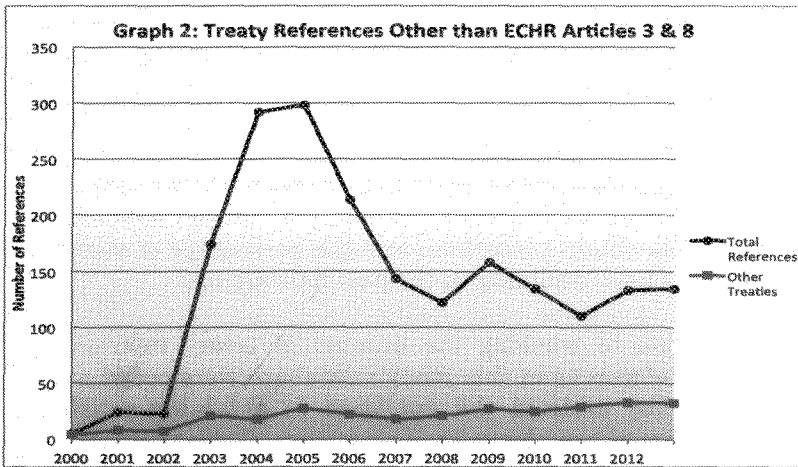
3. References to treaties other than ECHR articles 3 and 8 increased slightly throughout the 2000s.

As noted above, the treaty most responsible for the decline in treaty references in recent years is the ECHR, specifically articles 3 and 8. While the other treaties in this study were not referenced nearly as frequently, Graph 2, below, demonstrates that the number of those references has gradually increased in recent years.

140. Interview with Interviewee UK-149, *supra* note 130. While article 8 is certainly still operative, in July 2012, the UK Government changed the immigration rules to limit its scope. For a summary of those rule changes, which have been the subject of a subsequent legal challenge, see MELANIE GOWER, HOUSE OF COMMONS LIBRARY, SN/HA/6355, ARTICLE 8 OF THE ECHR AND IMMIGRATION CASES, 10–26 (2013), available at <http://www.parliament.uk/briefing-papers/SN06355/article-8-of-the-echr-and-immigration-cases> [<http://perma.cc/R7S5-7EQX>] (archived Oct. 2, 2014).

141. Telephone interview with Interviewee UK-141 (May 3, 2013); Telephone interview with Interviewee UK-147 (Nov. 15, 2013).

142. An additional possible reason for the decline in references to article 3 in the mid-2000s is the United Kingdom's transposition of the 2004 Qualification Directive in 2006. Given that article 15(c) of the 2004 Qualification Directive is arguably broader than article 3 in protecting non-citizens fleeing indiscriminate violence, it likely replaced article 3 in the submissions of many refugee lawyers (my thanks to Dr. Roland Bank and Professor Dallal Stevens for this insight). While the absolute number of references to the 2004 Qualification Directive is relatively small (57, or 2.9% of all references), this is due in part to the fact that the 2004 Qualification Directive did not become effective in the United Kingdom until 2006, which is rather late in this study's time frame. See *supra* Table 1.



The treaty most responsible for the modest increase in judicial references in the later 2000s is the CRC, which received more judicial references than any other non-ECHR treaty during the two decades analyzed for this study.¹⁴³ The CRC was rarely referenced prior to the late 2000s, when two events brought the notion of the best interests of the child (one of the key elements of the CRC) into mainstream UK refugee law. The first was Section 55 of the UK Borders, Citizenship and Immigration Act 2009, which provides that, in relation to asylum the Secretary of State must ensure that it discharges its duties with “regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.”¹⁴⁴ The second was the 2011 UK Supreme Court decision in *ZH (Tanzania)*, which explicitly invoked the CRC in holding that in cases involving removal of non-citizens (including those concerning asylum applicants) the courts must consider the best interests of the child.¹⁴⁵

Several lawyers confirmed that the CRC has become more prevalent in UK asylum practice and jurisprudence in recent years, owing to both Section 55 and *ZH (Tanzania)*.¹⁴⁶ One of these lawyers noted that *ZH (Tanzania)* has “blown open the CRC for use in cases”¹⁴⁷ and another said that: “It’s the gold standard. It’s where you start.”¹⁴⁸ On the other hand, another lawyer said that while *ZH*

143. The CRC was referenced in 45 decisions, which constitutes 2.3 percent of all treaty references in this study. See *supra* Table 1.

144. Borders, Citizenship, and Immigration Act, 2009, c. 11, § 55(1)(a) (U.K.).

145. See *ZH (Tanzania) v. Sec’y of State for the Home Dep’t*, *supra* note 6, [22]–[23], [26]–[30], [33].

146. Interview with Interviewee U107, in London, Eng. (Sept. 17, 2012); Interview with Interviewee UK-108, in London, Eng. (Sept. 17, 2012); Interview with Interviewee UK-138, in Birmingham, Eng. (Feb. 8, 2013); Interview with Interviewee UK-139, *supra* note 128.

147. Interview with Interviewee UK-108, *supra* note 146.

148. Interview with Interviewee UK-150, in Edinburgh, Scot. (Dec. 20, 2013).

(*Tanzania*) and other cases have made it considerably easier to make treaty-based arguments, those treaties are usually not “determinative of the issue”.¹⁴⁹ But at the very least, because of both legislative action and Supreme Court imprimatur, the CRC has become more prevalent in UK asylum jurisprudence in recent years.

4. The vast majority of treaty references in judicial opinions do not help applicants obtain protection, and the percentage of such helpful references has been declining in the past half-decade.

In addition to tracking the number of treaty references over time, treaty references in this study’s database were coded according to whether they assisted the applicant in obtaining relief, either through asylum or complementary protection. Coding categories were divided into “helpful” and “unhelpful” references as follows:

Helpful References

- The treaty was the basis for the court’s grant of asylum.
- The court used the treaty to buttress a grant of asylum it reached on other grounds.
- The court cited the applicant’s home country’s violation of the treaty in its description of conditions within that country.

Unhelpful References

- The court rejected the treaty-based argument and denied asylum.
- The court rejected the treaty-based argument but granted relief on other grounds.
- The court referenced the treaty either directly or indirectly but did not analyze it in denying asylum.

