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When Do Human Rights Treaties Help Asylum-Seekers? A Study Of Theory and Practice in Canadian Jurisprudence Since 1990


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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, human rights treaties, gender, litigation, legal theory, persecution, asylum, cause lawyering

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# TABLE OF CONTENTS

Introduction ......................................................................................................................... 1

I. Theoretical Explanations ................................................................................................. 3
   A. The Efficacy of Human Rights Treaties ................................................................. 3
   B. The Human Rights Approach to Human Rights Law ............................................. 8

II. Canada’s Refugee Adjudication Process ...................................................................... 10

III. Methodology ............................................................................................................... 14
   A. Quantitative Data: Case Law Database ............................................................... 14
   B. Qualitative Data: Lawyer Interviews ................................................................. 19

IV. Findings and Discussion ............................................................................................... 22
   A. Descriptive Analysis of Empirical Data ............................................................... 22
      1. The Pessimistic View ......................................................................................... 22
         a. Few Treaty References Overall ................................................................. 22
         b. The Declining Number of Treaty References Over Time .......................... 24
         c. The Declining Proportion of Treaty References Helpful to Refugees 28
      2. The Optimistic View ......................................................................................... 34
   B. Inferential Analysis of Empirical Data ..................................................................... 41
      1. Gender of the Applicant .................................................................................... 42
      2. Gender of the Judge ......................................................................................... 44
      3. Party Affiliation of the Appointing Prime Minister ......................................... 45
      4. Level of the Adjudication: RPD or Federal Court .......................................... 47

V: An Alternative Theory and Its Implications for Refugee Lawyers ............................. 49

Conclusion ......................................................................................................................... 51

Appendix ............................................................................................................................ 52
INTRODUCTION

Canada has been consistently recognized around the world for its exemplary treatment of refugees. It is the only country to have received the Nansen Refugee 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. It was recently ranked third among 31 countries in Europe and North America on a multifaceted scale measuring each nation’s success in integrating immigrants into civil society. Its principle refugee law stipulates that it 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 15 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 are human rights treaties referenced in such a limited and increasingly negative way in a country that prides itself on its respect for the human rights of non-citizens? That is the puzzle which this article analyzes.

Existing theoretical approaches to human rights and refugee law do not provide a complete explanation for this contradiction. This 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. And although the

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2 The award was presented to “the people of Canada” in 1986.
3 Migrant Integration Policy Index, 3d ed. (British Council and Migration Policy Group, 2011) at 44-49. Sweden and Portugal ranked first and second, respectively, on the same scale. Ibid. at 11.
4 Immigration and Refugee Protection Act SC 2001, C27 [IRPA]. This Act replaced the Immigration Act of 1976. Section 3(3)(f) of IRPA states that “[t]his act is to be construed and applied in a manner that . . . complies with international human rights instruments to which Canada is a signatory.”
5 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 IRPA s 25.1; Citizenship and Immigration Canada, Operational Manuals, IPS: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds (2011), online: Citizenship and Immigration Canada <http://www.cic.gc.ca>. See also Audrey Macklin, Asylum and the Rule of Law in Canada: Hearing the Other (Side) in Refugees, Asylum Seekers, and the Rule of Law: Comparative Perspectives, Susan Kneebone, ed. (Cambridge: Cambridge University Press, 2009) at 78-84.
6 Throughout this article, unless otherwise noted, the terms “judge” and “judges” refers to both administrative tribunal members and federal court judges who adjudicate claims for asylum and other forms of refugee
specific findings of this article are limited to Canada, the new theoretical approach based on those findings is applicable to other refugee destination countries, as well.

This article first discusses the relevant scholarly literature and how it might explain the puzzle outlined above. It then briefly reviews the Canadian asylum adjudication process and the research methodology employed in this study. The bulk of the article is split between descriptive and inferential analyses of the empirical data. It concludes with an alternative theoretical explanation for the impact of human rights treaties in the asylum litigation context, as well as the implications of this theory for lawyers representing refugees in domestic courts.

I. THEORETICAL EXPLANATIONS

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 15 years. The relevant scholarship in each of these fields, and how it might explain this contradiction, is described below.

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.7 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.8 Most of this scholarship focuses on 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.


• (Neo)realism. Pessimism: No effect on state behavior and potentially even negative effect;
• Institutionalism. Pessimism: No effect on state behavior;
• Regime theory. Cautious optimism: Possibly long-term positive effects;
• Transnational legal process: Optimism: Positive effects;
• Liberalism. Contingent optimism: Positive effect dependent on degree of democracy;
• Transnational human rights. Contingent optimism: Positive effect dependent on strength of human
contingencies: factors which influence treaty compliance. The factor most relevant to this article is the presence of domestic actors and institutions which encourage the enforcement of treaties. For example, Oona Hathaway notes that “where powerful actors can hold the government to account, international legal commitments are more meaningful” and “human rights treaties are more likely to be effective where there is domestic legal enforcement of treaty commitments.”

Similarly, Eric Neumayer finds a positive relationship between the efficacy of ratified treaties and the extent of democracy and the strength of civil society: “in most cases, for treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and perhaps pressure governments into translating the formal promise of better human rights protection into actual reality.” 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 whom 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. And it 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.

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

advocacy networks rights civil society with international linkages.

