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Abstract
This article supports a new theoretical approach to the utilization of human rights treaties in refugee status adjudications in domestic courts. The existing literature on treaty effectiveness is divided between several optimistic and pessimistic perspectives, none of which adequately predict the circumstances under which domestic courts in Canada reference treaties in ways that help refugees obtain relief. This new theoretical approach adds to the literature on treaty effectiveness in the litigation context by suggesting that the extent to which Canadian domestic courts reference treaties in ways that help refugees depends on several factors, including the manner in which those treaties are integrated into domestic law. It also demonstrates that invoking human rights treaties indiscriminately can be detrimental to the interests of refugees, as it can create the impression that the refugee's lawyer is desperate.

Keywords
Refugees--Legal status, laws, etc.; Treaties--Interpretation and construction; International and municipal law; Canada

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This article supports a new theoretical approach to the utilization of human rights treaties in refugee status adjudications in domestic courts. The existing literature on treaty effectiveness is divided between several optimistic and pessimistic perspectives, none of which adequately predict the circumstances under which domestic courts in Canada reference treaties in ways that help refugees obtain relief. This new theoretical approach adds to the literature on treaty effectiveness in the litigation context by suggesting that the extent to which Canadian domestic courts reference treaties in ways that help refugees depends on several factors, including the manner in which those treaties are integrated into domestic law. It also demonstrates that invoking human rights treaties indiscriminately can be detrimental to the interests of refugees, as it can create the impression that the refugee’s lawyer is desperate.

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Cet article propose une nouvelle approche théorique sur l'utilisation des traités relatifs aux droits de la personne dans les décisions des tribunaux nationaux sur le statut de réfugié. La documentation actuelle sur la validité des traités fait état de nombreux points de vue, tant optimistes que pessimistes, dont aucun ne prédit adéquatement les modalités selon lesquelles les tribunaux nationaux du Canada peuvent s'appuyer sur ces traités de manière à permettre aux réfugiés d'obtenir un recours. Cette nouvelle approche théorique vient s'ajouter à la documentation sur la validité des traités dans le contexte des litiges en suggérant que les modalités selon lesquelles les tribunaux nationaux du Canada peuvent s'appuyer sur ces traités de manière à venir en aide aux réfugiés dépendent de nombreux facteurs, en particulier de la manière dont ces traités sont intégrés au droit canadien. Elle démontre également qu'invoquer sans discernement les traités relatifs aux droits de la personne peut nuire aux intérêts des réfugiés en donnant l'impression que l'avocat du réfugié est à court d'arguments.

I. INTRODUCTION

CANADA HAS BEEN RECOGNIZED consistently around the world for its exemplary treatment of refugees.¹ It is the only country to have received the Nansen Refugee

I. John B Gould, Colleen Sheppard & Johannes Wheeldon, “A Refugee From Justice? Disparate Treatment in the Federal Court of Canada” (2010) 32:4 Law & Pol’y 454 at 458. However, changes to Canada’s refugee determination system introduced in 2012 have generated significant criticism about Canada’s commitment to refugee protection. See note 33, infra. See also Efrat Arbel & Alletta Brenner, “Bordering on Failure: Canada - U.S. Border Policy
Award, presented annually by the U.N. High Commissioner for Refugees to an individual, group, or organization in recognition of outstanding service to the cause of refugees, or stateless people. Canada was recently ranked third among thirty-one countries in Europe and North America on a multifaceted scale measuring each nation’s success in integrating immigrants into civil society. Its principal refugee law stipulates that the legislation be interpreted in a manner consistent with Canada’s human rights treaty obligations.

And yet, despite Canada’s reputation as a vigilant protector of the human rights of non-citizens, human rights treaties have had seemingly little impact on refugee jurisprudence in Canada. As this article will show, references to such treaties in Canadian jurisprudence have steadily declined over the past fifteen years. Even more surprising, the proportion of treaty references that help refugees obtain relief has diminished over that same period. What explains this apparent contradiction? Why have human rights treaties been referenced by judges in such a limited and increasingly unhelpful manner over the past fifteen years in a country that prides itself on its respect for the rights of non-citizens? This is the puzzle that this article analyzes.

Existing theoretical approaches to human rights and refugee law do not provide a complete explanation for this apparent contradiction. This failure underscores the gap in theoretical knowledge about the circumstances under
which treaties assist refugees in the asylum litigation context. This article begins to fill that gap by analyzing the circumstances under which human rights treaties are most likely to be referenced by Canadian domestic court judges in ways that help refugees obtain protection from persecution. Although the specific findings of this article are limited to Canada, several of the conclusions based on these findings are applicable to other refugee destination countries as well.

Part II of this article discusses the relevant scholarly literature and how it might explain the puzzle outlined above. Part III then briefly reviews the Canadian asylum adjudication process and Part IV outlines the research methodology employed in this study. The bulk of the article is found in Part V, which is split between descriptive and inferential analyses of the empirical data. The article concludes with a set of alternative explanations for the impact of human rights treaties in the asylum litigation context. The conclusion also discusses the resulting implications for lawyers representing refugees in domestic courts.

II. THEORETICAL EXPLANATIONS FOR THE CANADIAN CONTRADICTION

The theoretical literature in two areas of socio-legal studies, the effectiveness of human rights treaties and the human rights approach to asylum law, provides a possible explanation for the contradiction between Canada's reputation for respecting the rights of non-citizens and the decrease in references to human rights treaties in Canada's refugee jurisprudence over the past fifteen years. The

6. Throughout this article, unless otherwise noted, the term "asylum" refers to all forms of refugee protection in Canada, most notably asylum and humanitarian and compassionate consideration, the latter of which is granted if an applicant can demonstrate that removal from Canada will result in "unusual, undeserved or disproportionate hardship." See Singh v Canada (Minister of Citizenship and Immigration), 2009 FC 11 at para 18, 340 FTR 29. See also Immigration and Refugee Protection Act, SC 2001, c 27, s 25.1; Canada, Citizenship and Immigration Canada, IP 5 Immigration Applications in Canada made on Humanitarian or Compassionate Grounds (1 April 2011), online: <http://www.cic.gc.ca/ENG/RESOURCES/manuals/index.asp>. See also Audrey Macklin, "Asylum and the Rule of Law in Canada: Hearing the Other (Side)" in Susan Kneebone, ed, Refugees, Asylum Seekers, and the Rule of Law: Comparative Perspectives (Cambridge: Cambridge University Press, 2009) 78 at 83 [Macklin, "Rule of Law"].

7. Throughout this article, unless otherwise noted, the terms “judge” and “judges” refer to both administrative tribunal members and federal court judges who adjudicate claims for asylum and other forms of refugee protection in Canada. Similarly, unless otherwise noted, the terms “court” and “courts” refer to the administrative tribunal that hears first instance refugee claims, as well as any federal courts to which the decisions of that tribunal are appealed.
relevant scholarship in each of these fields is described below, along with how it might explain this contradiction.

A. THE EFFICACY OF HUMAN RIGHTS TREATIES

Substantial scholarship has been devoted over the past decade to the questions of why states comply with human rights treaties and whether such treaties influence state behavior.\(^8\) This literature, often based on quantitative studies, is divided into several camps, ranging from optimists who believe that treaty ratification has a consistently salutary effect on state behavior, to pessimists who assert the opposite, positing that treaty ratification often provides cover to states that then engage in more human rights violations than would otherwise have been the case.\(^9\) Most of this scholarship focuses on contingencies—factors that influence treaty compliance. 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 notes that “[w]here powerful actors can hold the government to account, international legal commitments are more meaningful” and that “human rights treaties are most likely to be effective where there is domestic legal enforcement of treaty commitments.”\(^10\) Similarly, Eric Neumayer finds a positive relationship between the efficacy of ratified treaties, on one hand, and the extent of democracy and the strength of civil society, on the other: “[I]n 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

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human rights protection into actual reality.” And in a recently published study, Wayne Sandholtz finds that the constitutional status of treaty law and the independence of courts influence the level of human rights protection within a given country. 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.

If we apply these theoretical expectations to the Canadian refugee adjudication system, we would hypothesize that Canadian courts are extremely receptive to human rights-based arguments in the asylum context. Lawyers are the kind of powerful actors who Hathaway predicts can hold the government to account for its treaty obligations. Indeed, according to Audrey Macklin, Canadian lawyers are the driving force in asserting international human rights arguments on behalf of refugees in domestic courts. Moreover, Canada is the kind of highly functioning democratic state with a strong civil society that Neumayer predicts can pressure governments to abide by their treaty obligations. Canada also has an independent judiciary, which Sandholtz associates with respect for human rights. Taken together, these contingencies support the hypothesis that human rights treaties have a strong influence on domestic courts in Canada.

11. Supra note 9 at 950. For more on the ability of mobilized advocates to compel enforcement of human right norms, see Margaret E Keck & Kathryn Sikkink, Activists Beyond Borders: Advocacy Networks in International Politics (Ithaca, NY: Cornell University Press, 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” (2009) 53:1 Int’l Stud Q 149 at 151.


13. Ibid at 38.


16. Ibid. An independent judiciary is one of the indicia by which Freedom House ranks the countries of the world.
Another hypothesis justified by the treaty effectiveness literature is that certain treaties will be more helpful to refugees than others. In a study of three human rights treaties, Daniel Hill concludes that treaty efficacy is related to the substantive right being protected.\(^{17}\) He finds that states are less threatened by the right to be free from sex discrimination protected by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)\(^{18}\) than they are by the protection found in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\(^{19}\) and the International Covenant on Civil and Political Rights (ICCPR)\(^{20}\) (both of which are likely to be asserted by political dissidents), and states are therefore more likely to comply with CEDAW than with the latter treaties.\(^{21}\) Given that this article analyzes judicial references to these same three treaties, as well as the Convention on the Rights of the Child (CRC),\(^{22}\) the International Convention on Economic, Social and Cultural Rights (ICESCR),\(^{23}\) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),\(^{24}\) one would hypothesize that the treaties most helpful to asylum seekers in Canadian domestic courts are those that protect rights that are least threatening to the government. In addition to CEDAW, this would most likely be CERD and CRC. Like CEDAW, CERD’s primary purpose is to protect against discrimination. And CRC is designed to protect the rights of children, a particularly sympathetic and non-threatening group.