As Table 2 indicates, 75 percent of all treaty references over the past two decades have not assisted the applicant in obtaining relief, whereas 25 percent of those references were helpful to the applicant.¹⁵⁰

149. Interview with Interviewee UK-139, *supra* note 128. Indeed, as noted later in this Article, of the forty-five references to the CRC in published decisions over the past two decades, only three were the basis for a grant of protection to the applicant.

150. These percentages are similar to the split I found between helpful and not helpful treaty references in Canada during a similar time period: 20 percent of references helped asylum-seekers obtain relief and 80 percent did not. Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10, at 32–33 tbl.9 (demonstrating that,

**Table 2: Total Helpful and Unhelpful Treaty References
(% of all refs. to that treaty)**

Treaty	Helpful References	Unhelpful References
CEDAW	4 (46.2%)	5 (53.8%)
ICCPR	18 (46.2%)	21 (53.8%)
CAT	5 (41.7%)	7 (58.3%)
CRC	15 (33.3%)	30 (66.7%)
ECHR Article 3	29 (21.6%)	106 (78.4%)
ECHR Article 8	131 (22.7%)	446 (77.3%)
Article 15 QD	2 (21.4%)	7 (78.6%)
ECHR Article 2	11 (12.9%)	74 (87.1%)
ECHR Article 5	1 (12.5%)	7 (87.5%)
Article 23 QD	1 (6.7%)	14 (93.3%)

As shown in Table 2, the treaty provisions with the lowest proportion of helpful references were all within the ECHR and the Qualification Directive. By contrast, the highest proportion of helpful references were to CEDAW, ICCPR, CAT, and CRC, although the total number of these helpful references was extremely small (46, or 2.3 percent of treaty references overall and 9.3 percent of helpful treaty references).¹⁵¹

When we look at the breakdown of helpful references, however, ECHR articles 3 and 8 had the highest percentage of references that resulted in a grant of protection (21.6 percent and 16.9 percent of all references to those provisions, respectively).¹⁵² The treaty with the highest percentage of references that buttressed a grant of relief on other grounds was CEDAW, with 46.2 percent of all references to CEDAW falling into that category. This contrast provides further evidence of the importance of treaty incorporation in affording a

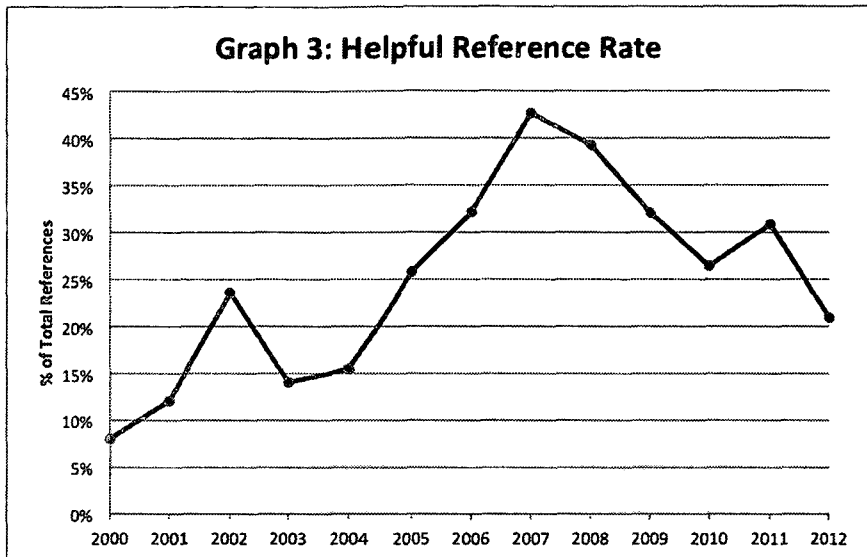
regardless of the judge's gender, treaty references were helpful about 20 percent of the time).

151. See *supra* Table 2. The treaty with the highest proportion of helpful references in my study of Canadian asylum decisions during the same time period was also CEDAW. See Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10, at 25 tbl.6. In that study, 50 percent of all references to CEDAW were helpful to the claimant. *Id.* There were far more CEDAW references overall in Canada (269) than in the United Kingdom (13). Compare *supra* Table 2, with Meili, *Canadian Jurisprudence Since 1990*, at 25 tbl.6. While the small sample size here cautions against grandiose conclusions, these data suggest that while treaties such as CEDAW and CRC are referenced sparingly by UK judges, they are helpful to asylum applicants in a relatively significant percentage of those cases. See *supra* Table 2.

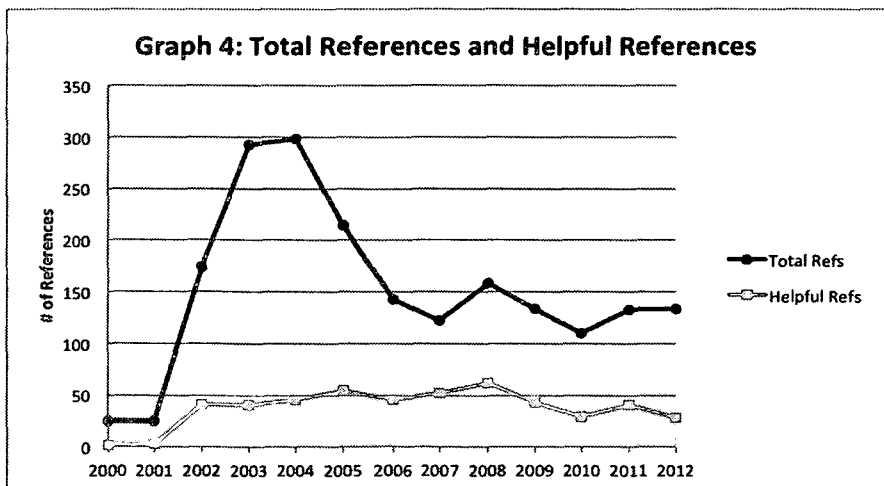
152. A chart compiling the various references to all of the treaties in this study appears at Appendix B.

means of complementary protection to asylum-seekers, as opposed to merely supporting a grant of relief on other grounds.