10 Neumayer, supra note 9 at 951.
12 Ibid. at 38.
15 Ibid. An independent judiciary is one of the indicia by which Freedom House ranks the countries of the world.
protected.\textsuperscript{16} He finds that states are less threatened by the right to be free from discrimination protected by the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")\textsuperscript{17} and therefore are more willing to comply with that treaty than with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")\textsuperscript{18} and the International Convention on Civil and Political Rights ("ICCPR")\textsuperscript{19}, both of which are likely to be asserted by political dissidents.\textsuperscript{20} Given that this article analyzes judicial references to these same three treaties, as well as the Convention on the Rights of the Child ("CRC")\textsuperscript{21}, the International Convention on Economic, Social and Cultural Rights ("ICESCR")\textsuperscript{22} and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD")\textsuperscript{23}, one would hypothesize that the treaties most helpful to asylum-seekers in Canadian domestic courts are those which protect rights 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 15 years. Moreover, the proportion of references which 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 most treaties most helpful to refugees.

One of the reasons that the expectations of the treaty effectiveness literature fails 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

\textsuperscript{20} Hill, supra note 17 at 1169, 1172.
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 which 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 its influence is likely to be small.24 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 which that literature measures are directed toward 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 their own nationals.25 This differential – and detrimental – treatment is the result of factors that include concerns over national security, xenophobia, and scapegoating for domestic ills.26 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.

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.27 It promotes a core set of refugee rights, based on ratified human rights treaties, which afford protection to refugees in any state party to the 1951

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26 Weissbrodt and Meili, supra note 26.

Refugee Convention or 1967 Protocol.\textsuperscript{28} 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{29}

One of the crucial aspects of the human rights approach is its emphasis on the human rights obligations of receiving states toward asylum-seekers and other refugees.\textsuperscript{30} 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 force 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 Audrey Macklin notes, there has been a concerted effort among Canadian refugee lawyers to infuse their advocacy with references to human rights treaties.\textsuperscript{31}

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


\textsuperscript{29} James Hathaway, \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”, 15 Harv. Hum. Rts. J. 133-154, at 143 (2002). It 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 (i.e., helping an individual obtain protection from persecution or other serious harm). \textit{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 or Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution” in \textit{Critical Issues in International Refugee Law} 143, James C. Simeon, ed. (Cambridge: Cambridge University Press, 2010).


\textsuperscript{31} Macklin, \textit{supra} note 14 at 323.
described above to accurately explain the Canadian contradiction, this article develops an alternative theoretical approach. It is based on several factors which influence whether – and in what way – judges reference 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.

II. 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. 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. During the period pertinent to this article, RPD members were appointed by the executive branch for fixed but renewable terms. RPD members are not required to

32 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 27 countries (25 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. 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. For more information on these changes, see Balanced Refugee Reform Act, R.S.C. 2010, and Protecting Canada’s Immigration System Act, R.S.C. 2012, which amend IRPA. See also Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49:1 Osgoode Hall LJ 71, 76 [Rehaag, “Counsel”]; Don Butler, “Chill of Ministerial Comments Erodes Independence of Immigration and Refugee Board, Former Chair Says” online: The Ottawa Citizen, (2011), available at: <http://www.ottawacitizen.com/sports/Chill+ministerial+comments+erodes+independence+Immigration+Refugee+Board+former+chair+says/5769462/story.html>. 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.

33 The other three IRB divisions are the recently-created Refugee Appeals Division, which considers appeals against decisions of the Refugee Protection Division to allow or reject claims for refugee protection, the Immigration Division, which holds inadmissibility and detention hearings, and the Immigration Appeals Division, which mostly hears appeals of sponsorship applications and appeals from orders of removal. Immigration and Refugee Board of Canada, http://www.irb-cisr.gc.ca/Eng/tribunal/rpdspr/Pages/index.aspx.

34 See former IRPA s 153(1). RPD members were appointed through the Governor -in- Council process, and could only be dismissed for cause by the Cabinet. IRPA s 153(1). As of December 2012, RPD members are civil servants, appointed in accordance with Canada’s Public Service Employment Act. See IRPA s 169(1).
have legal training, and many have no such training.\textsuperscript{35} Between 2002 and 2010, the RPD issued approximately 60\% of all decisions rendered by the IRB.\textsuperscript{36}

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 reviewing their claims. Only 1\% of claimants are denied at this stage of the process.\textsuperscript{37} 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.\textsuperscript{38}

RPD members are required to issue a written decision when they deny an application for refugee protection.\textsuperscript{39} 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.\textsuperscript{40} Between 1990 and 2012, approximately 16.9 per cent of RPD grants of protection were accompanied by a written decision.\textsuperscript{41} RPD written decisions are published when they are deemed to be novel, well-reasoned, insightful, or of general public interest.\textsuperscript{42} It has been estimated that only one to two percent of RPD decisions are published.\textsuperscript{43}

