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## U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law

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# U.K. REFUGEE LAWYERS: PUSHING THE BOUNDARIES OF DOMESTIC COURT ACCEPTANCE OF INTERNATIONAL HUMAN RIGHTS LAW

STEPHEN MEILI\*

**Abstract:** This Article analyzes how refugee lawyers in the United Kingdom navigate the tension between state power and international norms. Based on interviews with lawyers representing persons seeking asylum and other forms of refugee protection in the United Kingdom, the Article reveals how these lawyers successfully utilize international human rights treaties on behalf of their clients despite domestic policies making it more difficult for refugees to assert their rights. The Article argues that U.K. refugee lawyers play a critical role in the globalization struggle by encouraging state actors (in this case, the judiciary) to adhere to international norms that might otherwise go ignored in an anti-immigrant political climate. In so doing, these lawyers have helped to broaden the sources on which state power over immigration is based. The Article thus contributes to the literature on the devolution of state power in an era of globalization, as well as cause lawyering.

## INTRODUCTION

Over the past two decades, international law in many parts of the world has been moving in a less state-centric direction and more toward universal protection of human rights through, for example, the creation of the International Criminal Court, the emergence of universal jurisdiction (e.g., the *Pinochet* case), and international ad hoc tribunals (e.g., for Rwanda and Yugoslavia).<sup>1</sup> At the same time, the world has witnessed

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<sup>1</sup> See Rome Statute of the International Criminal Court art. 1, July 1, 2002, 2187 U.N.T.S. 90; R v. Bow Street Metro. Stipendiary Magistrate (No. 3) (*Pinochet III*), [2000] 1

the erosion of state sovereignty as the chief organizing principle of international relations.<sup>2</sup> Much as globalization of commerce has changed the international marketplace, globalization of human rights law has changed the way many countries treat non-citizens within their borders.<sup>3</sup>

Asylum law vividly illustrates the way that globalization creates tension between state power and international norms.<sup>4</sup> On the one hand, the global migration of people seeking relief from persecution has—through international treaties like the 1951 Convention relating to the Status of Refugees<sup>5</sup>—created international legal norms that supplant state power to decide who shall remain within a country and who shall be removed or excluded.<sup>6</sup> On the other hand, states have continually attempted to reassert power over their borders by enacting stricter immigration controls.<sup>7</sup> This struggle has become more acute over the past fifteen years in many refugee-receiving nations, the product of a general anti-immigrant sentiment exacerbated by security concerns stemming from the September 2001 terrorist attacks in the United States, the March 2004 Madrid train bombings, and the July 2005 London Underground bombings.<sup>8</sup> This conflict has been particularly acute in the United Kingdom, as a result of policies initially implemented by the Labor Government of then-Prime Minister Tony Blair to severely limit the number of persons seeking, and ultimately being granted, asylum.<sup>9</sup> These policies have included making it more difficult for potential asy-

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A.C. 147 (H.L.) (appeal taken from Eng.); S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>2</sup> See James N. Rosenau, *Governance, Order, and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 4 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

<sup>3</sup> See Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 3, 5–12 (Austin Sarat & Stuart Scheingold eds., 2001).

<sup>4</sup> See, e.g., Richard Maiman, *Asylum Law Practice in the United Kingdom After the Human Rights Act*, in THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 410, 411–13 (Austin Sarat & Stuart Scheingold eds., 2005) (discussing the evolution of asylum law in the United Kingdom and noting its incompatibility with portions of the European Convention on Human Rights).

<sup>5</sup> See generally Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

<sup>6</sup> *Id.* arts. 35–36.

<sup>7</sup> See Vincent Chetail, *Freedom of Movement and Transnational Migrations: A Human Rights Perspective*, in MIGRATION AND INTERNATIONAL LEGAL NORMS 47, 47 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003) (“[C]ontrol over migration remains one of the last bastions of the truly sovereign state.”).

<sup>8</sup> See James Hampshire, *Immigration Policy in the United Kingdom*, MIGRATION CITIZENSHIP EDUC., <http://www.migrationeducation.org/49.0.html> (last visited May 9, 2013).

<sup>9</sup> See Maiman, *supra* note 4, at 412–14.

lum-seekers to reach British territory in the first place, deporting unsuccessful applicants more expeditiously, and cutting legal aid funding that had previously supported the work of refugee lawyers.<sup>10</sup>

This Article explores the ways that lawyers representing asylum-seekers in the United Kingdom navigate the space between a diminished yet still formidable state authority over refugee status and the continuing emergence of international norms that pose a threat to such authority. The United Kingdom is a fascinating site to explore this question because, by effectively incorporating the European Convention on Human Rights (ECHR)<sup>11</sup> into its domestic law in 1998,<sup>12</sup> and agreeing to asylum procedures common to all European countries through the European Union (EU) Qualification Directive of 2004,<sup>13</sup> the United Kingdom consciously ceded significant control over refugee determinations to international norms.<sup>14</sup> Moreover, in 2011 the Supreme Court of the United Kingdom relied on the Convention on the Rights of the Child<sup>15</sup> (which has not been formally incorporated into British law) in holding that the best interests of the child must be a primary concern in any deportation case that might result in the separation of a child from his or her parents.<sup>16</sup>

These legislative and judicial developments have allowed U.K. refugee lawyers to simultaneously invoke international human rights norms while remaining within the bounds of domestic precedent.<sup>17</sup> As a result, these lawyers play a critical role in shaping state power over refugee matters in the wake of globalization.<sup>18</sup> By pushing for the expanded applica-

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<sup>10</sup> *See id.*

<sup>11</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>12</sup> *See* Human Rights Act, 1998, c. 42, § 1 (U.K.).

<sup>13</sup> Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12.

<sup>14</sup> Human Rights Act § 2.

<sup>15</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>16</sup> *ZH (Tanzania) v. Sec'y of State for the Home Dep't*, [2011] UKSC 4, [23]–[26] (appeal taken from Eng.). The decision in *ZH (Tanzania)* was based in part on section 55 of the U.K. Borders, Citizenship, and Immigration Act of 2009, which provides in relevant part that in relation to matters of immigration, asylum, or nationality, the Secretary of State's duties must be “discharged [with] regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.” Borders, Citizenship, and Immigration Act, 2009, c. 11, § 55 (U.K.).

<sup>17</sup> Maiman, *supra* note 4, at 414–15.

<sup>18</sup> *See id.*

tion of international human rights treaties to individual asylum cases, refugee lawyers force judges to address the persuasiveness of these international arguments and, at least in some cases, accept them.<sup>19</sup> Due largely to such pressure, the role of international human rights norms in U.K. asylum adjudications has expanded significantly over the past decade.<sup>20</sup>

This Article begins with a discussion of the two theoretical foundations that frame its analysis. It then outlines the empirical methodology on which its findings are based. Next, it describes and analyzes the data, and ends with a set of conclusions concerning the role of U.K. refugee lawyers in the ongoing struggle over the proper role for international human rights norms in domestic law.

## I. THEORETICAL FRAMES

Two interrelated areas of socio-legal scholarship set the theoretical frame for this Article: the diminution of state power in an era of globalization and cause lawyering in a global context. Each is described in more detail below.

### A. *Diminution of State Power in an Era of Globalization*

The rise of globalization has caused a realignment of norms guiding state conduct.<sup>21</sup> Competition between different legal standards has intensified.<sup>22</sup> Typical spheres of power, predominantly state regulatory regimes, have seen their influence decline.<sup>23</sup> The resulting power vacuum has been filled by a loose configuration of private-sector and international organizations, both profit-making and non-profit, operating outside the confines of typical government regulation.<sup>24</sup> Power now flows from foreign investment, liberal trade, and economic spheres such as central banking systems.<sup>25</sup> This has caused state regulatory regimes to further deteriorate as economic growth is no longer within their control.<sup>26</sup>

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<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 8–10 (2004).

<sup>22</sup> *See* Pheng Cheah, *Posit(ion)ing Human Rights in the Current Global Conjecture*, 9 PUB. CULTURE 233, 252–53 (1997).

<sup>23</sup> *See* SLAUGHTER, *supra* note 21, at 262.