The hypotheses outlined above are only partially borne out by the data collected and analyzed in this article. Contrary to what the treaty effectiveness literature would predict, human rights treaties are seldom referenced in Canadian refugee jurisprudence, and the frequency of such references has lessened over the past fifteen years. Moreover, the proportion of references that help refugees obtain relief has also declined. In addition, the treaties most likely to be referenced in ways that help refugees are CEDAW, CRC, and ICCPR, which only partially confirms the hypothesis driven by Hill’s analysis, which would have predicted CEDAW, CRC, and CERD as the treaties most helpful to refugees.

\(^{18}\) 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
\(^{19}\) 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
\(^{21}\) Hill, supra note 17 at 1172.
\(^{23}\) 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
One of the reasons that the expectations of the treaty effectiveness literature fail to explain the Canadian contradiction is that it measures compliance with treaties through the lens of state policies and practices, rather than the behavior of domestic courts. When judges consider human rights-based arguments in asylum cases, they are not—except at the highest levels of the judiciary—making official state policy with respect to human rights. Rather, they are engaging in the fairly ordinary judicial function of deciding, on a case-by-case basis, whether a given law (here, a human rights treaty that Canada has ratified and perhaps incorporated into domestic law) applies to a particular set of facts. As a result, the impact of treaties in this domestic court context is likely driven by a set of factors different from those identified in the literature on treaty compliance by states.

In her seminal work on treaty effectiveness, Beth Simmons recognizes the importance of measuring the impact of treaties in the litigation context but acknowledges that such measurement is difficult because litigation unfolds one case at a time and the number of cases through which one could determine a treaty’s influence is likely to be small. This article begins to fill that gap in the treaty effectiveness literature.

Another reason that the treaty compliance literature does not accurately predict treaty effectiveness in the asylum context is that in most cases, the practices that that literature measures are directed towards a particular country’s own citizens (e.g., does the country torture them, discriminate against them, deny them basic civil 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 to their own nationals. This differential—and detrimental—treatment is the result of factors that include concerns over national security,

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xenophobia, and scapegoating for domestic ills.\textsuperscript{27} Thus, even though the treaties examined in this article protect citizens and non-citizens alike, an entirely different set of factors appears to determine the effectiveness of those treaties when they are applied to each group separately.

\textbf{B. THE HUMAN RIGHTS APPROACH TO ASYLUM LAW}

The human rights approach is the dominant theory regarding the application of refugee law in domestic courts.\textsuperscript{28} It promotes a core set of refugee rights that is based on ratified human rights treaties and that affords protection to refugees in any state party to the 1951 \textit{Refugee Convention} or 1967 \textit{Protocol}.\textsuperscript{29} Through this approach, according to James Hathaway, refugee law fulfills its role as a system for the surrogate or substitute protection of human rights when the asylum seeker’s home country is unable to offer such protection.\textsuperscript{30}

One of the crucial aspects of the human rights approach is its emphasis on the human rights obligations of receiving states towards asylum seekers and

\textsuperscript{27} Weissbrodt \& Meili, supra note 26 at 47-53.
\textsuperscript{30} \textit{The Rights of Refugees under International Law} (Cambridge: Cambridge University Press, 2005). According to Deborah Anker, the human rights approach assists both the refugee law regime and the human rights regimes. See Deborah Anker, “Refugee Law, Gender, and the Human Rights Paradigm” (2002) 15:1 Harv Hum Rts J 133 at 143. The human rights approach aids the refugee law regime by elevating its status above that of “poor cousin” within the human rights milieu, and it aids the human rights regime by showing that human rights treaties can have demonstrable, positive impacts (\textit{i.e.}, helping an individual obtain protection from persecution or other serious harm). (Ibid at 133, 135). Some scholars have critiqued Hathaway’s conception of the human rights approach as too limited. For example, Michelle Foster argues that Hathaway’s categorization of human rights does not reflect the current state of human rights law and has actually obstructed the consideration of economic rights claims. See Michelle Foster, \textit{International Refugee Law and Socio-Economic Rights} (Cambridge: Cambridge University Press, 2007). Kate Jastram’s critique is more structural, as she asserts that the “significant differences between human rights analysis and refugee status determination” suggest that it is difficult to align the two regimes in any meaningful way. See Kate Jastram, “Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution” in James C. Simeon, ed, \textit{Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony} (Cambridge: Cambridge University Press, 2010) 143 at 171.
other refugees. That is, a receiving state must follow human rights norms in determining the fate of those who seek its protection. This emphasis on human rights protections suggests the following hypothesis: If lawyers invoke human rights treaties on behalf of refugees in domestic courts, those treaties should play a significant role in refugee status determinations; they should help domestic courts to decide whether the receiving country’s human rights treaty obligations compel a grant of asylum or other form of refugee protection in a given case. Such a hypothesis would be particularly strong in Canada since, as Macklin notes, there has been a concerted effort among Canadian refugee lawyers to infuse their advocacy with references to human rights treaties.

The data gathered for this article, however, suggest that the outcome we would expect from the human rights approach—like the outcome we would expect based on the treaty effectiveness literature—has not fully materialized. Given the failure of either theory described above to accurately explain the Canadian contradiction, this article develops an alternative explanation. It is based on several factors that influence whether—and in what way—judges refer to human rights treaties in the refugee litigation context. Because this new approach is based on Canadian refugee law and practice, it is necessary to briefly review the Canadian refugee adjudication process.

III. OVERVIEW OF CANADA’S REFUGEE ADJUDICATION PROCESS

As in many refugee destination countries, the system for adjudicating refugee protection claims in Canada features an initial decision by an administrative


tribunal and the possibility for judicial review in federal court.\textsuperscript{33} Canada’s administrative tribunal is the Immigration and Refugee Board (IRB), which is comprised of four different divisions. The focus of this article is the Refugee Protection Division (RPD), which hears first instance refugee claims.\textsuperscript{34} During the period pertinent to this article, RPD members were appointed by the executive branch

\textsuperscript{33} Canada’s refugee adjudication process underwent significant changes in December 2012, after the period for which data for this article was gathered. Two of the most notable changes were: (1) expedited processing of claims by refugees from twenty-seven countries (twenty-five of which are from the European Union) deemed to not normally produce asylum-seekers (termed Designated Countries of Origin, or DCOs); and (2) the creation of the Refugee Appeals Division (RAD) within the administrative tribunal that hears first instance asylum claims. These changes will hasten determinations for certain asylum-seekers and provide others with an additional means of appeal. See \textit{Balanced Refugee Reform Act}, SC 2010, c 8; \textit{Protecting Canada’s Immigration System Act}, SC 2012, c 17 (amending IRPA). Some observers are skeptical about the RAD’s independence, given that it will be comprised of public servants likely to be beholden to the executive branch that hired them. In addition, several lawyers interviewed for this article indicated that expedited procedures will make it more difficult for applicants and their representatives to adequately prepare claims. This concern has been borne out by recently reported statistics indicating that asylum applications in Canada declined by approximately 50 per cent between 2012 and 2013, a period when such applications increased in the United States. Peter Mazereeuw, “Refugee claims drop by half in Canada, Rise in US, says UN” (2 April 2014), online: Embassy <http://www.embassynews.ca/news/2014/04/01/refugee-claims-drop-by-half-in-canada-rise-in-us-says-un/45359>. See also Arbel & Brenner, \textit{supra} note 1 at 106. See also Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49:1 Osgoode Hall LJ 71 at 76 [Rehaag, “Counsel”]; Don Butler, “Chill of Ministerial Comments Erodes Independence of Immigration and Refugee Board, Former Chair Says,” \textit{The Ottawa Citizen} (29 November 2011) online: University of Ottawa <http://www.cdp-hrc.uottawa.ca/projects/refugee-forum/documents/SeriesPart4.pdf>. Neither of these changes will affect the significance of the findings reported in this article, given that the function of the RPD’s first tier tribunal and the federal courts within the refugee claim process are not altered by those changes. Nevertheless, a topic for future research will be the difference, if any, between how the RPD’s first tier tribunal and the newly created RAD reference human rights treaties in their decisions.

\textsuperscript{34} There are three other IRB divisions. The recently created Refugee Appeals Division considers appeals against decisions of the Refugee Protection Division to allow or reject claims for refugee protection. See “Refugee Appeal Division,” online: Immigration and Refugee Board of Canada: <http://www.irb-cisr.gc.ca/eng/refapp/pages/radsar.aspx>. The Immigration Division holds inadmissibility and detention hearings. See “Immigration Division,” online: Immigration and Refugee Board of Canada: <http://www.irb-cisr.gc.ca/eng/detention/pages/idsi.aspx>. Finally, the Immigration Appeals Division mostly hears appeals of sponsorship applications and appeals from orders of removal. See “Immigration Appeals Division,” online: Immigration and Refugee Board of Canada <http://www.irb-cisr.gc.ca/eng/immapp/pages/iadsai.aspx>.
for fixed but renewable terms. RPD members are not required to have legal training, and many do not. Between 2002 and 2010, the RPD issued approximately 60 per cent of all decisions rendered by the IRB.

Before persons seeking asylum or other forms of refugee protection within Canada may proceed through this administrative system, they must first be deemed eligible to seek relief by an immigration officer who reviews their claims. Only 1 per cent of claimants are denied at this stage of the process. Once deemed eligible, the applicant receives an administrative hearing before the RPD. If the RPD accepts the claim, the applicant may obtain permanent resident status in Canada and, eventually, citizenship. Although theoretically permitted to do so, the government rarely challenges a positive decision at the IRB stage.

RPD members are required to issue a written decision when they deny an application for refugee protection. By contrast, they are only required to issue a written decision in support of a grant of protection when the applicant requests one or when the applicant would otherwise be subject to exclusion. Between 1990 and 2011, approximately 16.9 per cent of RPD grants of protection were

35. RPD members were appointed through the Governor-in-Council process and could only be dismissed for cause by the Cabinet. See IRPA, supra note 4, s 153(1). As of December 2012, RPD members are civil servants, appointed in accordance with Canada’s Public Service Employment Act. See IRPA, supra note 4, s 169(1)(2).