\textsuperscript{35}See Rehaag, “Counsel” supra note 33 at 76
\textsuperscript{37}Peter Showler, Refugee Sandwich: Stories of Exile and Asylum (Montreal: McGill-Queen’s University Press, 2006) at 218.
\textsuperscript{38}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.
\textsuperscript{39}Department of Justice Canada, Refugee Protection Division Rules, Section 67 (2); IRPA s 169(d).
\textsuperscript{40}RPD Rules Section 67(2); IRPA 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\%, only 18.5\% of the 2704 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 in obtaining protection in a given case, rather than the proportion between positive and negative outcomes in refugee claims overall.
\textsuperscript{41}According to the IRB, the RPD granted refugee protection to 194,148 claimants between 1990 and 2011. Written reasons were provided in 32,852 of those cases. IRB Response to Access to Information Act request, dated June 7, 2013. Copy of response on file with author.
\textsuperscript{42}The RPD’s publication criteria are described in detail at http://www.irb-cisr.gc.ca:8080/ReFlex/About_Reflex.aspx. See also Dauvergne, supra note 37 at 314.
\textsuperscript{43}See Dauvergne, supra note 37 at 313. These criteria for publishing decisions assist this study’s analysis because a disproportionately large share of decisions referencing human rights treaties is likely to involve novel legal arguments or otherwise be in the public interest. Therefore, RPD decisions in which human rights treaties are
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.\(^44\) 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 “perverse or capricious manner or without regard to the evidence before it.”\(^45\) Leave for judicial review is rarely granted, though the grant rate among federal judges varies widely.\(^46\) If leave is denied, the judge is not required to provide an explanation for the denial and the decision is final.\(^47\) If leave is granted, the applicant receives a full merits hearing before a 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.\(^48\) Between 2005 and 2010, applicants succeeded at the judicial review stage about 44% of the time.\(^49\) Judges usually issue written rulings at this stage of the proceedings (either granting or denying judicial review) but are not required to do so. A decision by the Federal Court can be appealed by either the applicant or the government 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.\(^50\) An appeal from the Federal Court of Appeal to the Supreme Court of Canada is only permitted if leave is granted by the Supreme Court, with leave being limited to cases which raise issues of public importance.\(^51\)

An unsuccessful applicant may still request relief from removal by applying for humanitarian and compassionate consideration.\(^52\) Additionally, an unsuccessful applicant may apply for a Pre-Removal Risk Assessment (PRRA) to determine whether the applicant is at risk of persecution, danger of torture, risk to life, or risk of cruel and unusual

\(^{44}\) Under the changes implemented in December 2012, an appeal from the RPD would first be made to the newly created Refugee Appeals Division, after which the applicant could apply for leave to seek judicial review before the Federal Court of Canada. Supra note 33.

\(^{45}\) Macklin, supra note 6 at 82-83, citing Federal Court Act, s 18.1(3).

\(^{46}\) In a recent study of judicial review determinations between 2005 and 2010, Sean Rehaag found that the grant rate varied from 1.36% to 77.97%, depending on the judge. The overall grant rate for that period was 14.44%. See Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38:1 Queen’s L.J. 1-58, at 23, 25. [Rehaag, “Luck”]. In her study of IRB decisions between 2003 and 2010, Dauvergne found that leave was granted 17.6% of the time. See Dauvergne, supra note 37 at 311, n. 26.

\(^{47}\) Written reasons are rarely provided in decisions granting or denying judicial review. In such instances, judges typically issue orders without reasons.

\(^{48}\) Federal Courts Act, s 18.1(3).

\(^{49}\) Rehaag, “Luck”, supra note 48 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% to a high of 92.31%. Ibid. at 27.

\(^{50}\) IRPA s 74(d).

\(^{51}\) Supreme Court Act, RSC 1985, c S-26, s 40.

\(^{52}\) IRPA s 18.1(3).
treatment or punishment. Applicants rarely succeed at the PRRA stage because they are only permitted to present evidence which arose after their refugee hearing or which they could not reasonably have presented at that hearing.

III. 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. This study covers a 22 year period for two major reasons. First, all six treaties included in the study were ratified or acceded to by Canada as of the early 1990s. Second, a 22 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 then reviewed in order 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

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53 IRPA s 25(1.3).
54 Rehaag, “Luck”, supra note 48 at 12.
55 The federal court decisions include Judicial Review decisions on the merits by the Federal Court, as well as decisions by the Federal Court of Appeal and the Supreme Court of Canada. The criteria for determining which decisions are published are discussed at page 12, infra.
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. Or an applicant with a minor child who is a citizen of the destination country might claim that returning the applicant to his country of origin contravenes the best interest of his child, and thus violates Canada’s obligations under the CRC.

In order to fully 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). The Convention on the Rights of the Child and Baker v. Canada, a 1999 Canadian Supreme Court decision, exemplify this method. 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 court 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 which constitute a reference to the CRC for purposes of this study’s coding system are (1) the CRC, (2) Baker v. Canada 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.

59 The key words and phrases used in the coding of the treaties in this study are contained in the Appendix to this article.
61 Convention on the Rights of the Child, supra note 22, Article 3.
63 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.
64 The case law databases consulted in order to identify and code treaty references were Canada (Federal) Immigration and Refugee Board of Canada, online: Canada Legal Information Institute, (2012), <http://www.iijcan.org/en/ca/irb/index.html>; Reflex Decisions, online: Immigration and Refugee Board of Canada, (2012), <http://www.irb-csr.gc.ca:8080/Reflex/index_e.aspx>; Westlaw-Canimm-cs, online: WestLaw, (2012), <http://web2.westlaw.com/search/default.wl?rs=LAWS2.0&p=%2fsearch%2fdefault.wl&utid=1&mt=LawSchoolPractitioner&fn=_top&v=2.0&sv=Split&DB=CANIMM-CS>; and Decisions of the Federal Court, online: Federal Court, (2012), <http://decisions.fct-cf.gc.ca/en/index.html>. 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 from this study because those cases were later removed from the Reflex database and therefore could not be fully coded. Forty-five references from 1993 remain in the database of this study.
The total number of direct and indirect treaty references in the database is 3,432.\textsuperscript{65} Most of those references (3,005) appear in RPD decisions, while 427 appear in federal court decisions.\textsuperscript{66} 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.\textsuperscript{67}

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

- **The treaty was the basis for the court’s grant of asylum.**
  In *Baker v. Canada*\textsuperscript{68} the Canadian Supreme Court granted relief on humanitarian and compassionate grounds on the basis of the Convention of the Rights of the Child. The Court held that administrative tribunals were to consider Canada’s obligations under the CRC in evaluating such claims.