<sup>24</sup> *Id.*

<sup>25</sup> David Goldblatt et al., *Economic Globalization and the Nation-State: Shifting Balances of Power*, 22 ALTERNATIVES 269, 281 (1997).

<sup>26</sup> *Id.*

The literature on globalization identifies numerous ways in which states have ceded their policymaking powers to international economic pressures.<sup>27</sup> For example, in an effort to promote economic stability (and thereby to create more opportunity for trade and investment), many states have taken steps to reduce social programs and thus reduce taxes.<sup>28</sup> Similarly, the rise of multinational corporations (MNCs) has led to a focus on international economics causing a reduction of state policymaking powers.<sup>29</sup> MNCs are able to quickly shift labor and resources to take advantage of favorable labor and investment conditions.<sup>30</sup> States surrender policymaking to MNCs in order to capitalize on their economic benefits.<sup>31</sup> Finally, the emergence of transnational regulatory networks (TRNs), fora involving multiple nations' regulators, has further contributed to diminished policymaking powers of the state.<sup>32</sup> According to some scholars, TRNs are better equipped to deal with the challenges of globalization because they are relatively unconstrained by the political and jurisdictional pressures that constrict effective reform at the state level.<sup>33</sup>

This Article adds to the literature on globalization by arguing that refugee lawyers in the United Kingdom wield significant influence in the ongoing struggle between international human rights norms and state power over migration. Unlike other areas of regulatory authority where states have surrendered to global market forces for economic benefit, the acceptance of international human rights norms by state actors has been more contentious.<sup>34</sup> For example, while most countries have ratified numerous human rights treaties, many states parties routinely ignore or actively violate them in practice.<sup>35</sup> Moreover, while some state actors (primarily within the judiciary) have embraced inter-

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<sup>27</sup> See SLAUGHTER, *supra* note 21, at 262; Maiman, *supra* note 4, at 414–15; Rosenau, *supra* note 2, at 8–9.

<sup>28</sup> See LINDA WEISS, *THE MYTH OF THE POWERLESS STATE* 190, 192 (1998).

<sup>29</sup> See Goldblatt et al., *supra* note 25, at 277–80.

<sup>30</sup> David Held, *Rethinking Democracy: Globalization and Democratic Theory*, in *INTERNATIONALE WIRTSCHAFT, NATIONALE DEMOKRATIE* 59, 66 (Wolfgang Streeck ed., 1998).

<sup>31</sup> See *id.*

<sup>32</sup> Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *YALE J. INT'L L.* 113, 118–19 (2009). TRNs are “informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants.” *Id.* at 118.

<sup>33</sup> SLAUGHTER, *supra* note 21, at 167. Others see fewer benefits to TRNs. See Verdier, *supra* note 32, at 128–29.

<sup>34</sup> See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 273 (2009); Oona Hathaway, *The Promise and Limits of the International Law of Torture*, in *TORTURE: A COLLECTION* 199, 202–03 (Sanford Levinson ed., 2004).

<sup>35</sup> SIMMONS, *supra* note 34, at 273; Hathaway, *supra* note 34, at 202–03.

national human rights norms in determining eligibility for refugee status,<sup>36</sup> others (primarily within the legislative and executive branches) have adopted measures to lessen the impact of such determinations.<sup>37</sup> The ongoing struggle between these forces has created an opening for refugee lawyers to push for increased acceptance of international human rights norms in asylum adjudications.<sup>38</sup> As a result, these norms have significantly modified state power over migration in the United Kingdom during the past decade.<sup>39</sup>

### B. *Cause Lawyering in an Era of Globalization*

Cause lawyering scholarship examines lawyers who consciously seek social or political goals while simultaneously pursuing the interests of their individual clients.<sup>40</sup> While much of this scholarship focuses on cause lawyering in a comparative context (i.e., studying cause lawyering sites in various countries and regions, and the ways in which cause lawyers both serve and respond to the forces of globalization),<sup>41</sup> little of it deals with the application of international norms in domestic courts.<sup>42</sup> This Article begins to fill that gap by focusing on ways that U.K. refugee lawyers utilize international human rights norms when advocating on behalf of their clients in an era when many U.K. governmental policies seek to restrict the rights of non-citizens.

One of the core tenets of cause lawyering literature is that such lawyering thrives when a “confident” government promotes social justice initiatives, but is frustrated when a “frightened” government struggles to retain power.<sup>43</sup> This Article refines the latter of these premises in the international human rights context, demonstrating that after over a decade of what many would term drastic measures by the U.K. government to reassert power over its national borders, U.K. cause lawyers practicing refugee law are, if not thriving, certainly finding success in

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<sup>36</sup> See *ZH (Tanzania)*, [2011] UKSC 4 at [24].

<sup>37</sup> See Maiman, *supra* note 4, at 411–13.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at 416–20.

<sup>40</sup> STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3 (2005).

<sup>41</sup> Sarat & Scheingold, *supra* note 3, at 13–14.

<sup>42</sup> *But see* Maiman, *supra* note 4, at 410–24 (studying U.K. refugee lawyers shortly after implementation of the Human Rights Act, which incorporated the ECHR into British domestic law).

<sup>43</sup> Richard Abel, *Speaking Truth to Power: Occasions for Cause Lawyering*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 69, 103 (Austin Sarat & Stuart Scheingold eds., 1998).

expanding the protections available to their clients. These findings suggest that a modification of the tenet is warranted when a state's constricting domestic measures are countered by cause lawyers' innovative and persistent use of international norms to which the state has agreed, at least in principle, to abide. The state can surely frustrate the efforts of cause lawyers by clamping down on internal forces seeking social change, but when those forces are global norms which the state has agreed to uphold, it is more difficult for the state to consistently resist the efforts of cause lawyers to enforce them.

## II. METHODOLOGY

The data collected for this Article was obtained through interviews with forty-two U.K. solicitors and barristers between September 2010 and May 2013. All interviewees are lawyers who have regularly represented asylum-seekers and/or the government in asylum cases for at least three years. Key informants helped identify lawyers who fit these criteria for interviewing.

This qualitative approach seeks to understand the influence and effectiveness of international human rights law from the lawyers' own points of view, in their full complexity rather than in their distributional frequency. The method is therefore inductive and consists of semi-structured interviews with open-ended questions that focus on a set of key themes: whether the lawyers regularly invoke international human rights treaties in their asylum practice, under what circumstances they do so, and whether they feel that such law has an impact—be it positive or negative—on the outcomes of their cases. Because the study examines the key perceptions of cause lawyers about the impact of international human rights law on refugee law and practice in domestic courts, interviewing at least forty-two lawyers in the United Kingdom is sufficient to reach thematic saturation: the point at which no new themes emerge.<sup>44</sup>

The interviews proceeded as follows: Each lawyer was first asked to describe, in general terms, a recent asylum case that he or she argued in front of an administrative tribunal or appellate court. Depending on the depth of the response, the lawyer was asked follow-up questions regarding the particular facts of the case and the nature of the key legal arguments made to the judge. If the lawyer mentioned an international human rights treaty spontaneously during the initial response, they

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<sup>44</sup> Greg Guest et al., *How Many Interviews Are Enough?: An Experiment with Data Saturation and Variability*, 18 *FIELD METHODS* 59, 64–65 (2006).



were asked how and why they used it in that case and whether they thought it had any impact on the result—and if so, why. The lawyers were then asked more general questions about the frequency with which they explicitly reference international human rights law in their advocacy. If a lawyer failed to mention any international human rights treaty during the initial response, he or she was asked whether such treaties came up in the course of a case, and why or why not. Lawyers were also asked the more general question of how frequently they explicitly refer to human rights law in asylum cases.

### III. OVERVIEW OF THE U.K. ASYLUM ADJUDICATION PROCESS

The United Kingdom is a signatory to the 1951 Convention relating to the Status of Refugees<sup>45</sup> (Refugee Convention) and thus is obligated to grant refugee status to those who can demonstrate a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.<sup>46</sup> The decision whether to grant asylum in the United Kingdom is a hybrid administrative and judicial process.<sup>47</sup> An initial determination is made by the U.K. Border Agency (Border Agency), which is part of the Home Office, a governmental department focused on immigration, counterterrorism, drugs, and crime.<sup>48</sup> If the claim is rejected by the Border Agency, the claimant may appeal the denial to the Immigration and Asylum Tribunal (Tribunal), an administrative body that makes its own findings of

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<sup>45</sup> Refugee Convention, *supra* note 5, pmb. n.1.