36. See Rehaag, “Counsel,” supra note 33 at 76.


39. Ibid at 220. Under the rules effective as of December 2012, if the RPD rejects the claim, the applicant may now appeal to the newly created Refugee Appeals Division, although this appeal is not available to refugees from Designated Countries of Origin. This opportunity for appeal within the tribunal was not available during the time period covered by this article. In addition, the Minister of Citizenship and Immigration can appeal a positive decision to the RAD.

40. Refugee Protection Division Rules, SOR/2012-256, s 67(2)(c) [RPD Rules]; IRPA, supra note 4, s 169(d).

41. RPD Rules, supra note 40, s 67(2); IRPA, supra note 4, s 169(e). These criteria for providing written decisions mean that decisions granting protection are underrepresented in this study’s database of RPD decisions. Indeed, while the overall grant rate for asylum and humanitarian and compassionate consideration in Canada from 1990 through 2012 was 53.4 per cent, only 18.5 per cent of the 2,704 written opinions coded for this article (i.e., decisions in which at least one human rights treaty was referenced) were from cases in which such relief was granted. This discrepancy does not bias the conclusions of this study, however, because those conclusions concern the circumstances under which treaty references assist refugees
accompanied by a written decision.\textsuperscript{42} RPD written decisions are published when they are deemed to be novel, well-reasoned, insightful, or of general public interest.\textsuperscript{43} It has been estimated that only 1 to 2 per cent of RPD decisions are published.\textsuperscript{44}

Under the system in place during the period relevant to this article, if the RPD denied a claim, the applicant could apply for leave to seek judicial review before the Federal Court of Canada.\textsuperscript{45} A single federal judge rules on the request for judicial review, the grounds for which include error of law, breach of justice, or findings of fact made in a “perverse or capricious manner or without regard to the evidence before it.”\textsuperscript{46} Leave for judicial review is rarely granted, though the grant rate among federal judges varies widely.\textsuperscript{47} If leave is denied, the judge is not required to provide an explanation for the denial, and the decision is final.\textsuperscript{48} If leave is granted, the applicant receives a full merits hearing before the Federal Court. Federal Court judges who grant judicial review on the merits either remand the case to the RPD for a new hearing before a different RPD member, or instruct the RPD to grant the applicant refugee protection.\textsuperscript{49}
Between 2005 and 2010, applicants succeeded \(i.e.,\) leave was granted) at the judicial review stage about 44 per cent of the time.\(^{50}\) Judges usually issue written rulings at this stage of the proceedings (either granting or denying judicial review) but are not required to do so. Either the applicant or the government can appeal a decision by the Federal Court to the Federal Court of Appeal, but only if the Federal Court judge certifies that a “serious question of general importance” arose from the judicial review.\(^ {51} \) An appeal from the Federal Court of Appeal to the Supreme Court of Canada (SCC) is only permitted if the SCC grants leave, which is limited to cases that raise issues of public importance.\(^ {52} \)

An unsuccessful applicant may still request relief from removal by applying for humanitarian and compassionate consideration.\(^ {53} \) Additionally, an unsuccessful applicant may apply for a Pre-Removal Risk Assessment (PRRA) to determine whether the applicant is at risk of persecution, torture, death, or cruel and unusual treatment or punishment.\(^ {54} \) Applicants rarely succeed at the PRRA stage because they are only permitted to present evidence that arose after their refugee hearing or which they could not reasonably have presented at that hearing.\(^ {55} \)

**IV. METHODOLOGY**

This article employs a mixed-methods empirical approach, featuring both quantitative and qualitative data. Both aspects of this methodological approach are described below.

**A. QUANTITATIVE DATA: CASE LAW DATABASE**

The quantitative database for this article consists of approximately 24,000 published decisions by the RPD and Canadian federal courts, either granting or denying protection to persons seeking asylum or other forms of refugee protection between 1990 and 2012.\(^ {56} \) This study covers a twenty-two year period for two

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\(^{50}\) Rehaag, “Luck,” \textit{supra} note 47 at 23. As with decisions on leave for judicial review, decisions on the merits at the review stage vary widely depending on the judge hearing the appeal. Rehaag found that the grant rate for judges who decide cases on the merits after leave was granted ranged from a low of 7.89 per cent to a high of 92.31 per cent \textit{(ibid} at 27\textit{).}

\(^{51}\) \textit{IRPA}, \textit{supra} note 4, s 74(d).

\(^{52}\) \textit{Supreme Court Act}, RSC 1985, c S-26, s 40.

\(^{53}\) \textit{IRPA}, \textit{supra} note 4, s 25.

\(^{54}\) \textit{Ibid}, s 112.

\(^{55}\) Rehaag, “Luck,” \textit{supra} note 47 at 12.

\(^{56}\) The database is on file with the author. The database includes cases where asylum seekers had also sought relief on humanitarian and compassionate grounds. These cases were included
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major reasons. First, all six treaties included in the study were ratified or acceded to by Canada as of the early 1990s. Second, a twenty-two year time period creates a database of judicial opinions sufficiently large to reveal any patterns in the way treaties have been referenced over time and any statistically significant factors that may influence those patterns.

The 24,000 decisions were reviewed to find references to six core human rights treaties: ICCPR, CRC, CEDAW, CERD, ICESCR, and CAT. Noticeably absent from this list is the Refugee Convention—it was excluded from this study because its explicit aim is to assist asylum seekers. On the other hand, the six treaties selected for this study do not mention refugees per se. Instead, they 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. Moreover, the first five of these treaties (all except CAT) are the treaties from which human rights norms principally derive. Canadian refugee lawyers have invoked these treaties on behalf of their clients in a variety of ways. For example, an applicant for asylum fleeing political persecution might claim that by returning her to her country of origin, Canada would violate its obligation to protect her right to free expression under the ICCPR. As another example, an applicant with a minor child and who is a

because the purpose of the study is to determine the extent to which human rights treaties assist asylum applicants in obtaining relief from persecution, which can be obtained either through the Refugee Convention or complementary protections such as Canada’s provision of humanitarian and compassionate consideration. The Federal Court decisions in the database include judicial review decisions on the merits by the Federal Court, as well as decisions by the Federal Court of Appeal and the SCC. The criteria for determining which decisions are published are discussed in Part III, above.


citizen of the destination country might claim that returning the applicant to his country of origin contravenes the best interest of the child and thus violates Canada’s obligations under the CRC.

To gauge the prevalence of treaties in refugee jurisprudence, we counted as references not only specific mentions of the treaty itself (i.e., direct references), but also references to seminal cases that invoked the treaty and certain key words and phrases included in the treaty (i.e., indirect references). Consider, for example, the CRC and Baker v Canada (Minister of Citizenship and Immigration), a 1999 SCC decision. Article 3 of the CRC states: “In all 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.” The Baker case invoked the CRC in holding that the interests, needs, and rights of Canadian-born children should be taken into account before ordering the removal of their non-Canadian parents. Several court rulings issued after Baker have cited Baker (but not the CRC) for the proposition that the interests, needs, and rights of children must be taken into account in any decision regarding the removal of a child’s parents. Therefore, the relevant terms that constitute a reference to the CRC for the purposes of this study’s coding system are (1) the CRC, (2) Baker, and (3) the phrase “the best interests of the child.” This tallying of references was accomplished through word search functions in four online case law databases.

60. The key words and phrases used in the coding of the treaties in this study are contained in the Appendix to this article.
62. CRC, supra note 22, Article 3(1).
64. This methodology seeks to avoid one of the reasons for the phenomenon observed by Dauvergne, whereby courts refer less frequently to international instruments as they become more familiar with them. See Dauvergne, supra note 37 at 324. 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.
65. The case law research services consulted in order to identify and code treaty references were Canada Legal Information Institute, Immigration and Refugee Board of Canada - Canada (Federal), online: CanLII <http://www.iiican.org/en/ca/irb/index.html>; Westlaw Canada, Westlaw-Canimm-cs, online: Carswell, <http://web2.westlaw.com/search/default.wl?rs=LAWS2.0&trp=%2fsearch%2fdefault.wl&curtid=1&mt=LawSchoolPractitioner&fn=_top&vrs=2.0&ktsv=Split&DB=CANIMM-CS>; and Decisions of the Federal Court, online: Federal Court <http://decisions.fct-cf.gc.ca/fc-cf/en/nav.do>. All duplicate versions of decisions from online databases were eliminated from the coding. Forty-eight references from cases in 1993, which originally appeared on the Reflex online database, were eliminated.
The total number of direct and indirect treaty references culled from the database of approximately 24,000 published opinions is 3,432. Most of those references (3,005) appear in RPD decisions, while 427 appear in federal court decisions. The number of decisions containing at least one direct or indirect treaty reference is 2,704, or 11.3 per cent of all published RPD and Federal Court decisions between 1990 and 2012.

Because one of the main purposes of this study is to determine how frequently and in what manner courts refer to treaties in asylum adjudications, each of the treaty references was coded according to the way that the judge referred to the treaty. My research assistants and I used the following six coding categories, each of which is followed by an illustration from a specific case:

1. The treaty was the basis for the court’s grant of asylum.
   In *Baker* the SCC granted relief on humanitarian and compassionate grounds on the basis of the *CRC*. The Court held that administrative tribunals were to consider Canada’s obligations under the *CRC* in evaluating such claims.

2. The court rejected the treaty-based argument and denied asylum.
   In *Haida Rizvi v Canada*, the court held the applicants failed to demonstrate how removal would sufficiently harm the best interests of the children and denied relief.

3. The court used the treaty to buttress a grant of asylum it reached on other grounds.

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

67. There were two treaty references in dissenting opinions in Federal Court opinions that were not included in the database because this study focuses on treaty references in opinions that either granted or denied refugee protection.

68. Two thousand two hundred and ninety-three RPD decisions and 411 Federal Court decisions in the database contain at least one treaty reference.


70. 2009 FC 463.

71. 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*. 
In *X (Re)*\(^{72}\) the RPD held that sexual abuse was a violation of a fundamental right and deemed it a form of persecution. As part of its decision, the RPD referenced Article 9 of the *ICCPR*, using that treaty to demonstrate further that sexual abuse is a form of persecution.

4. **The court cited the applicant’s home country’s violation of the treaty in its description of conditions within that country.**
   In *MA7-08286*\(^ {73}\) the RPD cited an Amnesty International report documenting conditions in the applicant’s home country. The report referenced multiple *ICCPR* violations. The Board relied on this report in determining country conditions and granting asylum.