When we view helpful references over time, we see that they generally increased (as a percentage of all references) through the first half of the 2000s but gradually declined thereafter:



The trend revealed in Graph 3 stands in stark contrast to references overall, which, as shown in Graph 1, fell sharply during the mid-2000s and have leveled off since. Thus, at the same time that all treaty references were sharply declining (that is, in the mid 2000s), helpful references were increasing gradually. Since 2008, however, all references, as well as helpful references, have gradually declined. Graph 4 illustrates these trends.



Graph 4 also demonstrates that while there was a surge in treaty references in the years immediately after the HRA went into effect, the overwhelming majority of those references were not helpful. Since 2007, however, the relationship between helpful and unhelpful references has remained relatively consistent.

What explains the consistent predominance of unhelpful over helpful treaty references as well as the decline in the proportion of helpful references in the past few years? The former is likely the result of what several lawyers identified as an aversion among many judges to any kind of human rights-based argument. While such arguments became commonplace after passage of the HRA, they were not embraced by all judges:

- [Judges] are receptive in the sense that they accept that [a treaty-based claim] is arguable. How willing they are to engage with the argument in particular cases depends a lot on the judge. And I think one of the very clear features of the immigration and refugee courts in this country is . . . quite a clear distinction between allowers and refusers. I probably shouldn't say this but the reality is part of the barrister's job in this jurisdiction is to think up reasons to get the case adjourned away from particular judges because they are a liability.¹⁵³
- What I find with tribunal judges . . . they are quite case hardened. I've seen some judges who a few years ago I would consider fairly open minded, and they've kind of fallen into line. . . . They are the guys who would say . . . they've heard it all before. . . . They become kind of inured to the facts of certain types of cases.¹⁵⁴
- In my mind it is quite difficult to get anything all that meaningful in terms of persuading the court out of pure unincorporated provisions.¹⁵⁵

This aversion to human rights-based arguments may result from the overall anti asylum-seeker animus within the United Kingdom. Some of that animus is directed at human-rights claims in particular. The following recently published tabloid headlines are illustrative:

- Now 78 gypsies facing eviction from illegal camp claim their CHILDREN'S 'human rights' mean they should stay put (and you'll foot the £200,000 bill)¹⁵⁶

153. Interview with Interviewee UK-139, *supra* note 128.

154. Interview with Interviewee UK-151, in Manchester, Eng. (Jan. 14, 2014).

155. Interview with Interviewee UK-136, *supra* note 122.

156. Rob Cooper, *Now 78 Gypsies Facing Eviction from Illegal Camp Claim Their CHILDREN'S 'Human Rights' Mean they Should Stay Put (and You'll Foot the £200,000 Bill)*, MAIL ONLINE (U.K.) (Jan. 3, 2014, 7:01 AM), <http://www.dailymail.co.uk/>

- Human rights laws allowed 600 foreign criminals to dodge deportation and remain in Britain last year¹⁵⁷
- Drug dealer escapes deportation [sic] as it would breach his 'human right' to see his UK family¹⁵⁸

Although much of the anti-immigrant fervor in the United Kingdom has been redirected in recent years toward EU migration as the number of asylum claims has dropped, many lawyers suggested that the media's demonization of asylum-seekers and the human rights arguments they assert cannot help but influence judges. In answering an interview question about whether judges are influenced by negative portrayal of refugees, particularly in the tabloid press, the vast majority of lawyers replied either "yes" or some variant of "judges are human beings and they read the papers, too." Some lawyers went into more detail:

- [J]udges reflect popular imagination. Sometimes deliberately, sometimes just because they read the papers like everybody else. . . . And sometimes they explicitly say that they consider that it's their duty to respond to public concerns. Which is a kind of judicial way of saying I read the Daily Mail. It is a judicial way of saying that I read the media and I'm freaked out by all that I'm reading.¹⁵⁹
- Absolutely, no doubt at all that [the media affects judicial decisions]. It is very hard not to. Even the most liberal invincible judge can't not unconsciously take account of the atmosphere that, of the whole country really. Some of them will be responding quite consciously to it I think. Indeed some of the less subtle or sophisticated ones will let their prejudices spill out onto the page. Less of a problem in the upper tribunal or court of appeals obviously but certainly some of the first tier judges are pretty naked about their prejudices.¹⁶⁰

news/article-2533143/Now-78-gypsies-ordered-leave-illegal-camp-claim-CHILDRENS-human-rights-mean-stay-youll-foot-200-000-bill.html [http://perma.cc/78FR-ULTG] (archived Oct. 6, 2014).

157. David Collins, *Human Rights Laws Allowed 600 Foreign Criminals to Dodge Deportation and Remain in Britain Last Year*, MIRROR (U.K.) (Jan. 29, 2014, 12:00 AM), <http://www.mirror.co.uk/news/uk-news/human-rights-laws-allowed-600-3087593#.UuqgKLSmOOY> [http://perma.cc/A3XJ-XVPU] (archived Oct. 2, 2014).

158. Owen Bennett, *Drug Dealer Escapes Deportation as it Would Breach his 'Human Right' to See his Family*, EXPRESS (U.K.) (Jan. 8, 2014), <http://www.express.co.uk/news/uk/452696/Drug-dealer-escapes-deportation-as-it-would-breach-his-human-right-to-see-his-UK-family> (last visited Oct. 9, 2014) [http://perma.cc/3BJX-CSTX] (archived Oct. 2, 2014).

159. Interview with Interviewee UK-139, *supra* note 128.

160. Interview with Interviewee UK-141, *supra* note 141.

- I suspect if I were a judge reading an article about how horrid my decision was, I'd have to be a brave judge not to let that affect me . . . I think we see that level of attack all too frequently.¹⁶¹

While these comments are not directed to human rights-based arguments per se, they suggest that such arguments might receive a warmer judicial reception if refugees were not so demonized in the press.

5. To the extent that the treaty references are helpful, the majority form the basis for a grant of protection, as opposed to merely buttressing a grant of protection reached on other grounds.