- **The court rejected the treaty-based argument and denied asylum.**
  In *Bellovada v. Canada*\textsuperscript{69} the IRB held the applicant failed to demonstrate how removal would harm the “best interests of the child” under the CRC and denied relief.

- **The court used the treaty to buttress a grant of asylum it reached on other grounds.\textsuperscript{70}**
  In *X (Re)*\textsuperscript{71} the IRB 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 further demonstrate that sexual abuse is a form of persecution.

\textsuperscript{65} If a treaty was referred to both directly and indirectly in the same opinion, it was counted as one reference to the treaty.
\textsuperscript{66} 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.
\textsuperscript{67} 2,293 RPD decisions and 411 Federal court decisions in the database contain at least one treaty reference.
\textsuperscript{68} [1999] 2 S.C.R. 817.
\textsuperscript{69} 2010 CanLII 94054 (IRB).
\textsuperscript{70} 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.
\textsuperscript{71} 2010 CanLII 27719 (IRB).
• The court cited the applicant’s home country’s violation of the treaty in its description of conditions within that country.
In MA7-08286\textsuperscript{72} the RPD cited to 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.

• The court noted that Canada does not recognize the validity of the treaty and therefore is not bound by it.
In T97-00096\textsuperscript{73} the RPD ruled that the CRC had not been adopted into Canadian law and therefore did not give rise to enforceable substantive rights.

• The court referenced the treaty either directly or indirectly but did not analyze it in denying asylum.
In T99-14019, et seq.,\textsuperscript{74} where 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.

After the coding was completed, univariate 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, which rely upon a .10 significance level to demarcate statistically significant relationships, are reviewed in Section IV of this article.\textsuperscript{75}

B. Qualitative Data: Lawyer Interviews

In order to better understand and illustrate the statistical patterns revealed by the quantitative data, I conducted 21 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

\textsuperscript{72} 2010 MA7-08286 (IRB).
\textsuperscript{73} [1998] T97-00096 (IRB).
\textsuperscript{75} The statistical tests were conducted with the publicly available online statistical software package R. See http://cran.r-project.org.
lawyers practicing in six cities from five of the Canadian provinces. Each interview lasted between 30 and 45 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, they encourage state actors (here, primarily judges) to comply with a state’s treaty-based obligations. Their views about the ways that judges respond to human rights-based arguments thus contextualize the quantitative data in the study. Because the population of lawyers that the study examines is homogeneous in specialization and extent of professional expertise, 21 interviews is 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 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 risk of bias in the decision to only interview those lawyers who regularly represent refugees, rather than those who do so only occasionally. “Repeat players” are more likely to be familiar with international human rights law and therefore to invoke it on behalf of their clients. And yet, it is precisely because of this familiarity that their views are likely to illustrate patterns gleaned from the study’s quantitative data. Moreover, they can

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76 The lawyers interviewed for this article practice in Calgary, Montreal, Toronto, Ottawa, Vancouver and Winnipeg.
77 Macklin, supra note 14 at 323.
78 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. Dauvergne, supra note 39 at 324-25. As noted later in this article, the answer to that question appears to be “yes, in part”. See infra at pages 23-24.
79 Greg Guest, Arwen Bunce & Laura Johnson, “How Many Interviews Are Enough?: An Experiment with Data Saturation and Variability” 18 Field Methods 59 (2006). 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.
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 with open-ended interviews with refugee lawyers, this article provides clues to the puzzle about why treaty references, and in particular treaty references which help refugees obtain relief, have diminished over that period of time. It 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, it allows for predictions about the circumstances under which human rights treaties are more likely to assist refugees succeed in domestic courts.

IV. FINDINGS AND DISCUSSION

A. Descriptive Analysis of Empirical Data

The data gathered for this study are consistent with aspects of both the “pessimist” and “optimist” theories of treaty effectiveness. 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 the theory section of this article, the pessimistic perspective on human rights treaty effectiveness holds that such treaties have limited value and may sometimes be counterproductive. The data in this study reveals three trends over the past 22 years which are consistent with this view: The relative lack of references to treaties overall; the decline in such references over time; and the decrease in the proportion of treaty references which help the refugee obtain relief. Each of these trends is discussed below.

a. 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. 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, there is no human rights treaty other than the Refugee Convention before the court. And even when the lawyer representing the applicant raises such an argument, courts 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 international law.\(^{83}\)

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 lawyer bar:

It’s not like…my side of the bar is particularly well-informed on international issues. There are some lawyers who have an academic human rights background, and those are the lawyers who tend to drive these issues.\(^{84}\)

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.\(^{85}\)

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.\(^{86}\)

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 at oral argument.

\(b\). 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 been steadily declining over the past two decades. As the following graph demonstrates, references to the

\(^{83}\) Interview C-4, December 17, 2010. Conducted via telephone.
\(^{84}\) Interview C-16, May 8, 2013. Conducted via telephone.
\(^{85}\) Interview C-5; November 30, 2010. Conducted via telephone.
\(^{86}\) Interview C-5, supra note 86. This same lawyer also noted that human rights arguments are often unnecessary because Canada’s existing refugee law is “progressive.” Ibid.
four most 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-mid 2000s. And references to the other two treaties (CERD and ICESCR) have remained *de minimus* throughout the past two decades.