<sup>46</sup> *Id.* art. 1; see Protocol relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267 (removing the effect of the time limitation on the definition of “refugee” in Article 1 of the 1951 Convention); see also *Protocol Relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V5&chapter=5&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V5&chapter=5&lang=en) (last visited May 9, 2013) (showing the United Kingdom as a party to the 1967 Protocol).

<sup>47</sup> There are three different claims an asylum-seeker can make in attempting to remain in the United Kingdom: an asylum claim under the Refugee Convention, a claim for humanitarian protection under complementary protection principles that fall outside the Refugee Convention, and a “human rights claim” under the ECHR/Human Rights Act. Maria O’Sullivan, *The Intersection Between the International, the Regional and the Domestic: Seeking Asylum in the U.K.*, in REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW 228, 251 (Susan Kneebone ed., 2009); see JANE McADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 1–2 (2007). As a practical matter, in each individual case, the Home Office considers all three of these bases for protection, regardless of which one(s) the claimant actually raises. O’Sullivan, *supra*, at 251. Therefore, for purposes of this Article, all three of these claims will be designated as claims for asylum.

<sup>48</sup> *The Asylum Process*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/asylum/process/> (last visited May 9, 2013).

fact.<sup>49</sup> The Tribunal, comprised of approximately seven hundred judges, is divided into two levels: the First Tier initially hears the appeal and its decision can be appealed to the Upper Tribunal.<sup>50</sup> If claimants are unsuccessful at the Tribunal level, they may appeal to the Court of Appeal, and ultimately to the Supreme Court.<sup>51</sup> Judicial review is not a right, and appeals beyond the Tribunal (that is, to the court) are limited to errors of law.<sup>52</sup>

#### IV. THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN U.K. ASYLUM ADJUDICATION

Prior to 2000, the only international human rights instrument relevant to asylum jurisprudence was the Refugee Convention, which established the right to seek asylum.<sup>53</sup> The United Kingdom ratified the Refugee Convention in 1954 but did not incorporate it into domestic law until 1993.<sup>54</sup> The Refugee Convention limits asylum to those who can demonstrate that if they are forced to return to their home country they will be persecuted on the basis of one of the five Convention grounds enumerated above.<sup>55</sup> Accordingly, the Refugee Convention

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<sup>49</sup> ROBERT THOMAS, *ADMINISTRATIVE JUSTICE AND ASYLUM APPEALS: A STUDY OF TRIBUNAL ADJUDICATION* 61–62 (2011); O’Sullivan, *supra* note 47, at 252–53.

<sup>50</sup> MARK SYMES & PETER JORRO, *ASYLUM LAW AND PRACTICE* 875 (2010); Robert Thomas, *Refugee Roulette: A U.K. Perspective*, in *REFUGEE ROULETTE* 164, 164–65 (Jaya Ramji-Nogales et al. eds., 2009). While Tribunal judges—who are sometimes practicing refugee lawyers—are required to issue written decisions, the Upper Tribunal only publishes those decisions which it deems to have value as legal precedent or in describing conditions within a country relevant to the issue of whether an asylum-seeker’s forced return would violate the United Kingdom’s obligations under international law. SYMES & JORRO, *supra*, at 1078–80. Although precise statistics are unavailable, one lawyer estimated that ten percent of Tribunal decisions are published. Interview with Interviewee UK-106, in London, Eng. (Sep. 10, 2012).

<sup>51</sup> SYMES & JORRO, *supra* note 50, at 1112–14; *Chapter 27 – Judicial Review*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter27/> (last updated Apr. 25, 2013) (follow “Section 3 – Judicial review process” hyperlink; then scroll down to pages 2–3 of the linked document).

<sup>52</sup> See generally SYMES & JORRO, *supra* note 50, at 1035–1112 (discussing eligibility for and procedure of appeal beyond the Tribunal).

<sup>53</sup> See Refugee Convention, *supra* note 5, art. 1.

<sup>54</sup> See Asylum and Immigration Appeals Act, 1993, c. 23, § 2 (U.K.). According to section 2 of the Act, which is entitled “Primacy of Convention,” “[n]othing in the immigration rules . . . shall lay down any practice which would be contrary to the [Refugee] Convention.” See *id.* Moreover, in section 1 of the Act, “claim for asylum” is defined as “a claim made by a person . . . that it would be contrary to the United Kingdom’s obligations under the [Refugee] Convention for him to be removed from, or required to leave, the United Kingdom.” *Id.* § 1.

<sup>55</sup> Refugee Convention, *supra* note 5, art. 1(A)(2).

does not protect those likely to suffer harm for other reasons, such as generalized violence throughout their home country.<sup>56</sup> It also does not protect children likely to be harmed if their parents are deported following an unsuccessful asylum claim.<sup>57</sup>

As a result of these limitations, lawyers representing refugees in the United Kingdom prior to 2000 faced a significant challenge.<sup>58</sup> Without a bill of rights or similar document within domestic law, and facing judicial reluctance to rely on any international law other than the Refugee Convention, their advocacy options were extremely limited.<sup>59</sup> As one lawyer practicing in this area for over a decade stated: “If you had gone to an immigration tribunal pre-2000 and tried to bring up the [ECHR], they would have looked at you like you were wasting their time.”<sup>60</sup> Another lawyer explained that before the ECHR became part of U.K. domestic law, judges relied exclusively on the common law in deciding asylum claims. “[T]here were two schools of thought [both of which] felt that our common law was capable of delivering the same principles without tying us down to a particular treaty.”<sup>61</sup>

All of that changed in 2000, when the Human Rights Act (HRA) became effective in England.<sup>62</sup> The HRA effectively incorporated the ECHR,<sup>63</sup> which the United Kingdom had ratified in 1951, but had not previously incorporated into domestic law.<sup>64</sup> The HRA gave judges something they had previously lacked in a legal system without a constitutional provision for judicial review: the ability to overrule human rights-related decisions by the legislative and executive branches of government.<sup>65</sup> It also provided practitioners with a broader basis for

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<sup>56</sup> *See id.*

<sup>57</sup> *See* SYMES & JORRO, *supra* note 50, at 432–33.

<sup>58</sup> *See* O’Sullivan, *supra* note 47, 236–39 (characterizing the legislation proliferated by the United Kingdom from 1993–2002 as obscure, complex, and technical).

<sup>59</sup> *See* Interview with Interviewee UK-106, *supra* note 50; Interview with Interviewee UK-105, in London, Eng. (Sep. 10, 2012).

<sup>60</sup> Interview with Interviewee UK-106, *supra* note 50.

<sup>61</sup> Interview with Interviewee UK-105, *supra* note 59.

<sup>62</sup> The HRA was enacted in 1998 and went into effect in Scotland in July 1999, and Wales and England in October 2000. Maiman, *supra* note 4, at 410.

<sup>63</sup> *See* Human Rights Act, 1998, c. 42. The “Introductory Text” of the HRA states, in relevant part, that it is “[a]n Act to give further effect to rights and freedoms guaranteed under the [ECHR].” *Id.* Section 3(1) of the HRA provides that “[s]o far as it is possible to do so . . . legislation must be read and given effect in a way which is compatible with [ECHR] rights.” *Id.* § 3(1). Section 6(1) of the HRA provides that “[i]t is unlawful for a public authority to act in a way which is incompatible with a[n] [ECHR] right[.]” *Id.* § 6(1). Schedule 1 of the HRA consists of the operative provisions of the ECHR. *Id.* sch.1.

<sup>64</sup> *See id.* § 1.