5. **The court noted that Canada is not bound by the treaty.**
   In *T97-00096*\(^ {74}\) the RPD ruled that the *CRC* had not been adopted into Canadian law and therefore did not give rise to enforceable substantive rights.

6. **The court referred to the treaty either directly or indirectly but did not analyze it in denying asylum.**
   In *T99-14019*, et seq.,\(^ {75}\) in which the RPD ruled against the applicant on credibility grounds, the opinion did not address the argument that her removal would implicate rights referenced in the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (1996), which is based, in part, on *CEDAW*.

   Inter-coder checks were conducted throughout the data gathering and coding process to verify the accuracy of the coding system. After the coding was completed, bivariate chi-square tests were conducted to identify any statistically significant relationships between references to treaties and variables such as the gender of the applicant, the gender of the judge, and the level of adjudication (RPD or federal court). The results of these statistical tests are reviewed in Part IV of this article.\(^ {76}\)

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72. 2010 MA7-09525 (IRB).
73. 2010 MA7-08286 (IRB).
76. The statistical tests were conducted with the publicly available online statistical software package R. See The R Project for Statistical Computing, *The Comprehensive R Archive Network*, online: <http://cran.r-project.org>. 
B. QUALITATIVE DATA: LAWYER INTERVIEWS

To better understand and illustrate the statistical patterns revealed by the quantitative data, I conducted twenty-one semi-structured, open-ended interviews with Canadian lawyers who have regularly represented asylum seekers for at least five years. I relied on key informants in Canada to help identify lawyers who fit these criteria. I conducted these interviews between October 2010 and May 2013 in person or via telephone or Skype with lawyers practicing in six cities from five of the Canadian provinces. Each interview lasted between thirty and forty-five minutes.

Lawyer interviews were included in this study because lawyers are the driving force in asserting international human rights arguments on behalf of refugees in domestic courts. Through litigation, lawyers 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, twenty-one interviews are sufficient to reach thematic saturation (the point at which no new themes emerge). It is therefore unlikely that these interviews will misrepresent the broader community of experienced Canadian refugee lawyers.

The interviews proceeded as follows: Lawyers were first asked to describe, in general terms, cases where they had represented a non-citizen seeking relief from removal before the RPD or federal 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 lawyers mentioned

77. The lawyers interviewed for this article practice in Vancouver, Calgary, Winnipeg, Toronto, Ottawa, and Montreal.
79. Moreover, these interviews help to answer a question posed by Dauvergne in her recent study of the use of international human rights instruments by the IRB between 2003 and 2010; that is, whether the recent decline in references to such instruments is the result of lawyers not raising them in their arguments. See Dauvergne, supra note 38 at 324-25. As noted later in this article, the answer to that question appears to be “yes, in part.” See Part V, below.
80. Greg Guest, Arwen Bunce & Laura Johnson, “How Many Interviews Are Enough? An Experiment with Data Saturation and Variability” (2006) 18:1 Field Mthds 59. Guest et al conclude that for studies with a high level of homogeneity among the studied population, a sample of as few as six interviews may suffice to enable development of meaningful themes and useful interpretations (ibid at 78).
a human rights treaty (other than the Refugee Convention) spontaneously during the initial response, they were asked why they used it in that case and whether they 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 lawyers failed to mention any human rights treaties (again, other than the Refugee Convention) during the initial response, they were 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 refer to human rights treaties in refugee cases.

There is a risk of bias in the decision only to 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 illustrate patterns gleaned from the study’s quantitative data. Moreover, they can speak from experience as to any trade-offs they perceive in invoking international human rights treaties in a given case. Their analysis of these trade-offs provides insight into some of the circumstances under which such treaties may weaken refugee claims. Such circumstances are less likely to be revealed through quantitative data analysis.

By coding nearly three thousand written decisions over two decades of Canadian refugee jurisprudence, subjecting the results to statistical tests, and contextualizing those results through open-ended interviews with refugee lawyers, this article provides clues to the puzzle of why treaty references, and in particular, treaty references that help refugees obtain relief, have diminished over that period. This study also begins to fill the gap in the human rights treaty effectiveness literature identified by Simmons (i.e., measuring the effectiveness of treaties in the litigation context). 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 allows for predictions about the circumstances under which human rights treaties are more likely to help refugees succeed in domestic courts.

81. Supra note 25.
V. FINDINGS AND DISCUSSION

A. DESCRIPTIVE ANALYSIS OF EMPIRICAL DATA

The data gathered for this study are consistent with aspects of both the pessimistic and optimistic theories of treaty effectiveness discussed in Part II. Some of the data suggest that treaty references are generally not helpful to refugees. Conversely, other data suggest that under certain circumstances, treaty references are helpful to refugees in a significant percentage of cases. It is these circumstances that form the basis for a new theoretical approach to treaty effectiveness in the refugee adjudication context.

1. THE PESSIMISTIC VIEW

As described in Part II, the pessimistic perspective on human rights treaty effectiveness holds that such treaties have limited value and may sometimes be counterproductive.\(^{82}\) The data in this study reveal three trends over the past twenty-two years that are consistent with this view: the paucity of references to treaties overall; the decline in such references over time; and the decrease in the proportion of treaty references that help the refugee obtain relief. Each of these trends is discussed below.

I. FEW TREATY REFERENCES OVERALL

As noted above, only 11.3 per cent of published RPD and Federal Court decisions since 1990 contained either direct or indirect references to any of the six human rights treaties in this study.\(^{83}\) This paucity of references to treaties is most likely attributable to a number of factors. One of the most significant is that judges usually concern themselves exclusively with the question of whether an applicant has met the applicable standard under the *Refugee Convention*. In many cases, no human rights treaty other than the *Refugee Convention* is before the court. Even when the lawyer representing the applicant raises such an argument, the court

\(^{82}\) See Neumeyer, supra note 9.

\(^{83}\) As also noted above, this figure may be an overrepresentation of the prevalence of human rights references, given that the criteria for published opinions privileges opinions that raise novel legal arguments. Nonetheless, it is consistent with Dauvergne’s finding that human rights treaties were referenced in only 9.7 per cent of published opinions by the RPD, the Immigration Appeal Division, and the Immigration Division between July 2002 and December 2010. See Dauvergne, supra note 37 at 315. The vast majority of those decisions were at the RPD, which is the focus of this study. Dauvergne’s study does not include federal court opinions.
may not address it. One lawyer described the prevalent attitude among judges in this regard as follows: “I don’t think that most of the federal court judges are very open to novel arguments using the international law.”

A related explanation for the overall lack of treaty references is that many refugee lawyers are not aware of the relevant treaties. As the following interview excerpts suggest, there seems to be a gap in awareness of, or interest in, human rights-based arguments within the Canadian refugee law bar:

It’s not like … my side of the bar is particularly well-informed on international issues. There are some lawyers who have academic human rights backgrounds, and those are the lawyers who tend to drive these issues because they are more aware of it.

It’s … probably the academics more often than the others predictably who would range further afield and invoke international norms as relevant to the discussion.

In a similar vein, many refugee lawyers, particularly those who practice primarily before the RPD, have insufficient time and resources to prepare human rights-based arguments. As one lawyer noted:

When you’re preparing for a refugee case that is ordinarily expected to be a three hour hearing and you’re not being paid a tremendous amount of money to be doing it … it just takes too much time and effort to be … invoking the international case law that’s out there that could be supportive.

These comments suggest that judges and lawyers share responsibility for infrequent references to human rights treaties in Canadian refugee jurisprudence. It is fair to assume that in most cases, a judge is unlikely to refer to a particular treaty if the lawyer representing the applicant has not raised it in written submissions or during oral argument.

II. THE DECLINING NUMBER OF TREATY REFERENCES OVER TIME

Another way in which the pessimistic view of treaty effectiveness applies in the Canadian asylum litigation context is that the number of treaty references has declined in recent years, following a dramatic increase in such references in the mid-late 1990s. As Figure 1 demonstrates, references to the four most

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84. Interview of C-4 by Stephen Meili (17 December 2010) via telephone [transcript on file with author].
85. Interview of C-16 by Stephen Meili (8 May 2013) via telephone [transcript on file with author].
86. Interview of C-5 (30 November 2010) via telephone [transcript on file with author].
87. Ibid. This same lawyer also noted that human rights arguments are often unnecessary because Canada’s existing refugee law is “progressive.”
frequently referenced treaties (CAT, ICCPR, CRC, and CEDAW) have declined in recent years after having peaked at some point in the mid-1990s or early-to-mid-2000s. And references to the other two treaties (CERD and ICESCR) have remained de minimus throughout the past two decades.

FIGURE 1: REFERENCES TO TREATIES, 1990−2012

The recent pattern of decreasing treaty references is most pronounced in the cases of ICCPR and CAT. ICCPR was referenced in over 100 written decisions for several consecutive years, but has been referenced in fewer than 50 decisions in each year for the past decade. And while references to CAT gradually increased until a peak of about 175 in 2007, references to it have plunged to less than 50 in the past few years.

What explains this phenomenon? None of the lawyers interviewed indicated that they had curbed their use of either of these treaties in recent years. 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, as Figure 2 indicates, although applications for, and grants

88. This pattern is similar to that noted by Dauvergne in her study of the use of international human rights law by the IRB between 2002 and 2010. See Dauvergne, supra note 37 at 317-18.
of, refugee protection declined from the early 2000s through 2007, both have increased in the years since.\textsuperscript{89} If anything, the recent increase in claims should have resulted in an increase in treaty references in the past five years.