<table>
<thead>
<tr>
<th>Table 1: References to Treaties, 1990-2012</th>
</tr>
</thead>
</table>

The 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 the following table indicates, although applications for, and grants of, refugee protection declined from the early 2000s through 2007, both have increased in the years since. If anything, the recent increase in claims should have resulted in an increase in treaty references in the past five years.

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87 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 317-318.

88 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% through 2007, but has been steadily increasing since then. See Dauvergne at 310.
Table 2: Canadian Refugee Protection Applications and Grants 1990-2012

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 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.  

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...

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90 Interview C-12, December 2, 2011. Conducted via telephone.

Judges who have grown increasingly impatient with human rights-based arguments, who see them as “fluffy” or “toothless” (as one lawyer put it\textsuperscript{92}), but who do not want to appear openly hostile to them, might simply omit them from their decisions.\textsuperscript{93}

Another possible explanation for the decline in treaty references in recent years is what Catherine Dauvergne describes as a “learning effect” among judges.\textsuperscript{94} She posits that IRB decision-makers are more likely to engage with international norms when those norms are newly relevant.\textsuperscript{95} This effect most likely influences federal court judges, as well. As time passes, these decision-makers may feel less of a need to reference norms that have become an accepted part of asylum jurisprudence. Moreover, as the judiciary in general becomes more comfortable interpreting a particular treaty, the decisions in which it is referenced may meet the criteria for publication (e.g., novel arguments) less often. However, as noted above, the coding method for this study – which includes references to key words and phrases and seminal cases like *Baker* as references to the underlying treaty – would make the impact of the “learning effect” less pronounced here.

c. 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 as a proportion of all treaty references, those which assist the applicant obtain asylum had been declining over the past decade and a half, until very recently. In order to more clearly analyze this pattern, it is useful to combine the six coding categories utilized in this study according to the binary rubric of “helpful” and “not helpful”. Helpful references appear in decisions in which the applicant is granted asylum. Not helpful references appear in cases where asylum is denied. These two types of references correlate with the following coding categories:

“Helpful References”

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

“Not Helpful References”

- The court rejected the treaty-based argument and denied asylum.
- The court mentioned the treaty but did not analyze it in denying asylum.

\textsuperscript{92} Interview C-9, March 15, 2011, Montreal. Conducted in person.

\textsuperscript{93} I observed this attitude during a federal court hearing for humanitarian and compassionate consideration in Montreal in March 2011. The applicant in that case had a Canadian-born child who would be left with a single mother if the applicant were removed. Although the applicant’s lawyer repeatedly invoked the CRC during oral argument and in his written submissions, and although the judge eventually ruled in favor of the applicant (and seemed sympathetic to his situation during the hearing), the judge’s written opinion was devoid of any reference to the CRC. Indeed, at one point during the hearing, the judge declared, in reference to the CRC, “That is not Canadian law!”

\textsuperscript{94} Dauvergne, *supra* note 37 at 323.

\textsuperscript{95} *Ibid.*
• The court noted that Canada does not recognize the validity of the treaty.

The following chart shows the proportion of all treaty references that were helpful to refugees over the past 22 years.

Table 3: Proportion of Helpful Treaty References: 1990-2012

Table 3 reveals that the proportion of helpful to not helpful references in written asylum decisions over the past twenty years had been steadily declining until 2010, after which it rose sharply. 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% 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% in 1995 to 39% in 2010.96 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 in obtaining 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 Table 1, above, demonstrated, the number of annual references to CAT since 2010 has fallen well below 50, after having been

well above 50 for most of the previous 15 years. And as discussed later in this article, nearly all (97%) 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, Table 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.

What explains the generally 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 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.

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”?

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 Citizenship, Immigration and Multiculturalism Minister Jason Kenney implied in a 2009 statement that Mexican and Roma asylum-seekers were not legitimate refugees. Whether such attacks

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98 Comment from Professor Audrey Macklin, University of Toronto Faculty of Law, via email dated April 25, 2012. On file with author.
99 Interview C-20, May 16, 2013 (Toronto) Conducted via telephone.
have an impact on judicial references to human rights treaties (or the outcome of asylum and other refugee cases, for that matter) is beyond the scope of this article.\(^{101}\)

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 toward 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:

\[\text{[Judges] pay lip service to [human rights law] in some decisions but it doesn’t get translated into… binding obligations on the ground.}\]

The Constitutional arguments tend to just be given greater consideration and the international law is kind of used as window dressing.\(^{102}\)

Many lawyers nevertheless press on with these arguments because they believe that 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 comments:

\[\text{[I]n terms of just nudging the court forward even if it’s not likely to be successful it’s something I think we feel like we have to do. And then there’s a more general kind of philosophical feeling amongst some of the lawyers I’ve been working with that the development of international law and it’s increasingly binding nature on}\]

\(^{101}\) Also beyond the scope of this article, but an interesting subject for future research, is the relationship between public opinion toward 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 toward 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.

\(^{102}\) Interview C-3, March 15, 2011. Conducted in person.