<sup>65</sup> Maiman, *supra* note 4, at 411.

affording their clients protection.<sup>66</sup> While a particular applicant might not be able to establish persecution on one of the grounds enumerated in the Refugee Convention, if the applicant could show a likelihood of ill treatment upon returning to his or her home country for other reasons, the applicant would be likely to receive protection under the ECHR, and thus the HRA.<sup>67</sup>

While neither the HRA nor the ECHR concern asylum or refugee matters per se, lawyers representing asylum-seekers have invoked several ECHR provisions in defense of their clients.<sup>68</sup> For example, Article 3 of the ECHR prohibits, without exception, torture and “inhuman or degrading treatment or punishment.”<sup>69</sup> Accordingly, Article 3 is relevant to most asylum claims, as the majority of asylum applicants assert that they will be physically harmed if forced to return to their home country.<sup>70</sup> Article 8 provides for the right to respect for one’s private and family life, home, and correspondence.<sup>71</sup> It is often invoked in cases where return to the applicant’s country of origin will disrupt the private and/or family life developed since arriving in the United Kingdom.<sup>72</sup> These provisions, as well as others within the ECHR, offer broader protection to asylum-seekers than does the Refugee Convention, which requires significant evidence of projected harm in a narrow range of situations.<sup>73</sup> Moreover, the Refugee Convention also requires a demonstration that the harm likely to be suffered is because of one of the five enumerated reasons.<sup>74</sup> The ECHR’s protections contain no such requirement.<sup>75</sup>

As a result, it has now become accepted, if not required, practice for U.K. refugee lawyers to invoke the ECHR.<sup>76</sup> Statements from lawyers interviewed for this Article support this notion. One, for example, said:

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<sup>66</sup> See *id.* at 416–17.

<sup>67</sup> See *id.*

<sup>68</sup> See Interview with Interviewee UK-108, in London, Eng. (Sep. 17, 2012).

<sup>69</sup> ECHR, *supra* note 11, art. 3.

<sup>70</sup> See, e.g., Maiman, *supra* note 4, at 417 (describing application of the ECHR and the HRA to allegations of physical abuse).

<sup>71</sup> ECHR, *supra* note 11, art. 8.

<sup>72</sup> See Interview with Interviewee UK-108, *supra* note 68.

<sup>73</sup> See ECHR, *supra* note 11, arts. 3, 8; Refugee Convention, *supra* note 5, art. 1.

<sup>74</sup> Refugee Convention, *supra* note 5, art. 1.

<sup>75</sup> See generally ECHR, *supra* note 11 (containing no enumeration of causes of harm).

<sup>76</sup> See Interview with Interviewee UK-106, *supra* note 50; Interview with Interviewee UK-108, *supra* note 68.

I would never not run [the ECHR] . . . . [Y]ou don't have to prove the particular Refugee Convention grounds . . . . [I]t is incredibly rare to run a case without raising Article 8 as well. Article 8 ECHR is sort of par for the course. You always run a private life claim if they've been here for anything above a year.<sup>77</sup>

Another agreed, saying, "I can hardly think of any . . . asylum case I've done where I haven't relied on the Refugee Convention and the [ECHR]. It's just absolutely standard. That's what your arguments are about."<sup>78</sup>

Indeed, most of the lawyers interviewed suggested that it might border on malpractice to *not* invoke the ECHR in a particular case.<sup>79</sup> They indicated that judges expect to hear such arguments, any former resistance to them having been erased by the fact that the ECHR is "enshrined" in U.K. domestic law through the HRA.<sup>80</sup>

These attitudes reflect a dramatic, and very recent, change in attitudes among lawyers about the acceptance of ECHR-based arguments. For example, a 2005 study of the attitudes of U.K. refugee lawyers noted that "asylum lawyers were struggling to use the HRA . . . to improve their clients' prospects."<sup>81</sup> Furthermore, as recently as 2010, one of the lawyers interviewed said that judges see HRA-based arguments as a sign of desperation.<sup>82</sup> More current interviews, however, suggest that the EHCR has now become the kind of precedential statutory authority on which the British judiciary depends.<sup>83</sup>

#### V. EFFORTS TO REASSERT STATE AUTHORITY OVER THE ASYLUM PROCESS

At the same time that the U.K. judiciary was beginning to accept international norms beyond the Refugee Convention in evaluating asylum claims, the other branches of government were adopting procedures to limit the number of asylum-seekers and refugees within U.K. borders.<sup>84</sup> The catalyst for these procedures was the alleged abuse of

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<sup>77</sup> Interview with Interviewee UK-108, *supra* note 68.

<sup>78</sup> Interview with Interviewee UK-106, *supra* note 50.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

<sup>81</sup> Maiman, *supra* note 4, at 422.

<sup>82</sup> Telephone Interview with Interviewee UK-104 (Sep. 16, 2010).

<sup>83</sup> *See* Interview with Interviewee UK-106, *supra* note 50; Interview with Interviewee UK-108, *supra* note 68.

<sup>84</sup> *See* O'Sullivan, *supra* note 47, at 233–34.

the asylum system by migrants perceived as seeking economic prosperity rather than relief from persecution.<sup>85</sup> This perceived abuse became a hot-button political issue in the late 1990s, seized upon by the tabloid media as well as opposition politicians.<sup>86</sup> While toned down somewhat in recent years, it has led to a culture of skepticism toward asylum-seekers among the public and the judiciary. As one lawyer described the situation: “The political . . . background is absolutely rabid . . . . Asylum-seeker and refugee has become a dirty word. It is absolutely awful and shocking . . . [T]he counterargument is that there is abuse. Well, there is abuse in every single system where we have a presumption of innocence.”<sup>87</sup>

As a result of public outcry against alleged abuse, and an attempt to fend off charges from the Conservative Party and the media that it was “soft” on asylum, the newly installed Labour government of Tony Blair pledged to drastically reduce the number of asylum-seekers, culminating in the 2005 “tipping the balance target” proposal that it would remove more asylum applicants per month than the number who apply.<sup>88</sup> These efforts were aided by the United Kingdom’s enforcement of the Dublin Convention of 1990, which permits any EU Member State to transfer an asylum applicant to the EU Member State where the applicant first entered without documentation.<sup>89</sup> As a result, the deportation of asylum-seekers as a percentage of all removed immigrants in the United Kingdom rose from 6.4% in 1993 to 25.6% in 2006.<sup>90</sup> The government also made life more difficult for those asylum-seekers who were not removed by dispersing them throughout the country and limiting their eligibility for welfare benefits.<sup>91</sup>

In addition to removing asylum-seekers already in the country, the government adopted a number of policies during the first decade of the

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<sup>85</sup> *See id.* at 233 n.29.

<sup>86</sup> *Id.*

<sup>87</sup> Telephone Interview with Interviewee UK-111 (Oct. 18, 2012).

<sup>88</sup> Matthew Gibney, *Asylum and the Expansion of Deportation in the United Kingdom*, 43 *GOV'T & OPPOSITION* 146, 157 (2008).

<sup>89</sup> SYMES & JORRO, *supra* note 50, at 475–76. Given that many asylum-seekers in the United Kingdom first entered the EU through another country (typically in southern or eastern Europe), the United Kingdom was able to remove many asylum-seekers without adjudicating their claims. *See id.* at 476–78.

<sup>90</sup> *See* SCOTT BLINDER, *THE MIGRATION OBSERVATORY AT THE UNIV. OF OXFORD, BRIEFING: DEPORTATIONS, REMOVALS AND VOLUNTARY DEPARTURES FROM THE UK* 5–6 figs.2 & 3 (2012), available at <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Briefing-Deportations.pdf> (calculated from graphs noting the number total deportations and deportations by subtype).

<sup>91</sup> Gibney, *supra* note 88, at 157.

twenty-first century making it more difficult for asylum-seekers to reach the United Kingdom in the first place.<sup>92</sup> These policies included tighter control over documents, increased scrutiny of persons attempting to travel to the United Kingdom via air and rail, increased fines for airlines and truck drivers who transport undocumented persons to the country, and reduction of available points of entry.<sup>93</sup> Like the concerted effort to remove asylum applicants, these measures had their intended impact: the number of asylum applicants in the United Kingdom fell by over fifty percent between 2002 and 2010, from 103,000 to 41,000.<sup>94</sup>

The U.K. government has also made it more difficult to obtain refugee status by frequently changing the rules governing the asylum process.<sup>95</sup> As a result, a series of legislative initiatives over the past decade have resulted in restricted appeal rights and other procedural barriers to effective asylum claims.<sup>96</sup> Most recently, in July 2012, the Home Secretary proposed restrictive changes to the rules governing adjudication of cases under ECHR Article 8.<sup>97</sup>

The final and perhaps most significant governmental measure making asylum less attainable are cutbacks in legal aid funding. The legal aid system in the United Kingdom began in 1949 and provides legal services to lower-income persons in a variety of areas, including immigration law.<sup>98</sup> Approximately thirty percent of all adults in the United Kingdom qualify for legal aid.<sup>99</sup> Most lawyers who provide legal services to immigrants, including asylum-seekers, receive some form of

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<sup>92</sup> See, e.g., Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004, c. 19, § 17 (U.K.); Nationality, Immigration, and Asylum Act, 2002, c. 41 (U.K.); Immigration and Asylum Act, 1999, c. 33, §§ 18, 32 (U.K.).