The treaty that was most frequently the basis for protection was article 3, where 83.1 percent of all helpful references to it (241 out of 290) fell into this category.¹⁶² Similarly, 76.3 percent of all helpful references to article 8 (100 out of 131) appeared in situations where it was the grounds for relief.¹⁶³ By contrast, none of the eighteen helpful references to the ICCPR and only 20 percent of helpful references to the CRC (3 of 15) were the basis for relief.¹⁶⁴

These figures demonstrate, once again, the critical importance in the United Kingdom of a treaty being incorporated (or effectively incorporated) into domestic law. Not only are such treaties (such as the ECHR) more likely to be utilized by lawyers and referenced in judicial decisions, they are also more likely to constitute the basis for concrete relief for claimants. Non-incorporated treaties have much less of an impact. They may assist in the interpretation of other treaties, most notably the Refugee Convention, but do not provide relief themselves.

We now turn to the analysis of statistical tests which were conducted in order to determine the impact of several variables on the extent to which human rights treaties help asylum-seekers obtain relief.

B. Testing of Key Variables

In order to better understand the factors which might influence the way that UK judges reference human rights treaties in refugee adjudications, the data collected for this Article were subjected to a series of tests to determine any statistically significant relationships between four variables and helpful references to the six instruments. The variables selected for testing were gender of the applicant,

161. Interview with Interviewee UK-126, in London, Eng. (Dec. 13, 2012).

162. *Supra* Table 2; *infra* Appendix B.

163. *Supra* Table 2; *infra* Appendix B.

164. *Supra* Table 2; *infra* Appendix B.

gender of the judge, level of the adjudication (tribunal or federal court), and country of origin of the applicant. The first two variables were chosen because they have been the subject of previous studies on factors influencing the outcome of asylum adjudications in other countries.¹⁶⁵ The third and fourth variables were selected because many lawyers suggested that they influence the extent to which treaties assist asylum-seekers.¹⁶⁶

The data were subjected to bivariate chi-square tests and multivariate logistic regressions to determine whether the relationship between these variables could reflect a random process: if the probability that the observed relationship should have happened by such a process is less than five chances out of one hundred (a "p-value" of .05 or less) I conclude that the relationship between the variables is due to a systematic process and not simply random chance.¹⁶⁷

1. Gender of Applicant

Studies in Canada and the United States have found that female asylum applicants have a higher rate of success than their male counterparts.¹⁶⁸ And in my recent study on the impact of human rights treaties on asylum jurisprudence in Canada, I found that

165. See, e.g., JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION, *supra* note 68, at 33, 47–48 (analyzing disparities in asylum grant rates based on the judge's gender); ANDREW SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 110–12 (2014) (finding a divergence in successful grants of asylum between men and women); Innessa Colaiacovo, *Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011)*, 1 J. ON MIGRATION & HUM. SECURITY 122, 136–37 (2013) (suggesting that the gender of a judge may influence the likelihood of a grant of asylum); Sean Rehaag, *Do Women Refugee Judges Really Make a Difference? An Empirical Analysis of Gender and Outcomes in Canadian Refugee Determinations*, 23 CAN. J. WOMEN & L. 627, 641–42 (2011) (reporting statistical findings about the likelihood of a grant of asylum and the gender of the adjudicator and applicant in Canada).

166. See, e.g., Interview UK-138, *supra* note 146; Interview UK-142, *supra* note 129.

167. As noted above, because the bivariate and multivariate tests yielded essentially the same results, for purposes of simplicity, I have included only the bivariate results in this Article. See *supra* text accompanying note 105.

168. See Rehaag, *supra* note 165, at 642 tbl.3 (finding that female claimants appearing before Canada's asylum tribunal between 2004 and 2008 had a 55.9 percent success rate compared to a 47 percent success rate for male claimants). In a recently published study of decisions by Department of Homeland Security asylum officers who interview asylum-seekers and determine whether to grant them asylum, Schoenholtz et al. found that since 1996, women were granted asylum about 11 percent more frequently than men. See SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 165, at 110.

women were more likely to receive help from references to certain treaties and that the difference was statistically significant.¹⁶⁹ As the next table reveals, across all of the instruments, female applicants were 6 percent more likely to receive a helpful reference in their published asylum decision than were male applicants. Moreover, the resulting p-value (.02) indicates that there is a statistically significant relationship between gender of the applicant and helpful treaty references generally.¹⁷⁰

Table 3: Applicant Gender and Helpful References to All Treaties Combined
(p-value = 0.02)

	Helpful	Total	Rate	90% CI ¹⁷¹
Male	320	1371	23%	(21%, 25%)
Female	159	539	29%	(26%, 33%)
Both ¹⁷²	12	57	21%	(14%, 34%)
Unknown ¹⁷³	1	6	17%	(0.9%, 58%)

What explains this phenomenon? Several scholars who have probed the relationship between gender and refugee determinations assert that the kinds of claims recognized by the Refugee Convention tend to be male-centered, whereas complementary protection—which is provided by the treaties in this study—focuses disproportionately on women’s claims. For example, Heaven Crawley argues that “[w]omen are generally assumed to participate in politics less

169. See Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10, at 31 tbl.8. I found a statistically significant relationship between the gender of the applicant and judicial references to ICCPR, CRC, and CEDAW, but not CAT, CERD, and ICESCR.

170. While there were no statistically significant relationships between gender and helpful references to any of the particular treaties analyzed in this study, there was a statistically significant relationship between gender and helpful references to treaties overall. See *infra* Table 3.

171. “CI” refers to Confidence Interval, which represents a range of likely values for the population parameter being tested. In this case, that parameter is the percentage of references to human rights treaties in tribunal and appellate court decisions, which are helpful to the claimant. Thus, for example, we can be 90 percent certain that the range of helpful treaty references in decisions regarding a male applicant is between 21 and 25 percent.

172. “Both” refers to situations where a man and a woman jointly filed an asylum claim.

173. In six of the decisions in the database, the gender of the applicant was not indicated.

frequently, less forcefully, and less readily than men.”¹⁷⁴ Similarly, Susan Kneebone has observed that women asylum-seekers are constructed as vulnerable dependents or victims, and their experiences are thus depoliticized.¹⁷⁵ Kneebone adds “that [a] [w]oman’s claim is most likely to be accepted . . . if it occurs whil[e] she fulfills her role as wife/mother/sister.”¹⁷⁶ Because this study focuses on treaties which provide complementary protection often based on non-political claims that are beyond the confines of the Refugee Convention, it is not surprising that female applicants benefit disproportionately from treaty references.