\(^{103}\) Interview C-2, October 27, 2010. Conducted via telephone.
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{104} 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 ...and identify it as a problem. And ultimately the court will deal with it.\textsuperscript{105}

... 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{106}

While the strategy of repeatedly raising human rights-based arguments can result in helpful judicial precedent like 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:

If you are arguing [human rights] law you must have a weak case.\textsuperscript{107}

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{108}

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{109}

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{110}

Another lawyer noted that international law can detract from arguments in a refugee case, and that he never makes human rights law the centerpiece of his argument.\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.

\textsuperscript{104} Interview C-10, January 4, 2011. Conducted via telephone.

\textsuperscript{105} Interview C-12, supra note 91.

\textsuperscript{106} Interview C-7, supra note 92.

\textsuperscript{107} Interview C-19, May 15, 2013. Conducted via telephone.

\textsuperscript{108} Interview C-8, December 16, 2010. Conducted in person.

\textsuperscript{109} Interview C-3, supra note 81.

\textsuperscript{110} Interview C-6, January 5, 2012. Conducted via telephone.

\textsuperscript{111} Interview C-9, supra note 93.
Indeed, it can be harmful not only to the applicant but also to other refugees, through binding precedent that restricts the applicability of human rights treaties in future claims.

2. The Optimistic View

While the data collected for this article demonstrate that judicial references to human rights treaties in refugee cases is rare and declining, the data is also consistent with optimistic theories of treaty effectiveness. For example, as the following chart demonstrates, with the exception of CAT, over 30 per cent of all judicial references to the treaties in this study appeared in decisions where the applicant obtain relief. And in the case of CEDAW, just under half of the references were helpful to the applicant.\textsuperscript{112}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
& Helpful & Not Helpful & Total & Per cent Helpful \\
\hline
CAT & 56 & 1590 & 1646 & 3\% \\
\hline
ICCPR & 386 & 775 & 1161 & 33\% \\
\hline
CRC & 103 & 198 & 301 & 34\% \\
\hline
CEDAW & 134 & 135 & 269 & 50\% \\
\hline
CERD & 13 & 25 & 38 & 34\% \\
\hline
ICESCR & 7 & 10 & 17 & 41\% \\
\hline
\end{tabular}
\caption{Helpful and Not Helpful References According to Treaty, 1990-2012}
\end{table}

The figures in Table 6 are consistent with Hill’s theory that certain human rights treaties have a stronger impact on the behavior of state actors than others.\textsuperscript{113} In Hill’s study, state compliance with CEDAW was much higher than with either ICCPR or CAT, a

\textsuperscript{112} 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.

\textsuperscript{113} See Hill, supra note 17.
discrepancy that he attributes to the particular rights protected by each treaty. Here, we can see that references to CRC, CEDAW and ICCPR are far more helpful to applicants than references to CAT. And while the 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 22 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 Table 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 which made those treaties relevant to Canadian refugee law. For example, the increase in references to CAT beginning in the early-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.

The large increase in ICCPR references in the mid-late 1990s, as well as the precipitous decline in such references throughout the 2000s, is most likely the result of the interplay between ICCPR, CAT, and the Canadian Charter of Rights and Freedoms. 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. Thus, some of the wording of ICCPR was incorporated into the Charter. For example, there is similarity (though not complete symmetry) between Article 7 of ICCPR (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”) and Article 12 of the Charter (“Everyone 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 Article 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 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 Canadian Supreme Court decision in *Baker v. Canada*, which sanctioned the use of the

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115 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. And the denial rate for CAT claims is extremely high because the legal threshold for success on CAT claims is more demanding than that for Refugee Convention claims.

116 See IRPA s. 97.  
CRC as an interpretive tool in adjudicating humanitarian and compassionate claims.\textsuperscript{119} 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.\textsuperscript{120}

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.\textsuperscript{121}

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.\textsuperscript{122}

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.\textsuperscript{123} On the other hand, there has been considerable debate about whether Baker binds courts to consider the best interests of the child when

\textsuperscript{119} Baker v. Canada, supra note 61.
\textsuperscript{120} Interview C-3, supra note 103.
\textsuperscript{121} Interview C-11, November 14, 2011. Conducted via telephone. 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.
\textsuperscript{122} Interview C-12, supra note 91.
\textsuperscript{123} IRPA s 25.(1) (humanitarian and compassionate consideration) states , in relevant part: the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or 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. See IRPA s 25.(1) (emphasis added).
considering humanitarian and compassionate claims.\textsuperscript{124} That controversy may have caused some judges to exclude a reference to \textit{Baker} in their decisions, despite an applicant’s attorney’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.\textsuperscript{125}

In contrast to the comparatively frequent references to the four treaties described above, courts rarely referred to either CERD or ICESCR over the past 22 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 Supreme Court 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. The following table illustrates this correlation:

\renewcommand\arraystretch{1.2}
\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|c|}
\hline
 & \textbf{CAT} & \textbf{ICCPR} & \textbf{CRC} & \textbf{CEDAW} & \textbf{CERD} & \textbf{ICESCR} \\
\hline
\textbf{Relied Upon in Granting Asylum} & 3.0\% (50) & (0) & 14.0\% (42) & (0) & (0) & (0) \\
\hline
\textbf{Rejected in Denying Asylum} & 83.3\% (1371) & 54.3\% (631) & 52.5\% (158) & 41.6\% (112) & 52.6\% (20) & 58.8\% (10) \\
\hline
\end{tabular}
\caption{Nature of Treaty References by Treaty: 1990-2012}
\end{table}


\textsuperscript{125} \textit{Women Refugee Claimants Fearing Gender-Related Persecution} (Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, effective November 13, 1996). Online: Immigration and Refugee Board of Canada, (1996) <http://www.irb-cisr.gc.ca/Eng/brdcom/references/pol/guidir/Pages/women.aspx#note21>. 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 7 demonstrates, the CRC is the only treaty that judges employed with any regularity as the basis for granting asylum. 14 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 Supreme Court’s imprimatur on a treaty for interpretive effect in future decisions.\textsuperscript{126} None of the other treaties in this study has received this type of imprimatur from the Canadian Supreme Court.