<sup>93</sup> See Asylum and Immigration (Treatment of Claimants, etc.) Act § 17; Immigration and Asylum Act §§ 18, 32.

<sup>94</sup> Compare UNITED NATIONS HIGH COMM'R ON REFUGEES, STATISTICAL YEARBOOK 2010, at 88 tbl.9 (2011), available at <http://www.unhcr.org/4ef9c7269.html>, with UNITED NATIONS HIGH COMM'R ON REFUGEES, STATISTICAL YEARBOOK 2002 annex tbls.C.1, C.7 (2004), available at <http://www.unhcr.org/413598454.html>.

<sup>95</sup> See O'Sullivan, *supra* note 47, at 236–39.

<sup>96</sup> *Id.* at 237–38.

<sup>97</sup> See HOME DEPARTMENT, STATEMENT OF CHANGES IN IMMIGRATION RULES, 2012, H.C. 194 *passim* (U.K.). The proposed changes require Tribunal judges to balance a claimant's assertion of family rights under Article 8 with considerations that include the claimant's criminal history and whether there are any insurmountable obstacles to the continuation of the claimant's family life outside the United Kingdom. *Id.* at 4. The rules were challenged with mixed success in a recent Upper Tribunal case. See *MF (Nigeria) v. Sec'y of State for the Home Dep't*, [2012] UKUT 00393 (IAC).

<sup>98</sup> Jon Robins, *Legal Aid in 21st-Century Britain*, GUARDIAN (Mar. 11, 2009), <http://www.guardian.co.uk/money/2009/mar/11/legal-aid-justice-gap>.

<sup>99</sup> See *id.*

financial remuneration from legal aid.<sup>100</sup> As numerous scholars have noted, asylum-seekers generally have a much better chance of success when they are represented by counsel.<sup>101</sup> According to one lawyer interviewed for this Article: “One thing is absolutely right . . . that the way our . . . asylum determination system is set up is contingent upon applicants having good quality legal advice and representation.”<sup>102</sup>

The Cameron government, in its efforts to reduce budget deficits, has taken steps to substantially cut legal aid.<sup>103</sup> A previous round of cuts to the reimbursement rate and increased delay in the distribution of reimbursements to lawyers contributed to the closing of Refugee and Migrant Justice, and the Immigration Advisory Service, two prominent organizations that provided legal assistance to large numbers of refugees and other immigrants.<sup>104</sup> The latest round of cuts, implemented in April 2013, completely eliminate legal aid funding for a variety of immigration-related matters, including applications to remain in the United Kingdom under Article 8 of the ECHR.<sup>105</sup> And while funding will still be available for asylum-seekers, the reimbursement rate for such work will be further reduced.<sup>106</sup>

Lawyers in the interview sample (including those who represent the government) have described the cuts as “drastic,” “devastating,” and likely to have an “enormous” impact on persons seeking refuge

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<sup>100</sup> Owen Bowcott, *Tens of Thousands Lose Support as Immigration Advisory Service Closes*, GUARDIAN (July 11, 2011), <http://www.guardian.co.uk/law/2011/jul/11/immigration-advisory-service-closes-blames-government>; *Migrant Charity in Administration Amid Cash Problems*, BBC NEWS (June 15, 2010), <http://www.bbc.co.uk/news/10324774>.

<sup>101</sup> Although there have been no empirical studies in the United Kingdom of the correlation between representation by counsel and successful asylum claims, a significant correlation between those factors has been identified in both the United States and Canada. Sean Rehaag, *The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment*, 49 OSGOODE HALL L.J. 71–116 (2011); see Jon B. Gould et al., *A Refugee from Justice? Disparate Treatment in the Federal Court of Canada*, 32 LAW & POL. 454, 457–58 (2010); Jaya Ramji-Nogales et al., *Immigration Courts*, in REFUGEE ROULETTE, *supra* note 50, at 33, 45.

<sup>102</sup> Telephone Interview with Interviewee UK-101 (Sep. 8, 2010).

<sup>103</sup> Cf. Memorandum from Steve Symonds, Legal Officer, Immigr. L. Prac. Ass'n, Updates to Cuts/Changes to Legal Aid for Immigration Advice (May 15, 2012), available at <http://www.ilpa.org.uk/data/resources/14725/12.17.05-Ealing-Advice-Forum-re-Legal-Aid.pdf> (detailing reduced legal aid services for immigration and asylum issues).

<sup>104</sup> See Bowcott, *supra* note 100; *Migrant Charity in Administration Amid Cash Problems*, *supra* note 100.

<sup>105</sup> See Memorandum from Steve Symonds, *supra* note 103; see also Patrick Hennessy, *Legal Aid Curb for Foreign Migrants*, TELEGRAPH (London), Apr. 6, 2013, <http://www.telegraph.co.uk/news/politics/9976786/Legal-aid-curb-for-foreign-migrants.html>.

<sup>106</sup> See Memorandum from Steve Symonds, *supra* note 103.



from persecution.<sup>107</sup> Interviewees cited several reasons for these grim assessments. The most common response was that the cuts will reduce the number of lawyers representing asylum-seekers because most lawyers currently doing so offer additional advice to immigrants that will no longer be funded through legal aid.<sup>108</sup> As a result, many of these lawyers are likely to leave the immigration field entirely. As one lawyer succinctly put it: “We’re all very worried that the good [solicitor] firms . . . will go under . . . There’s only so much pro bono you can do.”<sup>109</sup>

Another consistently-cited concern was that people with otherwise valid claims under Article 8 will be returned to their home countries.<sup>110</sup> As one lawyer put it: “I’m sure that every day dozens of people will be removed from the United Kingdom who, were their [Article 8] case dealt with properly, would have succeeded in demonstrating that it was not proportionate to remove them.”<sup>111</sup>

In addition to these oft-cited effects, a few lawyers articulated other, less obvious impacts that demonstrate the logical inconsistency of the government’s proposals. For example, at a time when the government is otherwise trying to reduce the number of asylum claims in the United Kingdom, the cuts will likely *increase* the number of asylum claims because seeking asylum will be one of the only government-funded ways to seek to remain in the country.<sup>112</sup> The consequences of this development are significant, and go beyond an obviously increased judicial caseload.<sup>113</sup> Many of the litigants in these cases will be unrepresented, putting even greater pressure on limited judicial resources.<sup>114</sup> Moreover, lawyers predict that many of these cases are likely to be of questionable merit, which will heighten public hostility toward refugees generally.<sup>115</sup> As one lawyer put it, the “panic” over asylum-seekers will

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<sup>107</sup> Interview with Interviewee UK-114, in London, Eng. (Nov. 22, 2012); Telephone Interview with Interviewee UK-113 (Nov. 9, 2012); Interview with Interviewee UK-108, *supra* note 68.

<sup>108</sup> See Interview with Interviewee UK-114, *supra* note 107; Telephone Interview with Interviewee UK-113, *supra* note 107; Interview with Interviewee UK-120, in London, Eng. (Nov. 6, 2012); Interview with Interviewee UK-108, *supra* note 68.

<sup>109</sup> Interview with Interviewee UK-108, *supra* note 68.

<sup>110</sup> See *id.*

<sup>111</sup> Interview with Interviewee UK-115, in London, Eng. (Nov. 2, 2012).

<sup>112</sup> See Memorandum from Steve Symonds, *supra* note 103; Interview with Interviewee UK-114, *supra* note 107.

<sup>113</sup> See Interview with Interviewee UK-114, *supra* note 107.

<sup>114</sup> See *id.*; Interview with Interviewee UK-120, *supra* note 108.