2. Gender of Judge

Much research over the past several decades has been devoted to the influence of gender on judging.¹⁷⁷ The general conclusion of this research is that such influence is difficult to measure because gender intersects with other factors relevant to judging, including age, race/ethnicity, family background, class/social stratum, sexual orientation, and ideology.¹⁷⁸ As Erika Rackley succinctly puts it “any attempt to pin down the precise impact of gender on [female] judging is impossible.”¹⁷⁹

174. HEAVEN CRAWLEY, *REFUGEES AND GENDER: LAW AND PROCESS* 81 (2001). See also GEORGINA WAYLEN, *GENDER IN THIRD WORLD POLITICS* 118 (1996) (“Politics appears to be a largely male activity, as women are not part of the political élites in any great numbers and therefore appear as politically inactive in this vision of the world.”).

175. See Susan Kneebone, *Women Within the Refugee Construct: ‘Exclusionary Inclusion’ in Policy and Practice – the Australian Experience*, 17 INT’L J. REFUGEE L. 7, 22 (2005).

176. *Id.* at 10. On the other hand, some scholars caution that the narrative of the vulnerable female applicant might lead to a fear of open floodgates for gender-based claims, thus making it *more* difficult for such claims to prevail. See Siobhán Mullally, *Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?*, 60 INT’L & COMP. L.Q. 459, 479 (2011) (arguing that assumptions about the treatment of women “in a particular society reinforce the view that to recognize a claim for asylum would open floodgates”).

177. See, e.g., SALLY J. KENNEY, *GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* (2013). Kenney’s book provides a helpful review of this literature dating to the 1970s. *Id.* at 22–43; see also ERIKA RACKLEY, *WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY* (2013) (analyzing how gender diversity affects the quality of judicial decisions through an examination of the role and position of female judges); ULRIKE SCHULTZ & GISELA SHAW, *GENDER AND JUDGING* (2013). For a summary of this research through 2007, see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 343 & n.79 (2007).

178. See RACKLEY, *supra* note 177, at 142–43 (recognizing that it is difficult to prove that the gender of judges has an impact on judicial decision making); SCHULTZ & SHAW, *supra* note 177, at 29–30.

179. RACKLEY, *supra* note 177, at 162. Nevertheless, one area where scholars have detected a correlation between judge gender and case outcome is sex

Recent studies on asylum jurisprudence in Canada, the United States, and the United Kingdom have produced mixed results on the question of the impact of gender on decision making in the asylum context. For example, in his study of decisions by Canada's Immigration and Refugee Board between 2004 and 2008, Sean Rehaag concluded that although the grant rate for female Immigration and Refugee Board (IRB) members was lower, there was no "simple or straightforward answer" to the question of whether the gender of the adjudicator makes a difference in asylum claims in Canada.¹⁸⁰ However, in a more detailed analysis of Rehaag's data, Innessa Colaiacovo concludes that female IRB members have a higher grant rate.¹⁸¹ Ramji-Nogales, et al. found that female immigration judges in the United States are much more likely to grant asylum than male judges but also found little gender differential in the grant rate of Department of Homeland Security asylum officers.¹⁸² And in my study of the impact of human rights treaties on asylum jurisprudence and practice in Canada since 1990, I found no statistically significant relationship between judge gender and helpful references to six core human rights treaties.¹⁸³ In the UK context, I found no statistically significant relationship between the

discrimination. Thus, for example, a 2010 study by Boyd, et al. found "consistent and statistically significant individual and panel effects in sex discrimination disputes." Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406–07 (2010). The authors indicate not only that female and male judges bring different perspectives to such disputes but that female judges sometimes cause male judges to vote in ways that they otherwise would not. See Carrie Menkel-Meadow, *Asylum in a Different Voice? Judging Immigration Claims and Gender*, in REFUGEE ROULETTE, *supra* note 68, at 202, 208; Rehaag, *supra* note 165, at 643–49 (reporting statistical findings about the influence of an adjudicator's gender and "prior women's rights experience" on asylum applications based on gender claims and noting "a positive correlation between adjudicators with prior experience in women's rights" and grants of asylum).

180. Rehaag, *supra* note 165, at 652.

181. See Colaiacovo, *supra* note 165, at 136–37 (finding that male adjudicators were more likely to deny grants than female adjudicators). Colaiacovo notes that her analysis, unlike Rehaag's, included controls to account for differences among IRB members along dimensions that include education level and prior work experience. *Id.* at 127, 137–40.

182. See RAMJI-NOGALES ET AL., *supra* note 165, at 47 (finding a grant rate of 53.8 percent among female immigration judges, as compared to a 37.3 percent success rate among male judges); see also SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 165, at 178–79 (finding that Department of Homeland Security asylum officers showed little variation by gender, with grant rates of 45.7 percent among male officers and 47.4 percent among female officers).

183. See Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10, at 32–33 tbl.9. I found that women judges were slightly more likely to reference CEDAW and CERD in ways that helped the applicant obtain relief, and male judges were slightly more likely to reference CAT, ICCPR, CRC, and ICESCR in helpful ways. However, none of these relationships between gender of the judge and helpful treaty references were statistically significant.

gender of the judge writing the opinion and references that assist the applicant in obtaining asylum.¹⁸⁴

Table 4: Judge Gender and Helpful References to All Treaties Combined
(p-value = 0.61)

	Helpful	Total	Rate	90% CI
Male	452	1808	25%	(23%, 27%)
Female	34	146	23%	(18%, 30%)
Both ¹⁸⁵	7	12	58%	(32%, 82%)
Unknown ¹⁸⁶	0	7	0%	(0.0, 35%)

As Table 4 demonstrates, while male judges were 2 percent more likely to include a helpful reference in their decisions than are female judges, this difference was not statistically significant. We tested whether this conclusion depended on the gender of the applicant and found no statistically significant relationships.¹⁸⁷ We also looked at claims raised exclusively by women (female genital mutilation (FGM) and domestic violence directed towards women) and found no discernible patterns.¹⁸⁸

184. Only 146 of the references in this study were in opinions written by female judges (7.4 percent of all references where the gender of the judge is clear from the published opinion). See *supra* Table 4. This reflects the well-documented dearth of female judges in the United Kingdom. See RACKLEY, *supra* note 177, at 7–9 (noting that, in England and Wales, women comprised only 12.8 percent of High Court Judges and an even lower percentage in more senior courts). Nevertheless, this number is sufficient for a reasonable chi-square bivariate test. It does, however, stand in stark contrast to my Canadian database over the same two decade period where 40.1 percent of all references were by female judges. See Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10.