Table 7 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.\textsuperscript{127} This finding confirms the wisdom of the litigation strategy mentioned by several lawyers interviewed for this article, who cite human rights treaties even in cases where it may not be their strongest argument:

\begin{quote}
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.\textsuperscript{128} 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...
\end{quote}

\begin{table}
\centering
\begin{tabular}{|l|c|c|c|c|c|c|}
\hline
 & Buttressed Grant of Asylum & 0.4% (6) & 28.9% (336) & 18.9% (57) & 46.5% (125) & 28.9% (11) & 41.2% (7)
\hline
Reference in Country Conditions Report & 0 & 4.3% (50) & 1.3% (4) & 3.3% (9) & 5.3% (2) & 0
\hline
Not Recognized & 0 & 0 & 0.3% (1) & 0 & 0 & 0
\hline
Ignored in Denying Asylum & 13.3% (219) & 12.4% (144) & 13.0% (39) & 8.6% (23) & 13.2% (5) & 0
\hline
\end{tabular}
\end{table}

\textsuperscript{126} In addition, as noted above, the CRC’s operative language regarding the best interests of the child is included in IRPA. \textit{IRPA} s 25.(1).

\textsuperscript{127} In most cases, those other grounds were because the applicant satisfied the standards for asylum under the Refugee Convention.

\textsuperscript{128} Interview C-3, \textit{supra} note 103.
lose we can judicially review that decision and that’s one little bit of ammunition that’s in there. 129

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. And 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 6 and 7 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 they have been integrated into domestic law. And those references have been particularly helpful to refugees when the Canadian Supreme Court 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.

B. Inferential Analysis of Empirical Data

In order to better understand the factors which 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 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. 130 The database created for this article suggests a similar pattern with respect to treaty references in published RPD and federal court decisions: 30% of all treaty references in cases involving female applicants were helpful, whereas only 14% of treaty

129 Interview C-8, supra note 109.
When do Human Rights Treaties Help Asylum-Seekers?

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 univariate chi square test 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 due only to random chance.

The following table reveals that the existence of a statistically significant relationship between gender of applicant and type of treaty reference depends on the particular treaty:

Table 8: Applicant Gender and Helpful References
(Number of total treaty references for each category of applicant in parenthesis)

<table>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Female</th>
<th>Both(^{131})</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAT</td>
<td>4%</td>
<td>2%</td>
<td>3%</td>
<td>.465</td>
</tr>
<tr>
<td></td>
<td>(1088)</td>
<td>(406)</td>
<td>(148)</td>
<td></td>
</tr>
<tr>
<td>ICCPR</td>
<td>27%</td>
<td>44%</td>
<td>33%</td>
<td>&lt;.001</td>
</tr>
<tr>
<td></td>
<td>(675)</td>
<td>(271)</td>
<td>(105)</td>
<td></td>
</tr>
<tr>
<td>CRC</td>
<td>26%</td>
<td>40%</td>
<td>40%</td>
<td>.043</td>
</tr>
<tr>
<td></td>
<td>(136)</td>
<td>(112)</td>
<td>(52)</td>
<td></td>
</tr>
<tr>
<td>CEDAW</td>
<td>0</td>
<td>55%</td>
<td>21%</td>
<td>&lt;.001</td>
</tr>
<tr>
<td></td>
<td>(3)</td>
<td>(233)</td>
<td>(33)</td>
<td></td>
</tr>
<tr>
<td>CERD</td>
<td>32%</td>
<td>17%</td>
<td>50%</td>
<td>.371</td>
</tr>
<tr>
<td></td>
<td>(22)</td>
<td>(6)</td>
<td>(10)</td>
<td></td>
</tr>
<tr>
<td>ICESCR</td>
<td>33%</td>
<td>50%</td>
<td>40%</td>
<td>.840</td>
</tr>
<tr>
<td></td>
<td>(6)</td>
<td>(6)</td>
<td>(5)</td>
<td></td>
</tr>
<tr>
<td>ALL TREATIES</td>
<td>14%</td>
<td>30%</td>
<td>21%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1930)</td>
<td>(1034)</td>
<td>(353)(^{132})</td>
<td></td>
</tr>
</tbody>
</table>

\(^{131}\) "Both" refers to situations where a man and a woman jointly filed an application for relief.

\(^{132}\) 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
Table 8 demonstrates that the relationship between gender of 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

Rehaag has also 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 suggests a similar, though more statistically definitive, conclusion with respect to judge gender and helpful treaty references.

As Table 9, below, 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>
<thead>
<tr>
<th></th>
<th>Male</th>
<th>Female</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAT</td>
<td>4%</td>
<td>3%</td>
<td>1</td>
</tr>
</tbody>
</table>

\(^{133}\) See Rehaag, “Gender”, supra note 131.

\(^{134}\) Ibid.
WHEN DO HUMAN RIGHTS TREATIES HELP ASYLUM-SEEKERS?