<sup>115</sup> See Interview with Interviewee UK-114, *supra* note 107 (discussing how using Refugee Act claims as a way to get legal aid can pollute perceptions of the system); Interview with Interviewee UK-118, in London, Eng. (Oct. 18, 2012) (noting that citing directly to treaty provisions can be difficult).

return.<sup>116</sup> Another lawyer indicated that the rise in such cases will impair the reputation of lawyers, who will be viewed as litigating baseless claims.<sup>117</sup> Finally, one lawyer who frequently represents the state in asylum cases felt that the impending changes will hurt government lawyers because a lack of funding for most immigration-related matters will mean that solicitors who later represent the government in refugee cases will no longer acquire experience doing a range of immigration work, making them less effective.<sup>118</sup>

Viewed within the frame of globalization, the legal aid cuts are an extremely effective means of reasserting state power over migration and counteracting the encroachment of international norms. By limiting immigrants' ability to obtain counsel in Article 8 proceedings, for example, the government diminishes lawyers' opportunities to pressure courts to expand the influence of international human rights treaties within U.K. jurisprudence.<sup>119</sup>

## VI. RESPONSE OF CAUSE LAWYERS TO THE REASSERTION OF STATE POWER OVER ASYLUM

At the same time that the United Kingdom has taken the steps described above to make the right to asylum more difficult to assert and asylum itself more difficult to obtain, refugee lawyers have sought to increase their clients' likelihood of obtaining asylum by expanding the application of international norms to individual asylum cases.<sup>120</sup> They have pursued two interrelated strategies in doing so: advocating for complementary human rights protections for their clients and exploiting the increasingly global perspective of the U.K. judiciary. Each of these strategies is discussed below.

### A. *Complementary Human Rights Protections*

One of the strategies most consistently articulated by lawyers interviewed is infusing their advocacy with human rights arguments beyond

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<sup>116</sup> See Interview with Interviewee UK-107, in London, Eng. (Sept. 7, 2012).

<sup>117</sup> Interview with Interviewee UK-114, *supra* note 107. Not all lawyers felt that the effect of the cuts would be uniformly adverse to asylum-seekers. One thought that the cuts would weed out some of the less skilled lawyers representing refugees. Interview with Interviewee UK-115, *supra* note 111. Another predicted that some of the more skilled lawyers will become Tribunal judges, thus improving asylum jurisprudence overall. See Interview with Interviewee UK-120, *supra* note 108.

<sup>118</sup> Interview with Interviewee UK-119, in London, Eng. (Nov. 2, 2012).

<sup>119</sup> See Maiman, *supra* note 4, at 411–12.

<sup>120</sup> See *infra* text accompanying notes 129–165.

the Refugee Convention and the ECHR.<sup>121</sup> These arguments fall under the general rubric of complementary protection, which offers broader protections than the Refugee Convention and, in some cases, the ECHR.<sup>122</sup> Refugee lawyers thus seek to expand the ways that their clients might be able to remain in the United Kingdom by arguing that they are protected by treaties which the United Kingdom has ratified but not formally incorporated into domestic law. The most frequently mentioned treaty in this regard is the Convention on the Rights of the Child (CRC), which obligates states parties to ensure that, in all actions taken by public officials involving children, the best interests of the child shall be a “primary consideration.”<sup>123</sup> Moreover, the CRC requires states parties to ensure that children are not separated from their parents against their will.<sup>124</sup> Accordingly, the CRC offers broader protections to asylum-seekers than either the Refugee Convention or the ECHR.<sup>125</sup> The CRC also offers further protections by recognizing the social and economic rights of children and the right of children to participate in judicial proceedings, both of which are absent from the Refugee Convention and the ECHR.<sup>126</sup>

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<sup>121</sup> See Interview with Interviewee UK-118, *supra* note 115; Interview with Interviewee UK-106, *supra* note 50; Telephone Interview with Interviewee UK-101, *supra* note 102; Interview with Interviewee UK-107, *supra* note 116.

<sup>122</sup> See McADAM, *supra* note 47, at 1–2.

<sup>123</sup> CRC, *supra* note 15, art. 3(1) (“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.”).

<sup>124</sup> *Id.* art. 9(1) (“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”).

<sup>125</sup> McADAM, *supra* note 47, at 173–74. The CRC has received judicial imprimatur in several countries, including Denmark, Finland, Canada, Australia, and the United States. See *id.* at 183–94; Guy S. Goodwin-Gill, *Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*, 3 INT’L J. CHILDREN’S RTS. 405, 405–06 (1995).

<sup>126</sup> CRC, *supra* note 15, art. 4 (“With regard to economic, social and cultural rights, States Parties shall undertake [implementing] measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”). Article 12 of the CRC states, in full:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

There is a concerted effort among many U.K. refugee lawyers to bring cases under the CRC in order to give meaning to the term “best interests of the child.”<sup>127</sup> One of the most frequently articulated such arguments is that the deportation of the parent of a U.K.-based child will violate the United Kingdom’s obligations under the CRC, even where the parent does not have a valid asylum claim.<sup>128</sup> Another more nascent argument is that the CRC protects the public rights of children—not simply their private rights—and thus would prevent them from being returned to a country where generalized violence prevails, even if the child has not been individually targeted for persecution.<sup>129</sup>

Lawyers’ efforts to incorporate the CRC into their advocacy received a huge boost with the 2011 decision in *ZH (Tanzania) v. Secretary of State for the Home Department*,<sup>130</sup> in which the U.K. Supreme Court cited to the CRC when holding that courts must consider the best interests of the child in cases involving removal of non-citizens (including those concerning asylum applicants).<sup>131</sup> This Supreme Court imprimatur on the CRC has been critical to the U.K. judiciary’s acceptance of human rights treaties beyond the Refugee Convention and the ECHR.<sup>132</sup> As one lawyer put it, “[*ZH (Tanzania)*] really blew open the jurisprudence on the rights of the child, the best interests of the child.”<sup>133</sup> Another lawyer echoed this sentiment: “The [CRC] is very important . . . courts have taken judicial notice of it, but it also becomes a hardened legal standard by being incorporated into interpretation of Article 8.”<sup>134</sup>

One indicator of the importance of *ZH (Tanzania)* in reasserting the importance of international norms in asylum adjudication is the statement of a refugee lawyer who was interviewed for this Article in

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*Id.* art. 12.

<sup>127</sup> See *ZH (Tanzania) v. Sec’y of State for the Home Dep’t*, [2011] UKSC 4, [5]–[13] (appeal taken from Eng.) (noting explicitly appellant’s reliance on CRC and the question of what is in the child’s best interest).

<sup>128</sup> See *id.* at [11]–[13].

<sup>129</sup> Interview with Interviewee UK-105, *supra* note 59.

<sup>130</sup> See *ZH (Tanzania)*, [2011] UKSC 4 at [23].

<sup>131</sup> As noted above, in addition to the CRC, the decision in *ZH (Tanzania)* was based on section 55 of the U.K. Borders, Citizenship, and Immigration Act of 2009, which requires the Secretary of State’s duties to be discharged in ways that safeguard and promote the welfare of children in the United Kingdom. See *supra* note 16. *ZH (Tanzania)* was the first case where section 55 (as well as the CRC) received such judicial imprimatur. See *ZH (Tanzania)*, [2011] UKSC 4 at [24].

<sup>132</sup> See Interview with Interviewee UK-107, *supra* note 116.

<sup>133</sup> Interview with Interviewee UK-108, *supra* note 68.

<sup>134</sup> Interview with Interviewee UK-107, *supra* note 116.