185. “Both” refers to situations where a panel that included at least one male and one female judge issued the decision without any indication of the author of the opinion. These decisions were not included in the calculation of the p-value for this test.

186. In seven decisions in the data base, the name (and thus gender) of the judge was not included in the text. These decisions were not included in the calculation of the p-value for this test.

187. One interesting pattern occurred in situations where a man and a woman filed a joint application for relief. In such relatively rare situations (only fifty-seven published opinions over two decades) female judges were 14 percent more likely than male judges to include a favorable treaty reference). See *supra* Table 3.

188. We took random samples of FGM and domestic violence cases and found no statistically significant difference between the gender of the judge and helpful references.

3. Level of the Adjudication: Upper Tribunal or Appellate Court

Most of the lawyers interviewed for this study said that judges at the Upper Tribunal and appeals courts are equally amenable to human rights-based arguments, while judges at the First-tier Tribunal are far less so. The following comments typify this view:

- At the Upper Tribunal the standard of decision-making has gotten better. It is acting more like a proper court. Nick Blake¹⁸⁹ is largely responsible for this. The [Upper] Tribunal has been given more responsibility. The members have been designated as judges.¹⁹⁰
- The decision-making has been made more professional. The decisions on asylum in the 1990s and 2000-2003 were, frankly, appalling. There were so many decisions that were unsustainable. There was a sea change in terms of how decisions were made and the quality of decision-making.¹⁹¹
- I'm often surprised at how little the First-tier Tribunal judges know sometimes. . . . They're not all like that, some of them are quite good, clued up. But sometimes you do sort of wonder and the higher up you go obviously the more savvy they are, and the more clued up they are.¹⁹²

Because First-tier Tribunal decisions are not published, it is impossible to substantiate the widespread perception that judges at that level are less receptive to human rights-based arguments than judges further up in the hierarchy. On the other hand, data from published Upper Tribunal and appeals court decisions confirm the lawyers' perception of little difference in the extent to which judges at these two levels are likely to include helpful references to treaties in their decisions.

189. Sir Nicholas Blake is a barrister who served as President of the Upper Tribunal from 2010 to 2013. See *Rt. Hon. Sir Justice Blake*, MIGRATION MUSEUM PROJECT, <http://migrationmuseum.org/distinguished-friends/rt-hon-sir-justice-blake/> (last visited Oct. 19, 2014) [<http://perma.cc/945U-34NX>] (archived Oct. 13, 2014).

190. Interview with Interviewee UK-141, *supra* note 141.

191. Telephone Interview with Interviewee UK-145 (Nov. 14, 2013). One lawyer attributed the inferior quality of the First-tier to both the judges and the lawyers who appear before them:

[Lawyers at the First-tier Tribunal level] don't bring out all of the subtle points. [Judges] see a lot of rubbish in the [First-tier] tribunals. The advocates on both sides may be of questionable quality. So it may be for the appellate court to sort all the mess out . . . so both the judiciary is more equipped to deal with it and they have been presented with better arguments.

Interview with Interviewee UK-115, in London, Eng. (Nov. 2, 2012).

192. Interview UK-138, *supra* note 146.

Table 5: Levels of Adjudication and Helpful References to All Treaties Combined
(p-value = 0.07)

	Helpful	Total	Rate	90% CI
Appellate Court	269	1005	27%	(24%, 29%)
Tribunal	224	968	23%	(21%, 25%)

As Table 5 indicates, appeals courts are slightly more likely than the Upper Tribunal to include helpful references in their decisions (27 percent to 23 percent), but the relationship between the variables of adjudicator level and helpful references is not statistically significant (p value = 0.07).¹⁹³ In other words, applicants are as likely to receive a helpful treaty reference from an Upper Tribunal judge as they are from an appeals court judge.

4. Country of Origin of Applicant

Several lawyers indicated that asylum applicants from certain countries have had more success obtaining relief in the United Kingdom at different times in recent history. The following comments are indicative of this view:

- The UK public and the judges are all sympathetic to Sri Lankan Tamil cases. The UK government has never been critical of the Sri Lankan government, but has always had sympathy for the Tamils, and judges also have sympathy. I wonder whether the situation would be different if public opinion started to view Tamil Tigers as terrorists.¹⁹⁴
- Asylum is driven by world events, so right now, it is quite easy to get asylum from Eritrea for instance, if you're a male under 40 who hasn't completed military service.¹⁹⁵

In order to determine if there is a statistically significant relationship between helpful treaty references and the country of origin of applicants over time, such references were examined in decisions involving applicants from the ten countries in which treaty references appeared most frequently. As Table 6 indicates, although

193. This p-value does, however, indicate more of a relationship between level of adjudication and helpful treaty references than between judge gender and helpful treaty references (where the p-value was .61).

194. Interview with Interviewee UK-147, *supra* note 141.

195. Interview with Interviewee UK-142, *supra* note 129.

there is some divergence in the range of helpful references in decisions affecting applicants from the various countries (from a high of 32 percent helpful references for Iranian applicants to a low of 17 percent for Pakistani applicants), there is not a statistically significant relationship between helpful references and country of origin (p value = 0.32). This finding is not particularly surprising, given the relative paucity of cases from each country. However, even when tests were conducted to explore the relationship between the helpful reference rate of individual countries with the helpful reference rate of all ten countries combined, no statistically significant differences emerged.¹⁹⁶ Thus, while applicants from certain countries may have had more success obtaining asylum at various times in recent UK history, applicants from those countries (or any other countries, for that matter) are not necessarily more or less likely to receive a helpful treaty reference.¹⁹⁷

Table 6: Country of Origin and Helpful References to All Treaties Combined
(p -value = 0.36)

	Helpful	Total	Rate	90% CI
Sri Lanka	35	152	23%	(18%, 30%)
Afghanistan	30	120	25%	(19%, 32%)
Turkey	24	113	21%	(15%, 29%)
Iraq	27	94	29%	(21%, 37%)
Iran	29	93	31%	(24%, 40%)
Kosovo	23	88	26%	(19%, 35%)
Pakistan	15	87	17%	(11%, 25%)

196. This test considers the probability that each particular country is a random sample of the overall group. The lack of any statistically significant differences between the individual country probability and the overall probability (none of the p -values was less than 0.10) suggests that any variation in the relationship between country of origin and helpful treaty references is, indeed, random.