<table>
<thead>
<tr>
<th></th>
<th>ICCPR</th>
<th>CRC</th>
<th>CEDAW</th>
<th>CERD</th>
<th>ICESCR</th>
<th>ALL TREATIES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1022)</td>
<td>(556)</td>
<td>(582)</td>
<td>(442)</td>
<td>(171)</td>
<td>(127)</td>
</tr>
<tr>
<td>32%</td>
<td>31%</td>
<td>31%</td>
<td>53%</td>
<td>36%</td>
<td>47%</td>
<td>43%</td>
</tr>
<tr>
<td>(32%)</td>
<td>(31%)</td>
<td>(31%)</td>
<td>(53%)</td>
<td>(36%)</td>
<td>(47%)</td>
<td>(43%)</td>
</tr>
<tr>
<td>.61</td>
<td>.53</td>
<td>.36</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ALL TREATIES</td>
<td>19%</td>
<td>20%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1931)</td>
<td>(1291)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As Table 9 demonstrates, the p-value for each treaty is well above .05. Given the statistical tests run for this study, there does appear 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 referenced in a way that helps a refugee obtain asylum: the answer is “no”.

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 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

---

\(^{135}\) The total number of references indicated in this table (3222) 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.

\(^{136}\) Rehaag, “Luck”, supra note 48 at 32. Rehaag’s study examined decisions in refugee cases from 2005 to 2010.
court judges. 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 10: Prime Minister Party and Helpful References
(Number of total treaty references for judges of each party in parenthesis)

<table>
<thead>
<tr>
<th>Party</th>
<th>Cons.</th>
<th>Lib.</th>
<th>P-C</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAT</td>
<td>0 (28)</td>
<td>6% (229)</td>
<td>9% (11)</td>
<td>.373</td>
</tr>
<tr>
<td>ICCPR</td>
<td>0 (3)</td>
<td>38% (40)</td>
<td>20% (5)</td>
<td>.331</td>
</tr>
<tr>
<td>CRC</td>
<td>89% (9)</td>
<td>36% (70)</td>
<td>25% (12)</td>
<td>.005</td>
</tr>
<tr>
<td>CEDAW*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CERD*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ICESCR*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ALL TREATIES</td>
<td>22% (41)</td>
<td>16% (355)</td>
<td>17% (30)</td>
<td>.662</td>
</tr>
</tbody>
</table>

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

The only case where 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:

137 Because RPD judges are not appointed by the Prime Minister, it was not possible to include them in this party affiliation analysis.
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.\textsuperscript{138}

The higher you go up [in] the courts the more [international human rights law] is one of the tools in the arsenal.\textsuperscript{139}

The data gathered for this study reject this hypothesis. Table 10 illustrates the relationship between the level of adjudication and helpful treaty references.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{} & \textbf{Fed. Court} & \textbf{RPD} & \textbf{p-value} \\
\hline
\textbf{CAT} & 6\% (269) & 3\% (1377) & .049 \\
\hline
\textbf{ICCPR} & 33\% (48) & 33\% (1113) & 1 \\
\hline
\textbf{CRC} & 40\% (91) & 32\% (210) & .249 \\
\hline
\textbf{CEDAW} & 27\% (11) & 51\% (258) & .223 \\
\hline
\textbf{CERD} & 50\% (2) & 33\% (36) & 1 \\
\hline
\textbf{ICESCR} & 33\% (6) & 45\% (11) & 1 \\
\hline
\textbf{ALL TREATIES} & 17\% (427) & 21\% (3005) & \\
\hline
\end{tabular}
\caption{Level of Adjudication and Helpful References}
\end{table}

As Table 10 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 less likely to include a helpful reference to CEDAW and ICESCR (Federal \textsuperscript{138} Interview C-3, supra note 103. \textsuperscript{139} Interview C-4, supra note 84.
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 privileges 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 automatically rejected by the RPD. Indeed, one in five such arguments was received favorably by the tribunal over the past 22 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 THEORY 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. They 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 beyond 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 call for a new theoretical approach to the effectiveness of human rights treaties in the refugee litigation context. While based on data from the Canadian case, this new theoretical approach is likely to apply to other refugee receiving
nations that, like Canada, have strong democratic institutions and civil societies but whose domestic courts rarely reference human rights treaties in refugee adjudications. This approach holds that helpful judicial references to such treaties depend on the following:

• 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;
• 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;
• 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;
• 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.

This new theoretical approach and the data on which it is based 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, it 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.

CONCLUSION

The evidence presented in 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. Accordingly, this new approach can help refugee lawyers invoke human rights treaties strategically, and thus maximize the likelihood that Canadian domestic courts will reference those treaties in ways that assist their clients. It 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>&quot;In the best interests of the child.” Articles 3, 9, 18, 21</td>
<td>Baker</td>
</tr>
</tbody>
</table>
| ICCPR   | “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 7  
"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  
“The family is the natural and fundamental group unit of society and is entitled to protection by society and | Ward  |
<p>| | | |
|         |                                                                          |       |</p>
<table>
<thead>
<tr>
<th>Country</th>
<th>Treaty</th>
<th>Article</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICESCR</td>
<td></td>
<td>23</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) “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>
</tr>
<tr>
<td>CEDAW</td>
<td></td>
<td></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)</td>
</tr>
</tbody>
</table>
| CAT       |          |        | “No State Party shall expel, return ("refouler") 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 “For the purposes of this Convention, the term "torture" 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
<table>
<thead>
<tr>
<th><strong>CERD</strong></th>
<th>“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</th>
</tr>
</thead>
<tbody>
<tr>
<td>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>
</tbody>
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