FIGURE 2: CANADIAN REFUGEE PROTECTION APPLICATIONS AND GRANTS, 1990–2012\textsuperscript{90}

One alternative explanation for the decrease in treaty references is what might be termed “human rights fatigue” among judges. Several lawyers described judges exhibiting various forms of exasperation when lawyers repeatedly articulate human rights-based arguments. Two of these lawyers used the same “dead horse” metaphor:

[The judges] are really mad at me because I keep raising [human rights arguments]. I keep hoping some day the Supreme Court will hear this issue. It’s wrong to label

\textsuperscript{89} There is a similar pattern with respect to RPD decisions through the 2000s. The annual number of such decisions declined by as much as 50 per cent through 2007, but has been steadily increasing since then. See Dauvergne, supra note 37 at 310.

everybody a terrorist when they’re not. … I do think some of it is lawyers just continuing to raise it and raising them in different ways or different applications. [The judge] told me I needed to stop beating a dead horse.91

Sometimes it feels like flogging a dead horse when you start talking about international law and international norms and you bring in the different conventions and you can feel the judge rolling his or her eyes…. 92

Judges who have grown increasingly impatient with human rights-based arguments, who see them as “fluffy” or “toothless” with no place in the courtroom (as one lawyer put it93), but who do not want to appear openly hostile to them, might simply omit them from their decisions.94

Another possible explanation for the decline in treaty references in recent years is what Catherine Dauvergne describes as a “learning effect” among judges.95 She posits that IRB decision makers are more likely to engage with international norms when those norms are newly relevant.96 This effect most likely influences federal court judges as well. As time passes, decision makers may feel less of a need to reference norms that have become an accepted part of asylum jurisprudence. Moreover, as the judiciary generally becomes more comfortable interpreting a particular treaty, the decisions in which it is referenced may meet the criteria for publication (e.g., novel arguments) less often. However, as noted above, the coding method for this study—which includes references to key words, phrases, and seminal cases like Baker as references to the underlying treaty—would make the impact of the “learning effect” less pronounced here.

A final possible explanation is that the Refugee Convention has become more robust in offering protections for asylum seekers, obviating the need for reliance on supplemental treaties. However, none of the lawyers interviewed mentioned this as an explanation. Moreover, the uneven pattern in asylum grants since 1990,
as reflected in Figure 2, suggests that the impact of the Refugee Convention, which is the driving force behind nearly all asylum claims, has been similarly inconsistent.

III. THE DECLINING PROPORTION OF TREATY REFERENCES HELPFUL TO APPLICANTS

A third reason that the pessimistic perspective on treaty compliance applies in the Canadian refugee litigation context is that the proportion of treaty references that assist the applicant to obtain asylum declined over most of the past decade and a half, before increasing very recently. To analyze this pattern, it is useful to combine the six coding categories utilized in this study according to the binary rubric of “helpful” and “unhelpful.” Helpful references appear in decisions in which the applicant is granted asylum. Unhelpful references appear in cases where asylum is denied. Helpful references correspond to coding categories 1 (the treaty was the basis for the court’s grant of asylum), 3 (the court used the treaty to buttress a grant of asylum it awarded on other grounds), and 4 (the court cited the applicant’s home country’s violation of the treaty in its description of conditions within that country). Unhelpful references correspond to coding categories 2 (the court rejected the treaty-based argument and denied asylum), 5 (the court noted that Canada does not recognize the validity of the treaty and therefore is not bound to it), and 6 (the court referenced the treaty either directly or indirectly but did not analyze it in denying asylum).

Figure 3 shows the proportion of all treaty references that were helpful to refugees over the past twenty-two years.

FIGURE 3: PROPORTION OF HELPFUL TREATY REFERENCES, 1990–2012
Figure 3 reveals that the proportion of helpful to unhelpful references in written asylum decisions over the past twenty years rose quickly at first, declined steadily from 1995 to 2010, and again rose sharply thereafter. In other words, the percentage of references to human rights treaties in cases where the human rights-based argument was rejected and relief denied had, until very recently, been gradually increasing, while the percentage of references to such treaties in cases where relief was granted had been declining. Prior to the recent increase in the proportion of helpful references, those references had declined by about 20 per cent between 1995 and 2010. While not heartening for human rights advocates, the drop in helpful references is less precipitous than the decline in the asylum and complementary protection grant rate in Canada over the same period, which fell from 70 per cent in 1995 to 39 per cent in 2010.97 Indeed, one could reasonably argue that the drop in the grant rate might have been even steeper were it not for those human rights-based arguments that assisted applicants to obtain relief.

The recent spike in the proportion of helpful treaty references is most likely the result of the significant drop in references to CAT. As demonstrated in Figure 1, above, the number of annual references to CAT since 2010 has fallen well below fifty, after having been well above that mark for most of the previous fifteen years. And as I will show in Table 1, below, nearly all (97 per cent) of references to CAT are not helpful to the applicant. Thus, rather than a signal of increasing judicial acceptance of human rights-based arguments, the post-2010 increase in helpful references as a share of all references is most likely a function of fewer references to CAT, a particularly unhelpful treaty.

In addition to supporting a pessimistic view of treaty effectiveness, Figure 3 suggests that repeated invocation of human rights treaties will not necessarily lead to an increase in helpful treaty references by judges, as the human rights approach to asylum law might suggest. Indeed, it appears that Canadian adjudicators of refugee claims have become less convinced by human rights arguments over time. A comment by a lawyer underscores this point: “You end up getting some [human rights] jurisprudence which basically says ‘it didn’t work here, it didn’t work here, it didn’t work here,’ so you don’t have a lot of positive jurisprudence.”98

What explains the general downward trend in helpful treaty references? One explanation is a byproduct of the increased utilization of human rights treaties by lawyers representing asylum seekers. It is possible that more of these

97. Supra note 90.
98. Interview C-16, supra note 85.
arguments are appearing in weaker claims, resulting in a higher rejection rate of those arguments by judges. Whereas lawyers may have been more selective in using human rights-based arguments at first, the more widespread use of them in recent years may mean that they are being rejected more frequently.

Second, judges may be trying to protect themselves from challenge by applicants. Successful applicants (and their lawyers) are unlikely to criticize decisions that ignore a human rights-based argument while granting protection. On the other hand, judges who ignore such arguments en route to a negative decision are more likely to face a challenge.99

Third, judges may be responding to negative views of refugees propounded by certain media outlets and politicians. One lawyer termed this phenomenon the “Toronto Sun Factor,” referring to the tabloid newspaper:

A judge makes a decision, and on the front page of the Toronto Sun, it gets reported. So the judge is going to be influenced by how that looks. Is it … “terrorist is allowed to stay in Canada”?: is it “criminal allowed to stay?”?: is it “liar permitted to stay”?: … So we construct the cases that are going before a discretionary type decision maker, whether it’s an immigration officer or a tribunal it’s got to be kept in mind that there is that Toronto Sun Factor there. In their mind, do they want to be named in the front page of a big newspaper as allowing this case in when it’s so full of holes or it’s so negative or it’s got all these other factors in it. So, of course, you know, it’s normal; it’s the way people are. They don’t want to be viewed as such as a bad guy. They got into the business of decision making not to fight a fight and be a partisan. They got into it because it’s a good job… . They are not interested in being heroes.100

In addition, the government of current Prime Minister Stephen Harper has stepped up its verbal attacks on asylum seekers in recent years. For example, Canada’s former Citizenship, Immigration, and Multiculturalism Minister, Jason Kenney, implied in a 2009 statement that Mexican and Roma asylum seekers were not legitimate refugees.101 Whether such attacks have an impact on judicial

99. I am grateful to Audrey Macklin for this observation.
100. Interview of C-20 (16 May 2013) via telephone [transcript on file with author].
references to human rights treaties (or the outcome of asylum and other refugee cases, for that matter) is beyond the scope of this article.\textsuperscript{102}

Finally, these data may be partly the result of the human rights fatigue phenomenon described above. Many of the interviewed lawyers suggested that judges have grown increasingly weary (and wary) of, and sometimes annoyed by, human rights-based arguments. This includes judges who may be generally sympathetic to the plight of asylum seekers. My interviews with refugee lawyers confirm this theory. Nearly all took a pessimistic view of judicial receptivity towards human rights-based arguments. Even those lawyers who think that judges can be persuaded to accept such arguments acknowledge that getting them to do so is an uphill battle. The following comments exemplify this view: “[Judges] pay lip service to [human rights law] in some decisions but it doesn’t get translated into … binding obligations on the ground.”\textsuperscript{103} “The Constitutional arguments tend to just be given greater consideration and the international law is kind of used as window dressing.”\textsuperscript{104}

Many lawyers nevertheless press on with these arguments because they believe that it is the only way to lay the groundwork for precedential decisions sanctioning the use of human rights treaties for certain types of asylum claims. This practice is reflected in the following interview excerpts:

[I]n terms of just nudging the court forward even if it’s not likely to be successful it’s something I think we feel like we have to do. And then there’s a more general kind of philosophical feeling amongst some of the lawyers I’ve been working with that the development of international law and its increasingly binding nature on domestic decision making is a good thing. So even if it maybe feels futile to raise these arguments you raise them because it’s the right thing to do.\textsuperscript{105}

\textsuperscript{102} Also beyond the scope of this article, but an interesting subject for future research, is the relationship between public opinion towards refugees and judicial references to human rights treaties. One of the reasons it would be difficult to explain any such relationship in the Canadian context is that Canadian public opinion towards refugees appears to be somewhat conflicted. On the one hand, in a poll conducted in Canada nearly every year since 1990, over half of the respondents agreed or strongly agreed with the statement “many people claiming to be refugees are not real refugees.” On the other hand, the percentage of respondents answering in that way declined from 78.9 per cent in 1994 to 55.3 per cent in 2011. See The Environics Institute, \textit{Focus Canada 2011}, online: <http://www.environcisnstitute.org/uploads/institute-projects/pdf-focuscanada-2011-final.pdf> at 25.

\textsuperscript{103} Interview of C-3 (15 March 2011) conducted in person [transcript on file with author].

\textsuperscript{104} Interview of C-2 (27 October 2010) via telephone [transcript on file with author].