197. Because of the large number of countries of origin for asylum applicants (and thus the relatively small number of treaty references in decisions relating to any one particular country of origin), rather than conducting a multivariate regression analysis in this instance, we computed the overall helpful treaty reference rate and ran a series of single sample difference of proportion tests based on individual countries of origin. Here again, we found no statistically significant relationships.

Somalia	25	82	30%	(22%, 40%)
Zimbabwe	23	79	29%	(22%, 40%)
Eritrea	9	50	18%	(9.7%, 29%) ¹⁹⁸

VI. CONCLUSIONS

The literature on treaty effectiveness would predict that the United Kingdom is fertile ground for treaty references which help asylum-seekers obtain relief. It is a highly functioning democracy that has ratified numerous human rights treaties and incorporated some of them into its domestic law. Moreover, it has an active refugee bar that utilizes human rights treaties on a regular basis.

The data collected for this Article, however, suggest that this prediction is off the mark. References to human rights treaties by UK

198. The only country among the top ten countries of origin for asylum-seekers over the past two decades not on Table 6 is China, which was the seventh most common country of origin for asylum-seekers during 2008. See INFO. CTR. ABOUT ASYLUM & REFUGEES, KEY STATISTICS ABOUT ASYLUM SEEKER APPLICATIONS IN THE UK DECEMBER 2009 UPDATE 18 tbl.4 (2009), available at <http://www.icar.org.uk/ICAR%20Statistics%20Paper%201%20-%20December%202009%20update.pdf> [<http://perma.cc/UK3E-W83Y>] (archived Oct. 7, 2014) (showing China as a top ten origin country for UK asylum applicants from 2004 to 2008); INFO. CTR. ABOUT ASYLUM & REFUGEES, KEY STATISTICS ABOUT ASYLUM SEEKER APPLICATIONS IN THE UK FEBRUARY 2009 UPDATE 16 tbl.4 (2009), available at <http://www.icar.org.uk/KeyStatistics%20-%20Paper%201%20-%20January%202009%20update.pdf> [<http://perma.cc/K6L7-CJWL>] (archived Oct. 18, 2014) (showing China as a top five origin country for UK asylum applicants from 2002 to 2007); U.N. HIGH COMM'R FOR REFUGEES, ASYLUM LEVELS AND TRENDS IN INDUSTRIALIZED COUNTRIES 2010 35 tbl.22, 37 tbl.23 (2011), available at <http://www.unhcr.org/4d8c5b109.pdf> [<http://perma.cc/LTF5-ZMRQ>] (archived Oct. 7, 2014) (indicating that China continued to be a top ten origin country for UK asylum applicants in 2009 and 2010); U.N. HIGH COMM'R FOR REFUGEES, TRENDS IN ASYLUM APPLICATIONS LODGED IN EUROPE, NORTH AMERICA, AUSTRALIA, AND NEW ZEALAND, 2001 15 tbl.9 (2002), available at <http://www.unhcr.org/3c5a6ae24.html> [<http://perma.cc/4SWU-AKZU>] (archived Oct. 10, 2014) (listing China as ninth among the top ten origin countries for UK asylum applicants in 2001); U.N. HIGH COMM'R FOR REFUGEES, UNHCR ASYLUM TRENDS 2012 43 tbl.22, 45 tbl.23 (2013), available at <https://www.tagesschau.de/ausland/unhcr108.pdf> [<http://perma.cc/MRU3-AZAP>] (archived Oct. 7, 2014) (showing China as a top ten origin country for UK asylum applicants in 2011 and 2012); ROGER ZETTER, DAVID GRIFFITHS, SILVA FERRETTI & MARTYN PEARL, HOME OFFICE RESEARCH (U.K.), STUDY 259, AN ASSESSMENT OF THE IMPACT OF ASYLUM POLICIES IN EUROPE 1990-2000 88-89 (2003), available at http://www.irr.org.uk/pdf/asylum_policy_impact.pdf [<http://perma.cc/FF7X-KDMF>] (archived Oct. 7, 2014) (showing China as a top ten origin country for UK asylum applicants from 1997 to 2000). This discrepancy is likely because claims brought by Chinese asylum-seekers are more amenable to resolution under the Refugee Convention alone, which obviates the need for judges to entertain (or lawyers to make) claims for complementary protection.

domestic courts were virtually nonexistent prior to the effective incorporation of the European Convention on Human Rights into UK law at the turn of the last century. And after such references surged in the early 2000s (particularly references to articles 3 and 8 of the ECHR), they have subsequently declined. Also in decline since the early 2000s are references to treaties that assist asylum-seekers in obtaining relief.

These findings suggest that a more nuanced analysis of treaty effectiveness is in order in the asylum litigation context. Such an analysis is based on several findings from this Article. The most obvious is that in the UK context ratification alone does not guarantee that a treaty will be of any assistance to refugees. Only those treaties that have been effectively incorporated through domestic legislation or informally incorporated through Supreme Court precedent consistently played a significant role in assisting asylum-seekers in obtaining relief. Unincorporated treaties play less of a role, most notably by interpreting the meaning of terms such as “persecution” under the Refugee Convention. Indeed, were it not for the Human Rights Act, Section 55 of the UK Borders, Citizenship and Immigration Act 2009, and *ZH (Tanzania)*, human rights treaties would have little purchase in UK asylum law.

While the importance of incorporation is surely not a surprise, it only tells part of the story. This Article has shown that other, less obvious factors also help determine the impact of human rights treaties in UK asylum jurisprudence. For example, the quantitative data collected for this Article reveal a statistically significant relationship between the gender of the applicant and references to treaties that assist the applicant in obtaining asylum. That is, female applicants are more likely than their male counterparts to benefit from treaty references in published asylum decisions. On the other hand, the quantitative data reveal the *lack* of a statistically significant relationship between helpful treaty references and the gender of the judge, the level of adjudication (Upper Tribunal or appeals court), and the applicant’s country of origin. In some cases, these findings confound the conventional wisdom.