2010, prior to the decision in *ZH (Tanzania)*. This lawyer noted the irony of the way that the adoption of the ECHR, through passage of the HRA, had subsequently been counterbalanced by a reduction in complementary protection through other international human rights instruments:

Oddly, at the same time as the Human Rights Act started to . . . bite, you end up getting less complementary protection granted because the government decides that they are worried about the numbers coming and tries to bear down on protection standards as a result . . . . They couldn't go below the human rights standards contained in the [Human Rights] Act. But you've also seen a sort of diminution of complementary protection based on discretion, based on compassion, based on other humanitarian ideals and objectives.<sup>135</sup>

*ZH (Tanzania)* has, for the moment at least, stemmed this diminution of complementary protections.<sup>136</sup> Although it is still early to determine with any certainty the long-term impact of *ZH (Tanzania)* on asylum jurisprudence, it has certainly aided lawyers' efforts to apply complementary international norms to domestic law in the United Kingdom.<sup>137</sup> As a result, judges will be forced to at least address the issue of whether—and how—these norms apply in individual cases.<sup>138</sup> Whether they do so in a way that generally aids asylum-seekers remains to be seen.<sup>139</sup>

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<sup>135</sup> Telephone Interview with Interviewee UK-101, *supra* note 102.

<sup>136</sup> Other lawyers recently interviewed for this Article indicated that they have used other complementary protections in their advocacy, including the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities. Interview with Interviewee UK-114, *supra* note 107; Telephone Interview with Interviewee UK-111, *supra* note 87. *See generally* Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. However, none of these treaties has obtained as much acceptance within the judiciary as the CRC.

<sup>137</sup> In this way, the decision in *ZH (Tanzania)* is similar to that in *Baker v. Minister of Citizenship and Immigration*, which established a similar precedent in Canada. *See* [1999] 2 SCR 817, 860–62 (Can.). Since that opinion, Canadian refugee lawyers have frequently invoked the CRC in their advocacy, even though Canada has not formally incorporated the treaty into domestic law. *See id.* at 861; Stephen Meili, *Do Human Rights Treaties Help Asylum Seekers? Canadian Refugee Jurisprudence and Practice Since 1990*, at 11 (Minn. Legal Studies Research, Paper No. 12-59, 2012), available at <http://ssrn.com/abstract=2164258>.

<sup>138</sup> *See ZH (Tanzania)*, [2011] UKSC 4 at [24].

<sup>139</sup> Preliminary indications from the author's ongoing research of published U.K. asylum decisions indicate that arguments based on the CRC are, indeed, gaining traction. Based on a sample of fifty-eight reported decisions in the asylum tribunals and appellate courts between 1990 and 2012 in which the CRC was referenced in some way, there were no helpful references to the CRC (out of ten total references) prior to 2005, but twenty-

*ZH (Tanzania)* was the result of a legal strategy long practiced by cause lawyers in litigation: pushing the boundaries of precedent to establish revised standards that assist not only their clients, but a larger cause.<sup>140</sup> In this case, that cause is the diffusion of international human rights norms.<sup>141</sup> Lawyers interviewed for this Article described this process in a variety of ways, in particular that of “educating” judges. For example, one lawyer noted, “I suppose if practitioners aren’t [articulating these laws] then we are not going to be able to educate the judiciary to take [the laws] into account.”<sup>142</sup> Another said, “judges . . . welcome being shown how the EU Charter [which includes the ECHR and other human rights instruments] works and being taken kind of through the history of it a bit . . . it depends on the judge . . . . When you are arguing something different you get the judge’s attention.”<sup>143</sup> A third said, “[You say to the judge] ‘I am going to tell you where the learning comes from [on that subject] . . . .’ It’s all about giving the judge comfort. If you want to do something quite interesting and creative, then you just give them comfort.”<sup>144</sup>

This strategy is not without risks, as an educational session might annoy a judge, particularly if she or he is not predisposed toward human rights arguments.<sup>145</sup> Indeed, some lawyers identified circumstances where invoking treaty-based argument may actually hurt, rather than help, an asylum applicant.<sup>146</sup> For example, one attorney stated that lawyers who push such arguments at the Tribunal level, where—according to this lawyer—the judges do not like complicated law, might end up biasing the court against their client.<sup>147</sup> Other lawyers noted, for example, that “[p]eople feel they have to throw everything in . . . . I’ve sat at the back of the courts lots of times and watched judges say ‘what does this add to your argument?’ Why be put in that position?”<sup>148</sup> Another

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two helpful references (out of forty-eight total references) between 2005 and the present. For these purposes, “helpful” references occur when the CRC either (1) was the basis of a grant of asylum or other form of relief from removal, or (2) buttressed a decision in favor of the applicant that the court or tribunal reached on other grounds (such as the Refugee Convention). Thus, the number of helpful references to the CRC has expanded considerably since 2005.

<sup>140</sup> See SCHEINGOLD & SARAT, *supra* note 40, at 13–14.

<sup>141</sup> See *id.* at 14.

<sup>142</sup> Telephone Interview with Interviewee UK-102 (Oct. 18, 2010).

<sup>143</sup> Telephone Interview with Interviewee UK-113, *supra* note 107.

<sup>144</sup> Interview with Interviewee UK-114, *supra* note 107.

<sup>145</sup> See Interview with Interviewee UK-108, *supra* note 68.

<sup>146</sup> See Interview with Interviewee UK-120, *supra* note 108.

<sup>147</sup> Interview with Interviewee UK-108, *supra* note 68.

<sup>148</sup> Interview with Interviewee UK-120, *supra* note 108.

noted that such a move can be counterproductive “if it highlights the lack of provision in the Convention that you could rely on directly.”<sup>149</sup> A third agreed, saying, “If you try to rely on too many grounds, at times you undermine one by making progress with another.”<sup>150</sup>

These reactions suggest that invoking human-rights-based argument may not be the win-win situation many cause lawyers assume (i.e., that it will help both their clients and the larger cause of general acceptance of human rights norms applicable to asylum claims). In some cases, it can both hurt the cause of human rights generally, as well as the immediate interests of the client.<sup>151</sup>

Such risks, however, have not deterred most U.K. refugee lawyers from pursuing a long-term strategy of pushing for greater understanding and acceptance of complementary protections for asylum-seekers.<sup>152</sup> Cases like *ZH (Tanzania)* prove the wisdom of this strategy and fuel similar efforts.<sup>153</sup> Litigation over such matters is likely to be at the forefront of the struggle over the proper role of international norms in U.K. asylum jurisprudence and policy for the foreseeable future.<sup>154</sup>

### B. *Playing to the Global Judicial Stage*

A related strategy for expanding the scope of international norms in U.K. refugee law is exploiting the globalization of human rights jurisprudence.<sup>155</sup> As Anne-Marie Slaughter has noted, courts in many countries often look to the human rights jurisprudence of other nations for guidance because they are relying on a core of international agreements.<sup>156</sup> An attorney interviewed for this Article indicated that U.K. judges who rule on asylum cases are “aware that they make law for the whole world.”<sup>157</sup> Other lawyers welcomed this development, noting that it has resulted in a more serious consideration of human rights arguments in asylum jurisprudence. For example, one said: “My sense is that the higher up you go the much more conscious the court is of its international influence. And I think it is a good thing because it makes

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<sup>149</sup> Interview with Interviewee UK-118, *supra* note 115.

<sup>150</sup> Interview with Interviewee UK-121, in London, Eng. (Nov. 6, 2012).

<sup>151</sup> See Maiman, *supra* note 4, at 418.

<sup>152</sup> See *id.* at 419–21.

<sup>153</sup> See *ZH (Tanzania)*, [2011] UKSC 4 at [12], [29]–[33]; Interview with Interviewee UK-108, *supra* note 68.

<sup>154</sup> See Maiman, *supra* note 4, at 414–15.

<sup>155</sup> See SLAUGHTER, *supra* note 21, at 79–81.

<sup>156</sup> *Id.*

<sup>157</sup> Interview with Interviewee UK-107, *supra* note 116.

the whole endeavor much more serious.”<sup>158</sup> Another noted: “[You tell the judge] you are on the right side of global attitudes and global thinking . . . . This is where the thinking globally is going . . . . [Judges] like to think of themselves as being on the right side of global developments.”<sup>159</sup>

These comments suggest yet another way that globalization has eroded state authority over refugee matters. Judges deciding cases in this area may be at least as beholden to international forces, including jurists, lawyers, and scholars from other countries, as they are to state actors within the country where they sit.<sup>160</sup> Their international audience may create subtle pressures leading them to adopt a more international, rather than domestic, perspective when deciding asylum cases.<sup>161</sup> Many refugee lawyers are aware of this phenomenon and seek to use it to their clients’ advantage.<sup>162</sup>

## CONCLUSIONS

This Article’s empirical findings advance the two areas of socio-legal scholarship which formed its framework.