\textsuperscript{105} Interview of C-10 (4 January 2011) via telephone [transcript on file with author].
By the time the Supreme Court sees it it's usually the tenth attempt to get the Supreme Court to hear the issue before they finally decide that they will hear it. Part of it is that there is a build up, the court's aware of it, people start writing articles like professors … and identify it as a problem. And ultimately the court will deal with it.\textsuperscript{106}

I think it’s really important for us as advocates to continue bringing [human rights arguments] up so that the message gets through and that the seeds are planted.\textsuperscript{107}

While the strategy of repeatedly raising human rights-based arguments can result in a helpful judicial precedent like \textit{Baker}, it can also be counterproductive to the interests of applicants, especially where it might be interpreted as a sign of desperation. Several lawyers alluded to situations where the invocation of human rights treaties might hurt their client:

> When you are basically down to arguing international legal principles you've got a pretty weak case.\textsuperscript{108}

> I would never hope to succeed simply on the basis of [international human rights] agreements…. That alone though would not do it… So I don't think it's the be all and end all of the case.\textsuperscript{109}

> I wouldn't be very confident, and I don't have any data to back me up here, but I don't think I'd feel very confident strictly relying on the international law arguments unless it's backed up by other arguments.\textsuperscript{110}

> It's always counterproductive to argue things that the court is not going to be receptive to. I mean in the sense if that you are just irritating the decision maker, in my experience that's generally counterproductive, unless you are setting up a record for appeal or you have some other strategy in mind.\textsuperscript{111}

These comments suggest that invoking human rights arguments in asylum cases is not always the win-win situation that the human rights approach to asylum law assumes. Indeed, it can be harmful not only to the applicant but also to other refugees by setting precedents that restrict the applicability of human rights treaties in future claims.\textsuperscript{112}

\textsuperscript{106} Interview C-12, \textit{supra} note 91.
\textsuperscript{107} Interview C-7, \textit{supra} note 92.
\textsuperscript{108} Interview of C-19 (15 May 2013) via telephone [transcript on file with author].
\textsuperscript{109} Interview of C-8 (16 December 2010) conducted in person [transcript on file with author].
\textsuperscript{110} Interview C-3, \textit{supra} note 103.
\textsuperscript{111} Interview of C-6 (5 January 2012) via telephone [transcript on file with author].
\textsuperscript{112} IRB decisions are not binding on subsequent IRB members except when those decisions are designated as “jurisprudential guides” by the Chairperson of the IRB. See Immigration
B. THE OPTIMISTIC VIEW

While the data collected for this article demonstrate that judicial references to human rights treaties in refugee cases are rare and declining, the data are also consistent with optimistic theories of treaty effectiveness. For example, Table 1 demonstrates that, with the exception of CAT, over 30 per cent of all judicial references to the treaties in this study appeared in decisions in which the applicant obtained relief. And in the case of CEDAW, just under half of the references were helpful to the applicant.¹¹³

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Helpful</th>
<th>Unhelpful</th>
<th>Total</th>
<th>Per cent Helpful</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAT</td>
<td>56</td>
<td>1590</td>
<td>1646</td>
<td>3%</td>
</tr>
<tr>
<td>ICCPR</td>
<td>386</td>
<td>775</td>
<td>1161</td>
<td>33%</td>
</tr>
<tr>
<td>CRC</td>
<td>103</td>
<td>198</td>
<td>301</td>
<td>34%</td>
</tr>
<tr>
<td>CEDAW</td>
<td>134</td>
<td>135</td>
<td>269</td>
<td>50%</td>
</tr>
<tr>
<td>CERD</td>
<td>13</td>
<td>25</td>
<td>38</td>
<td>34%</td>
</tr>
<tr>
<td>ICESCR</td>
<td>7</td>
<td>10</td>
<td>17</td>
<td>41%</td>
</tr>
</tbody>
</table>

The figures in Table 1 are consistent with Hill’s theory that certain human rights treaties have a stronger impact on the behavior of state actors than others.¹¹⁴ In Hill’s study, state compliance with CEDAW was much higher than with either ICCPR or CAT, a discrepancy that he attributes to the particular rights protected by each treaty.¹¹⁵ Here, we can see that references to CRC, CEDAW, and ICCPR are far more helpful to applicants than references to CAT.¹¹⁶ And while the

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¹¹³ These figures are particularly noteworthy because, as noted above, only 16.9 per cent of all written RPD decisions occur in cases where the applicant is granted relief.

¹¹⁴ Supra note 17.

¹¹⁵ Ibid.

¹¹⁶ The rather bleak data pertaining to CAT is attributable to the fact that in most cases, a court will only consider a CAT claim when the applicant has failed to meet the standard for asylum under the Refugee Convention. The denial rate for CAT claims is extremely high because
percentage of helpful references to CERD and ICESCR is relatively high (34 and 41 per cent, respectively), the total number of references to those two treaties over twenty-two years (38 and 17, respectively) indicates that they have been of little help to refugees over time.

In order to determine the reason for these disparities in treaty helpfulness, it is useful to return to Figure 1, which illustrates trends in treaty references over time. The vast majority of those references were to four of the treaties (CAT, ICCPR, CRC, and CEDAW). The spikes in references to these treaties between the mid-1990s and the early 2000s are the result of actions by one or more branches of government that made those treaties relevant to Canadian refugee law. For example, the increase in references to CAT beginning in the early to mid-2000s is undoubtedly the result of amendments to IRPA in 2002, which for the first time permitted the RPD to grant protection to applicants based on CAT criteria. Prior to that time, such status could only be granted based on Refugee Convention criteria.117

The large increase in ICCPR references in the mid to late 1990s, as well as the precipitous decline in such references throughout the 2000s, are most likely the result of the interplay between ICCPR, CAT, and the Canadian Charter of Rights and Freedoms.118 There is considerable overlap between the ICCPR, which Canada ratified in 1976, and the Charter, which was enacted in 1982. Indeed, the Charter is to be interpreted in a manner consistent with ICCPR.119 Thus, some of the wording of ICCPR was incorporated into the Charter.120 For example, there is similarity (though not complete symmetry) between Article 7 of ICCPR (“[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”) and section 12 of the Charter (“[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment”). Given that the coding scheme for this study is based, in part, on key phrases from the various treaties, an asylum claim based on section 12 of the Charter (e.g., a torture-based claim) was coded as an ICCPR reference. After CAT was incorporated into IRPA in 2002, lawyers asserting torture-based asylum claims could cite IRPA rather than the legal threshold for success on CAT claims is more demanding than that for Refugee Convention claims.

117. IRPA, supra note 4, s 97.
119. Peter W Hogg, Constitutional Law of Canada, 5th ed, loose leaf (consulted on 17 February 2014), (Toronto: Carswell, 2007) at s 36.9(c).
than the Charter, which helps to explain why references to CAT increased for a few years after 2002, while references to ICCPR declined.

The modest increase in CRC references after 2000 is most likely attributable to the 1999 SCC decision in Baker, which sanctioned the use of the CRC as an interpretive tool in adjudicating humanitarian and compassionate claims. Several lawyers cited Baker as justification for invoking the principle behind the CRC (but not necessarily the CRC itself) in cases where the interests of children are at stake. The following comments are illustrative:

Typically, in my submissions pertaining to whenever I have a child involved … I’ll cite the Convention [on the Rights of the Child]. I don’t think it has a lot of force. What’s most persuasive to the decision makers is the fact that there is a Supreme Court decision [Baker] saying that they must be alert and alive and attentive to the best interests of the children. I quote the Supreme Court decision.

I don’t quote international law when I’m doing [refugee] applications … I’ll just quote the federal court case that’s already decided that. It’s not usual that I would whip out the Convention [on the Rights of the Child] when I could just quote Baker. Because international law is only relevant in so far in that it’s incorporated into Canadian law.

If you do submissions on the best interest of the child you may mention the Convention on the Rights of the Child but more often than not people will mention … the Baker judgment… . We mention the conventions in addition to the cases. I know a lot of lawyers will just mention the cases now.

Indeed, it is somewhat surprising that there was not a larger bump in the number of CRC references in the post-Baker era, given that a reference to Baker or “best interests of the child” was coded as a CRC reference. Moreover, IRPA, which became effective in 2002, mandates that the best interests of the child be taken into account when determining humanitarian and compassionate claims. On the other hand, there has been considerable debate about whether Baker binds

121. Baker, supra note 61.
122. Interview C-4, supra note 84.
123. Interview of C-11 (14 November 2011) via telephone [transcript on file with author]. This statement, as well as others from lawyers in the study, reveals a split in lawyering strategy about citing to treaties themselves, as opposed to case law endorsing a principle enshrined in that treaty. This split may help to explain why Dauvergne’s study revealed so few meaningful references to human rights treaties—many of the lawyers in those cases never invoked treaties by name.
124. Interview C-12, supra note 91.
125. See IRPA, supra note 4, s 25(1). This section states the following humanitarian and compassionate considerations:
courts to consider the best interests of the child when considering humanitarian and compassionate claims. That controversy may have caused some judges to exclude a reference to Baker in their decisions, despite an applicant’s lawyer’s efforts to argue its relevance.

The gradual increase in CEDAW references from the mid-1990s through the early 2000s is most likely due to guidelines on gender-related asylum claims issued by the IRB in the mid-1990s. Directed to both advocates and judges, these guidelines specifically list CEDAW as a reference for determining whether conduct meets the standard for persecution under Canadian asylum law.

In contrast to the comparatively frequent references to the four treaties described above, courts rarely referred to either CERD or ICESCR over the past twenty-two years. Not surprisingly, neither CERD nor ICESCR have been incorporated into Canadian domestic law in any way. Thus, we can surmise that one of the factors impacting the frequency with which a treaty is referenced by judges in Canada in the refugee litigation context is the extent to which that treaty has been integrated into domestic law, either through formal incorporation, administrative directive, or SCC precedent.

In order to determine whether the manner in which the treaty is integrated into domestic law influences the way it is referenced by judges, it is useful to view the various types of treaty references according to each of the treaties. Table 2 illustrates this correlation:

[T]he Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible … or who does not meet the requirements of this Act, … examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected [emphasis added].


127. Immigration and Refugee Board of Canada, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Ottawa: Immigration and Refugee Board, 1996), online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/poll/GuiDir/Pages/GuideDir04.aspx>. These Guidelines also list ICCPR and ICESCR as recommended references for purposes of gender-based claims. This may have contributed somewhat to the increase in the number of references to ICCPR in asylum decisions in 1997, although ICCPR (like ICESCR) is less directly related to gender-based discrimination than is CEDAW and thus was likely not invoked as frequently in gender-based asylum claims as CEDAW.
As Table 2 demonstrates, the CRC is the only treaty that judges employed with any regularity as the basis for granting asylum. Fourteen per cent of all references to the CRC were in cases where the court identified it as the basis for relief. This phenomenon is most likely due to the influence of Baker, and demonstrates the importance of the SCC’s imprimatur on a treaty for interpretive effect in future decisions. None of the other treaties in this study has received this type of imprimatur from the SCC.