Moreover, the qualitative data reveal two factors which can make even incorporated treaties less effective than the treaty effectiveness literature would otherwise suggest. First, the indiscriminate use of human rights treaties can prove counterproductive: according to nearly all of the lawyers interviewed for this Article, many judges perceive the repeated invocation of such treaties as a sign of desperation and an attempt to compensate for a weak case. Lawyers sometimes complicate a straightforward (and strong) case under the Refugee Convention by including human rights-based arguments.

Second, treaties may have less of an impact within a public environment hostile to asylum-seekers. While precise measurement

of the influence of anti-refugee policies, public opinion, and media coverage on judicial decisions is beyond the scope of this Article, the consensus among lawyers interviewed is that it absolutely plays a role. It certainly helps to explain the decline in treaty references that have helped asylum-seekers in the United Kingdom over the past half decade.

These findings are similar to those in my recent study of the impact of human rights treaties on asylum jurisprudence and practice in Canada over the past twenty years.¹⁹⁹ There, I also found that helpful treaty references have steadily declined over the past decade and that incorporation of a treaty, whether through formal governmental action or Supreme Court precedent, is far more important than ratification in determining the extent to which domestic courts reference that treaty in published decisions.²⁰⁰ Moreover, as in the current study, I found a statistically significant relationship between gender of the applicant and helpful treaty references. And finally, most lawyers whom I interviewed for that study also believed that the indiscriminate use of human rights treaties by refugee lawyers does more harm than good.

The similarity of findings from my Canada and UK studies suggest that this Article's implications for refugee lawyers may be generalizable, at least to other common law countries. First, because references to treaties are most helpful to asylum-seekers when the treaties have been in some way incorporated into domestic law, lawyers should continue to press for such incorporation, either through governmental action or Supreme Court precedent.

Second, treaties are likely to be met with similar enthusiasm—or lack thereof—at all levels of the asylum adjudication process that result in published decisions. Thus, it makes strategic sense for lawyers to invoke treaties at the earliest stage of the process. In addition to preserving an argument for appeal, it may sometimes result in a positive decision or buttress a positive decision reached on other grounds. And even if a human rights-based treaty argument does not help in an individual case, it may nevertheless promote the application of human rights norms to refugee jurisprudence more generally. On the other hand, lawyers should not “overegg the pudding” when it comes to human rights treaties. While treaties have provided relief to many asylum-seekers whose claims fall outside the confines of the Refugee Convention, they can also alienate the judge and obfuscate an otherwise strong case.

199. See generally Meili, *Canadian Jurisprudence Since 1990*, *supra* note 10.

200. See *id.* at 28 (finding that treaties which have been formally incorporated into a country's domestic laws were more frequently referenced by judges than treaties which were not formally incorporated).

Finally, refugee lawyers should consider ways to cast asylum-seekers in a more positive light. While lawyers are understandably concerned with the immediate (and often overwhelming) demands of their individual cases, those cases may be adversely affected by negative perceptions of asylum-seekers within the general public, the media, and the government. It thus behooves lawyers to participate in efforts by advocacy groups and NGOs to humanize asylum-seekers in order to counter the tabloid-fed portrayals of them as queue-jumping public resource drains and security threats.

VII. APPENDIX A. KEY WORDS, PHRASES, AND CASES FOR CODING
HUMAN RIGHTS TREATIES

Treaty	Language	Cases
CRC	"best interests of the child should be a primary consideration"	ZH (<i>Tanzania</i>)
ICCPR	"various international instruments relating to human rights"	
CEDAW	"discriminatory practices and violence against women" "societal discrimination" (against women)	
CAT	"consistent pattern of gross, flagrant or mass violations of human rights" "(prohibits in absolute terms) torture or inhuman or degrading treatment or punishment"	
ECHR Article 2	"right to life" "real and immediate threat to life" "real risk that he would be killed" "a near certainty of death"	
ECHR Article 3	"real risk that he would be subjected to inhuman or degrading treatment or punishment" "ill treatment" "real risk" of torture, cruel inhuman or degrading treatment or punishment "real risk on return"	
ECHR Article 6	denial of a fair trial "independent and impartial tribunal established by law"	
ECHR Article 8	"established a private life" "established a family life" "proportionate/disproportionate interference" with family life or private life "right to respect for family life" "disruption of family life"	
Qualification Directive Article 15	"subsidiary protection" "real risk of serious harm" "real risk of ill treatment"	
Qualification Directive Article 23	"ensure that family unity can be maintained"	

VIII. APPENDIX B. CODING REFERENCES TO ALL TREATIES

	Art. 3	Art. 8	Art. 2	Art. 6	QD Art 15	QD Art 23	CRC	ICCPR	CEDA W	CAJ
Treaty was basis for protection	241 (21.6%)	100 (16.9%)	3 (3.1%)	0	5 (10.9%)	0	3 (6.4%)	0	0	1 (8.3%)
Court rejected treaty-based argument and denied protection	729 (65.3%)	414 (37.4%)	72 (6.5%)	30 (2.7%)	90 (8.2%)	13 (1.2%)	36 (3.2%)	21 (1.9%)	5 (0.5%)	1 (0.1%)
Court used the treaty to buttress a grant of protection on other grounds	49 (4.4%)	31 (2.8%)	8 (0.7%)	5 (0.5%)	4 (0.4%)	1 (0.1%)	10 (0.9%)	13 (1.2%)	6 (0.5%)	2 (0.2%)
Court cited home country violation of treaty in country condition analysis	0	0	0	0	0	0	0	0	0	0
Court rejected treaty-based argument but granted protection on other grounds	4 (0.3%)	3 (0.5%)	1 (1.0%)	2 (4.1%)	2 (4.3%)	0	0	0	0	0
Court referenced treaty but did not analyze it in denying protection	76 (6.8%)	27 (2.5%)	1 (1.0%)	2 (4.1%)	1 (2.2%)	1 (0.9%)	0	0	0	6 (5.4%)
Court ignored treaty-based argument but granted protection on other grounds	17 (1.5%)	16 (2.7%)	11 (11.5%)	2 (4.1%)	4 (8.7%)	0	2 (4.3%)	0	0	0