### A. *Devolution of State Power via Globalization*

As numerous scholars have observed, globalization has created a power vacuum in many areas of civil society, including commerce, trade, and finance.<sup>163</sup> On the other hand, despite the increased influence of international norms throughout the world, individual states continue to assert significant power over immigration law and policy.<sup>164</sup> States maintain this power in two ways, which we might think of as bad cop-good cop behavior.<sup>165</sup> In the role of bad cop, the state takes steps to limit the number of asylum-seekers and refugees within its borders.<sup>166</sup> In the United Kingdom, these steps have included increased penalties for those who transport refugees into the country, ever-changing pro-

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<sup>158</sup> Telephone Interview with Interviewee UK-111, *supra* note 87.

<sup>159</sup> Interview with Interviewee UK-114, *supra* note 107.

<sup>160</sup> See SLAUGHTER, *supra* note 21, at 81.

<sup>161</sup> See *id.*

<sup>162</sup> See Interview with Interviewee UK-114, *supra* note 107.

<sup>163</sup> See David Held & Anthony McGrew, *Introduction*, in GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE 1, 2–4 (David Held & Anthony McGrew eds., 2002).

<sup>164</sup> See MCADAM, *supra* note 47, at 254–55.

<sup>165</sup> See *id.*; Gibney, *supra* note 88, at 159–61.

<sup>166</sup> See Gibney, *supra* note 88, at 156.



cedural rules that make it more difficult to meet the standard for asylum, and greatly reduced legal aid funding.<sup>167</sup> In the role of good cop, the state adopts international human rights standards, thus broadening the forms of protection available to refugees under domestic (rather than international) law.<sup>168</sup> In the case of the United Kingdom, these forms of adoption include effective incorporation of the ECHR into domestic law through the HRA, transposition into U.K. domestic law of the EU Qualification Directive on uniform asylum procedures, passage of section 55 of the U.K. Borders, Citizenship and Immigration Act 2009, and the Supreme Court decision in *ZH (Tanzania)*, which provided judicial imprimatur on the Convention on the Rights of the Child.<sup>169</sup>

Thus, rather than cede power to global forces—as is the case with other areas of state policy described in the globalization literature—in the migration context states either fight to retain power (the bad cop) or co-opt it by adopting international norms (the good cop). This results in mixed messages from different state actors, as they give with one hand (incorporating the ECHR) and take away with the other (legal aid cuts).

Refugee lawyers have a strong influence on this process, particularly in encouraging courts to adopt international human rights standards into domestic law through judicial precedent.<sup>170</sup> For without such influences it appears that many judges are likely to rely only on domestic interpretations of international law.<sup>171</sup> The advocacy of many U.K. refugee lawyers for complementary protection under unincorporated treaties like the CRC, however, effectively forces judges to deal with international arguments and, at least in some cases—like *ZH (Tanzania)*—accept them.<sup>172</sup>

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<sup>167</sup> See Nationality, Immigration, and Asylum Act § 143; Gibney, *supra* note 88, at 162; Memorandum from Steve Symonds, *supra* note 103.

<sup>168</sup> See Maiman, *supra* note 4, at 410–11.

<sup>169</sup> See *ZH (Tanzania) v. Sec’y of State for the Home Dep’t*, [2011] UKSC 4, [24] (appeal taken from Eng.); McADAM, *supra* note 47, at 55; Maiman, *supra* note 4, at 410–11.

<sup>170</sup> See Andrew Boon, *Cause Lawyers in a Cold Climate: The Impact(s) of Globalization on the United Kingdom*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 3, at 143, 150–51; Maiman, *supra* note 4, at 417–18.

<sup>171</sup> See SLAUGHTER, *supra* note 21, at 81; Maiman, *supra* note 4, at 416–18.

<sup>172</sup> See *ZH (Tanzania)*, [2011] UKSC 4 at [12], [21]–[33].

### B. Cause Lawyering

This Article provides evidence justifying a slight modification to one of the primary tenets of the cause lawyering literature, namely that cause lawyering is frustrated under a “frightened government” which resorts to restrictive measures to regain control.<sup>173</sup> It is fair to characterize the U.K. government’s response to increased immigration flows over the past fifteen years as one of fear, i.e., fear of losing control of the nation’s borders.<sup>174</sup> However, this Article demonstrates that despite the desperate measures taken by the government to curb the influx of asylum-seekers, cause lawyers representing asylum-seekers are not completely frustrated in their attempts to provide protection for their clients.<sup>175</sup> Indeed, compared to a study of such lawyers less than a decade ago, today’s refugee lawyers are far more optimistic.<sup>176</sup>

This ray of hope for cause lawyers has been brought about by an intriguing combination of domestic law and international human rights norms, which have enabled lawyers to broaden the parameters of asylum law protection beyond that which state law affords.<sup>177</sup> Accordingly, one corollary to this core tenet of cause lawyering is that when the forces against which state power is aligned are international in nature (e.g., international human rights norms), cause lawyering may not flourish, but it certainly is not frustrated.<sup>178</sup> At least in the United Kingdom, cause lawyers use those norms to keep pushing the boundaries of domestic resistance, confident—or at least hopeful—that they will eventually experience breakthroughs like *ZH (Tanzania)*.<sup>179</sup> Such breakthroughs take time, as the education of judges proceeds slowly, usually through a series of preliminary cases which may be unsuccessful.<sup>180</sup>

Another modification to this fundamental principle is that the government should not be seen as monolithic when it comes to being

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<sup>173</sup> See Abel, *supra* note 43, at 103.

<sup>174</sup> See Gibney, *supra* note 88, at 157.

<sup>175</sup> See, e.g., *ZH (Tanzania)*, [2011] UKSC 4 at [12], [24]–[25] (agreeing with lawyer’s contention that the CRC required the Secretary of State to consider international obligations in deportation proceedings).

<sup>176</sup> Compare Maiman, *supra* note 4, at 418–21, with *supra* text accompanying notes 127–163.

<sup>177</sup> See McADAM, *supra* note 47, at 7–8.

<sup>178</sup> See Lisa Hajjar, *From the Fight for Legal Rights to the Promotion of Human Rights: Israeli and Palestinian Cause Lawyers in the Trenches of Globalization*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA*, *supra* note 3, at 68, 74–75.

<sup>179</sup> See Maiman, *supra* note 4, at 422.

<sup>180</sup> Cf. *id.* at 416 (noting how initial claims after the passage of the Human Rights Act were unsuccessful).

frightened.<sup>181</sup> In a tripartite government, one branch might be less fearful than another, more open to social change, or less apprehensive about public opinion.<sup>182</sup> To that extent, cause lawyers engaging with the less fearful branch (the judiciary, in the United Kingdom) can flourish, while those who engage with more fearful branches (the U.K. executive, and in particular the Home Office) will likely be frustrated.<sup>183</sup>

In the final analysis, refugee lawyers in the United Kingdom are not resisting state power over migration as much as trying to redefine it; that is, they seek to modify the sources on which that power is based.<sup>184</sup> In the globalization context, they endeavor to fill the power vacuum in the new global legal order by pressuring the state (through its courts) to not only broaden human rights-based protections for refugees but to make those protections part of domestic law.<sup>185</sup> In this way, cause lawyers are proponents of expanded state power over migration, provided that power is based on international human rights norms.<sup>186</sup>

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<sup>181</sup> See Thomas, *supra* note 50, at 167–68.

<sup>182</sup> See, e.g., Gibney *supra* note 88, at 162–64 (contrasting political pressure on the executive to strengthen detention with judicial insistence on due process and the right to a speedy trial).

<sup>183</sup> See Maiman, *supra* note 4, at 413–15.

<sup>184</sup> See, e.g., *ZH (Tanzania)*, [2011] UKSC 4 at [12] (noting that the claimant's lawyer conceded state discretion in reviewing asylum claims but emphasized international obligations to be considered).

<sup>185</sup> See Maiman, *supra* note 4, at 417–18; Sarat & Scheingold, *supra* note 3, at 14.

<sup>186</sup> Cf. SLAUGHTER, *supra* note 21, at 79–82 (noting that by applying international human rights law, domestic courts are moving beyond existing legislation).