Table 2 also shows that in a significant percentage of decisions (except with respect to CAT), judges used the treaty to buttress a decision granting relief on other grounds. This finding confirms the wisdom of the litigation strategy

<table>
<thead>
<tr>
<th></th>
<th>CAT</th>
<th>ICCPR</th>
<th>CRC</th>
<th>CEDAW</th>
<th>CERD</th>
<th>ICESCR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relied Upon in Granting Asylum</td>
<td>3.0% (50)</td>
<td>0</td>
<td>14.0% (42)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Rejected in Denying Asylum</td>
<td>83.3% (1371)</td>
<td>54.3% (631)</td>
<td>52.5% (158)</td>
<td>41.6% (112)</td>
<td>52.6% (20)</td>
<td>58.8% (10)</td>
</tr>
<tr>
<td>Buttressed Grant of Asylum</td>
<td>0.4% (6)</td>
<td>28.9% (336)</td>
<td>18.9% (57)</td>
<td>46.5% (125)</td>
<td>28.9% (11)</td>
<td>41.2% (7)</td>
</tr>
<tr>
<td>Referenced in Country Conditions Report</td>
<td>(0)</td>
<td>4.3% (50)</td>
<td>1.3% (4)</td>
<td>3.3% (9)</td>
<td>5.3% (2)</td>
<td>(0)</td>
</tr>
<tr>
<td>Not Recognized</td>
<td>(0)</td>
<td>(0)</td>
<td>0.3% (1)</td>
<td>(0)</td>
<td>(0)</td>
<td>(0)</td>
</tr>
<tr>
<td>Ignored in Denying Asylum</td>
<td>13.3% (219)</td>
<td>12.4% (144)</td>
<td>13.0% (39)</td>
<td>8.6% (23)</td>
<td>13.2% (5)</td>
<td>(0)</td>
</tr>
</tbody>
</table>

128. In addition, as noted above, the CRC’s operative language regarding the best interests of the child is included in IRPA. See IRPA, supra note 4, s 25 (1).
129. In most cases, those other grounds were because the applicant satisfied the standards for asylum under the Refugee Convention.
mentioned by several lawyers interviewed for this article—citing human rights treaties even in cases where it may not be the strongest argument:

We still lay out the argument as fully as we can in the hope that even if we’re not going to be congratulated on our nice argument about the Convention or the Covenant or the CEDAW that it will have some impact.\(^\text{120}\)

If I thought that there was a right involved that was reflected in some international rights instrument I would put that into the record. I would make reference to it. Even if I’m [convinced] that I’m talking to deaf ears I would still do it. Because if we lose we can judicially review that decision and that’s one little bit of ammunition that’s in there.\(^\text{121}\)

As these comments suggest, although a treaty-based argument may not sway the judge initially hearing the case, it may have an impact later in the proceedings. Even in cases where the treaty does not support a grant of relief, it may nevertheless aid the cause of the diffusion of human rights norms in domestic court jurisprudence. Indeed, the data in Tables 3 and 4 (below) illustrate that the human rights approach to asylum law has gained some traction in Canadian refugee jurisprudence. While human rights treaties are rarely the principal reason for a grant of protection, they provide the court with additional authority on which to base its decision in favor of the applicant.

In sum, the descriptive statistical analysis has revealed that in the Canadian refugee law context, human rights treaties have been most frequently referenced by judges in ways that are helpful to refugees when the treaties have been integrated into domestic law. And those references have been particularly helpful to refugees when the SCC has deemed the treaty applicable to refugee claims.

The next section of this article determines whether there are any statistically significant relationships between certain variables and helpful treaty references.

### C. INFERENTIAL ANALYSIS OF EMPIRICAL DATA

In order to better understand the factors that might influence the way that Canadian judges reference human rights treaties in refugee adjudications, we subjected the data to a series of tests to determine the statistical significance of several variables and helpful references to the six treaties. The factors selected for testing were gender of the applicant, gender of the judge, political affiliation of the Prime Minister who appointed the federal judge, and the level of the adjudication (tribunal or federal court). The first three variables were chosen

\(^{130}\) Interview C-3, infra note 103.

\(^{131}\) Interview C-8, infra note 109.
because they have been the subject of studies on factors influencing the outcome of asylum adjudications in Canada. The fourth variable was selected because of comments from numerous lawyers interviewed for this article.

1. GENDER OF THE APPLICANT

Previous research has determined that women are more likely than men to obtain asylum in Canada. The database created for this article suggests a similar pattern with respect to treaty references in published RPD and federal court decisions: 30 per cent of all treaty references in cases involving female applicants were helpful, whereas only 14 per cent of treaty references in cases involving male applicants were helpful. While striking, these figures do not demonstrate by themselves that there is a statistically significant relationship between gender and helpful treaty references. Therefore, we subjected the data to a bivariate chi-square test with a 90 per cent confidence interval to determine the so-called p-value of the relationship between these variables. A p-value below .05 suggests a statistically significant relationship; that is, the relationship between the variables is not due only to chance.

Table 3 reveals that the existence of a statistically significant relationship between the gender of the applicant and the type of treaty reference depends on the particular treaty.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Male</th>
<th>Female</th>
<th>Both</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAT</td>
<td>4% (1088)</td>
<td>2% (406)</td>
<td>3% (148)</td>
<td>.465</td>
</tr>
<tr>
<td>ICCPR</td>
<td>27% (675)</td>
<td>44% (271)</td>
<td>33% (105)</td>
<td>&lt;.001</td>
</tr>
</tbody>
</table>

26% (156) \hline
CEDAW & 0 (3) & 55% (233) & 21% (33) & <.001 \\
CERD & 32% (22) & 17% (6) & 50% (10) & .371 \\
ICESCR & 33% (6) & 50% (6) & 40% (5) & .840 \\
ALL TREATIES & 14% (1920) & 30% (1034) & 21% (353) & \\

Table 3 demonstrates that the relationship between the gender of the applicant and helpful treaty references is statistically significant in the case of ICCPR, CRC, and CEDAW. Thus, at least with respect to these treaties, we can conclude that helpful references are more likely to appear in decisions where the applicant is a woman than when the applicant is a man. On the other hand, there is no statistically significant relationship between gender of the applicant and CAT, CERD, and ICESCR.

Why are women more likely to receive helpful references to at least some treaties than men? Judges may have a tendency to view female applicants as less threatening (and more vulnerable) than male applicants. They may also tend to view women as the primary caregivers for children, rendering their claims under treaties like CRC more credible. Whatever the reason, we can conclude that female applicants in Canada are more likely than male applicants to benefit from judicial references to CRC, CEDAW, and ICCPR in Canadian refugee adjudications.

2. GENDER OF THE JUDGE

Sean Rehaag has examined whether the gender of the judge is related to the outcome in refugee claims at the IRB level. He found that there was no “simple or straightforward” answer to the question of whether the gender of the adjudicator makes a difference in such claims. The data collected for this study

133. See Rehaag,”Gender,” supra note 132.
134. Ibid. However, in a more recent analysis of Rehaag’s data, Innessa Colaiacovo concludes that female IRB members have a higher grant rate. See Innessa Colaiacovo, “Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011)” (2013) 1:4 J Mig & Hum Sec 122. In the US context, Ramji-Nogales, et al found that female immigration judges in the US are much more likely to grant asylum than male judges. See Jaya Ramji-Nogales, Andrew Schoenholtz & Philip G Schrag, “Refugee
suggest a similar, though more statistically definitive, conclusion with respect to judges’ gender and helpful treaty references.

As Table 4 demonstrates, decisions by female judges were only slightly more likely than decisions by their male counterparts to include a treaty reference helpful to the applicant (20 per cent versus 19 per cent). The lack of a statistically significant relationship between judge gender and helpful references was consistent across all six treaties.

TABLE 4: JUDGE GENDER AND HELPFUL REFERENCES
(Number of total treaty references for each category of judge in parenthesis)

<table>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Female</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAT</td>
<td>4% (1022)</td>
<td>3% (556)</td>
<td>1</td>
</tr>
<tr>
<td>ICCPR</td>
<td>32% (582)</td>
<td>31% (442)</td>
<td>0.61</td>
</tr>
<tr>
<td>CRC</td>
<td>36% (171)</td>
<td>31% (127)</td>
<td>0.53</td>
</tr>
<tr>
<td>CEDAW</td>
<td>47% (135)</td>
<td>53% (134)</td>
<td>0.36</td>
</tr>
<tr>
<td>CERD</td>
<td>33% (12)</td>
<td>36% (25)</td>
<td>1</td>
</tr>
<tr>
<td>ICESCR</td>
<td>44% (9)</td>
<td>43% (7)</td>
<td>1</td>
</tr>
<tr>
<td>ALL TREATIES</td>
<td>19% (1931)</td>
<td>20% (1291) †</td>
<td></td>
</tr>
</tbody>
</table>

As Table 4 demonstrates, the p-value for each treaty is well above 0.05. Given the statistical tests used for this study, there appears to be a simple and straightforward answer to the question of whether the gender of the judge makes a statistically significant difference in whether any of the six treaties are likely to be referred to in a way that helps a refugee obtain asylum: The answer is “no.”

Roulette: Disparities in Asylum Adjudication” (2007-2008) 60:2 Stan L Rev 295 (finding a grant rate of 53.8 per cent among female immigration judges, as compared to a 37.3 per cent success rate among male judges). On the other hand, Schoenholtz et al found little gender differential in the grant rate of Department of Homeland Security asylum officers. See Schoenholtz et al, Lives in the Balance, supra note 132 at 178-79.
3. PARTY AFFILIATION OF THE APPOINTING PRIME MINISTER

In his recently published study of the substantial divergence among federal court judges in granting leave for judicial review, as well as relief on the merits at the judicial review stage, Rehaag analyzed the possible effect of the political party of the prime minister who appointed the particular judge. While he found that judges appointed by Conservative prime ministers were, in the aggregate, less likely to grant leave for judicial review and relief on the merits than judges appointed by Liberal prime ministers, he also noted that there was far greater variation between individual judges appointed by prime ministers within either party than between the two parties.135

The data collected for this study reveals an inconsistent pattern with respect to party affiliation of the appointing prime minister and helpful treaty references by federal court judges.136 Table 5 demonstrates that in the aggregate, federal judges appointed by Conservative prime ministers who referenced any treaty were slightly more likely to include helpful treaty references than judges appointed by Liberal prime ministers, though the difference is not statistically significant.

<table>
<thead>
<tr>
<th>TABLE 5: PRIME MINISTER PARTY AND HELPFUL REFERENCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Number of total treaty references for judges of each party in parenthesis)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>-----------------</td>
</tr>
<tr>
<td>CAT</td>
</tr>
<tr>
<td>ICCPR</td>
</tr>
<tr>
<td>CRC</td>
</tr>
<tr>
<td>CEDAW*</td>
</tr>
<tr>
<td>CERD*</td>
</tr>
<tr>
<td>ICESCR*</td>
</tr>
<tr>
<td>ALL TREATIES</td>
</tr>
</tbody>
</table>

*Too few references (11 or less) for statistical analysis.

136. Because RPD judges are not appointed by the Prime Minister, it was not possible to include them in this party affiliation analysis.
The only case in which there is a statistically significant relationship between party affiliation and helpful treaty references is the CRC, where Conservative-appointed judges were considerably more likely to include a helpful treaty reference than their Liberal-appointed counterparts. However, it is important to note that these tests only evaluate the references of judges who included at least one reference to a treaty in their decisions. There were several judges appointed by prime ministers of each party who never included any treaty references in their decisions. Therefore, based on the data collected for this study, it is impossible to reach any definitive conclusions about the relationship between the party of the appointing prime minister and helpful treaty references.

4. LEVEL OF THE ADJUDICATION: RPD OR FEDERAL COURT

The interviews of lawyers conducted for this article support the hypothesis that federal court judges are more likely to include helpful treaty references in their decisions than are tribunal members. Several lawyers stated that treaty-based arguments are more likely to receive a sympathetic ear as one ascends the judicial hierarchy. The following interview excerpts illustrate this view:

The higher the court, the more likely they are to say something lofty and to declare that Canada has to respect its international obligations. And the lower we go in the kind of chain of administration, the more likely that is to be ignored . . . . I’m not saying everybody ignores it, but the more likely you are to get away with ignoring it. 137

The higher you go up [in] the courts the more there is a reliance on [international human rights law] that is one of the tools of the arsenal. 138

The data gathered for this study reject this hypothesis. Table 6 illustrates the relationship between the level of adjudication and helpful treaty references.

<table>
<thead>
<tr>
<th>TABLE 6: LEVEL OF ADJUDICATION AND HELPFUL REFERENCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Number of total references for each level of adjudication in parenthesis)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>-------------------------------------</td>
</tr>
<tr>
<td>CAT</td>
</tr>
<tr>
<td>ICCPR</td>
</tr>
<tr>
<td>CRC</td>
</tr>
</tbody>
</table>

137. Interview C-3, infra note 103.
138. Interview C-4, infra note 84.
As Table 6 demonstrates, the pattern with respect to individual treaties is mixed. Federal judges were more likely than RPD members to include a helpful reference to CAT, CRC, and CERD, but they were less likely to include a helpful reference to CEDAW and ICESCR (federal judges and RPD members were equally likely to include a helpful reference to ICCPR). More importantly, however, in none of these situations (with the possible exception of CAT) was the relationship between the level of adjudicator and helpful treaty references statistically significant.

Any conclusion with respect to treaty references and the level of adjudication must be tempered by the RPD’s criteria for publishing decisions, which privilege decisions that are novel, well-reasoned, insightful, or of general public interest. This may result in an over-representation of treaty references in RPD decisions when compared with decisions by the federal courts, which are not subject to the same publication criteria. Nevertheless, these data suggest that refugee lawyers should not assume that treaty-based arguments will be rejected automatically by the RPD. Indeed, the tribunal received one in five such arguments favorably over the past twenty-two years, which is roughly the same rate as for federal judges. Thus, lawyers should see the inclusion of treaty-based arguments at the tribunal stage as something more than merely preserving an argument for appeal—it may also be the basis for a grant of relief.

VI. AN ALTERNATIVE EXPLANATION AND ITS IMPLICATIONS FOR REFUGEE LAWYERS

The optimists in the treaty effectiveness literature would predict that Canada’s highly functioning democracy, strong civil society, and independent judiciary would lead to a robust human rights influence within Canadian refugee jurisprudence. The pessimists would point to the decline in treaty references—and particularly the decline in helpful treaty references—as evidence of the inefficacy
of human rights treaties. Pessimists would also point to the comments of lawyers regarding the perils of indiscriminate invocation of treaty-based arguments as evidence of the counter-productivity of such treaties. Proponents of the human rights approach to refugee law would hold up *Baker* as an example of the way that courts will apply human rights norms to refugee cases when lawyers repeatedly pressure them to do so.

The data gathered and analyzed in this article demonstrate that the actual role of human rights treaties in Canadian refugee jurisprudence is more complicated and contradictory than either of these theoretical approaches would suggest. While Canada satisfies most of the conditions for *effective* treaty enforcement identified in the relevant literature, Canadian judges rarely utilize human rights treaties other than the *Refugee Convention* in adjudicating refugee claims. While the proportion of helpful references to human rights treaties has declined in recent years, references to *CEDAW*, *ICCPR*, and particularly *CRC*, are helpful to applicants in a significant percentage of claims. And although *Baker* is an example of how the human rights approach to refugee law can help refugees obtain protection, there has been a dearth of treaty-based, precedent-setting cases since *Baker* was issued in 1999.

These contradictions suggest the need for a different way of analyzing the effectiveness of human rights treaties in the refugee litigation context. While based on data from the Canadian context, this analysis is likely to apply to other refugee-receiving nations that, like Canada, have strong democratic institutions and civil societies, but whose domestic courts rarely refer to human rights treaties in refugee adjudications. The insights provided by the data in this article suggest that helpful judicial references to such treaties depend on the following factors:

1. Whether the treaty has been integrated into domestic law. A treaty that is ratified but not made part of domestic law (such as *CERD* and *ICESCR* in the case of Canada) is unlikely to be helpful to refugees;
2. The manner in which the treaty has been integrated into domestic law. Treaties whose applicability to refugee protection cases has been approved by the nation’s highest court are likely to be the most helpful to refugees;
3. The gender of the applicant. In Canada, if the applicant is a woman and she is invoking *CRC*, *CEDAW*, or *ICCPR*, she is more likely than a male applicant to be the beneficiary of a helpful treaty reference;
4. The treaty being referenced. In Canada, every one of the core human rights treaties is more likely to be referenced in a helpful way than *CAT*. *CEDAW* is more likely than any other treaty to be referenced.
in a helpful way. The CRC is more likely than any other treaty to be the basis for a grant of relief.

These findings have important implications for lawyers representing refugees in Canada and elsewhere. First, because references to treaties are helpful to refugees when the treaties have been integrated into domestic law through precedent setting judicial decisions, lawyers should continue to press for such precedent through litigation. Second, treaties are likely to be met with similar enthusiasm—or lack thereof—at the tribunal and appellate court level. Treaty-based arguments are not doomed to failure at the tribunal level. Thus, it makes strategic sense to invoke treaties at the earliest stage of the process. In addition to preserving an argument for appeal, this may sometimes result in a positive decision or buttress a positive decision reached on other grounds. And finally, even if the human rights treaty argument does not help in an individual case, it may nevertheless promote the application of human rights norms to refugee jurisprudence more generally.

VII. CONCLUSION

The data presented in this article provide a collection of insights about the utilization of human rights treaties in refugee status adjudications in Canadian courts. Collectively, these insights offer a perspective that differs from the existing literature on treaty effectiveness, which does not adequately predict the circumstances under which domestic courts in Canada refer to treaties in ways that help refugees obtain relief. This new perspective adds to the literature on treaty effectiveness in the litigation context by suggesting that the extent to which Canadian domestic courts refer to treaties in ways that help refugees depends on several factors, including the manner in which those treaties are integrated into domestic law. It also demonstrates that invoking human rights treaties indiscriminately may hurt refugees, as it can create the impression that the refugee’s lawyer is desperate. Accordingly, this new approach can help refugee lawyers invoke human rights treaties strategically and thus maximize the likelihood that Canadian courts will refer to those treaties in ways that assist refugee claimants. This new approach can also assist lawyers in their efforts to expand the influence of human rights norms in Canadian refugee jurisprudence.
### APPENDIX - KEY WORDS, PHRASES, AND CASES FOR CODING HUMAN RIGHTS TREATIES

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Language</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRC</td>
<td>“In the best interests of the child.” (Articles 3, 9, 18, 21)</td>
<td>Baker</td>
</tr>
<tr>
<td>ICCPR</td>
<td>“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” (Article 7) &lt;br&gt;“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” (Article 17) &lt;br&gt;“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” (Article 23)</td>
<td>Ward</td>
</tr>
<tr>
<td>ICESCR</td>
<td>“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” (Article 12(1)) &lt;br&gt;“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.” (Article 10(1))</td>
<td></td>
</tr>
<tr>
<td>CEDAW</td>
<td>“The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.” (Article 16(1)c)</td>
<td></td>
</tr>
<tr>
<td>CAT</td>
<td>“No State Party shall expel, return (&quot;refouler&quot;) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” (Article 3) &lt;br&gt;“For the purposes of this Convention, the term &quot;torture&quot; means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (Article 1)</td>
<td></td>
</tr>
<tr>
<td>CERD</td>
<td>“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights.” (Article 5)</td>
<td></td>
</tr>
</tbody>
</table>
FOOTNOTES

1. “Both” refers to situations where a man and a woman jointly filed an application for relief.

2. The total number of references indicated in this table (3,317) is slightly less than the total number of treaty references in the database (3,432) because in some cases, the gender of the applicant was not discernible from the published decision. In those decisions, the applicant was referred to simply as "the applicant" or in a similarly gender-neutral fashion and the decision was devoid of any gender-identifying pronouns.

3. The total number of references indicated in this table (3,222) is less than the total number of treaty references in the database (3,432) because the gender of RPD members who made a total of 209 references was undeterminable from the published decisions and other publicly available documents. In addition, one Federal Court published decision was issued en banc, rather than by an individual judge.