2017

The Human Rights of Non-Citizens: Constitutionalized Treaty Law in Ecuador

Steve Meili

University of Minnesota Law School, smeili@umn.edu

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles

Part of the Law Commons

Recommended Citation

347

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
THE HUMAN RIGHTS OF NON-CITIZENS: CONSTITUTIONALIZED TREATY LAW IN ECUADOR

STEPHEN MEILI*

I. INTRODUCTION

In an era of global economic crises, escalating armed conflict, and massive refugee flows, the gap between the ideals envisioned by the international human rights framework and the reality of life for the world’s 224 million non-citizens continues to widen.1 While the rate of human rights treaty ratification has grown exponentially over the past few decades, there is much scholarly debate about whether such ratification has actually altered the human rights records of ratifying states.2 Indeed, non-citizens in all parts of the world face an ever-expanding array of human rights violations, including discrimination based on migration status, physical and emotional abuse, arbitrary detention, and limited access to justice.3 These violations often go unaddressed.4

* University of Minnesota Law School. My thanks to Richard Abel, José Alvarez, Tony Anghie, Zachary Elkins, Thomas Ginsburg, Alexandra Huneeus, Anne-Marie Marshall, Alejandro Anaya Muñoz, Jaya Ramji-Nogales, Kathryn Sikkink, Kiyo Tsutsui, Ingrid Wuerth and numerous members of the faculty of the University of Minnesota Law School for their helpful insights in the development of this article. My thanks also to University of Minnesota Law Librarians Connie Lenz and Loren Turner, and law students Nicholas Bednar ('16), Mary Georgevich ('18), Nicholas Hittler ('16), James Keeble ('15), and Gloria Munoz ('16) for their research assistance, and to my Administrative Assistants Elizabeth Colfield and Jean Wells for their logistical support. © 2017, Stephen Meili.


2. For a summary of the literature on human rights treaty effectiveness, see infra note 17.

3. See David Weissbrodt and Stephen Meili, Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights, 28 Refugee Survey Quarterly No. 4 (2010) at 57 (“Non-citizens in various parts of the world are subject to discrimination, physical and emotional abuse, arbitrary detention, and limited access to justice, among other human rights violations”). See also Matthew Gibney, Precarious Residents: Migration Control, Membership and the Rights of Non-Citizens 2 (UNITED NATIONS DEV. PROGRAMME HUM. DEV. REPORTS, Research Paper No. 2009/10, 2009) (“[S]ome non-citizens may, upon entering a state, find themselves with hardly any rights at all, including the right to reside legally in the state. As well as possessing a lowly social and political status, these migrants may be socially segregated from other members of society with few opportunities for transferring their status to one with more extensive rights and entitlements”).

4. See Weissbrodt, supra note 3, at 2. (“Often, xenophobia and racism—at times reflected in a country’s legislation—prevail, and serve to deny non-citizens the rights which they are guaranteed by international law. This leaves non-citizens subject to harassment and abuse by political parties, officials, the media, and by society at large. At the same time, it is usually the case that non-citizens cannot assert their rights for fear of retribution. They usually have no way of participating in the
Some scholars have identified constitutionalization of human rights law as a mechanism that heightens the effectiveness of human rights treaties. As Zach Elkins, Tom Ginsburg, and Beth Simmons have noted, both the number of rights included in the typical national constitution and the number of countries with such rights in their respective Constitutions have steadily increased over the past several decades. Indeed, according to Wayne Sandholtz, “by the 21st century, constitutional protection of human rights had become the global standard.” Such constitutionalized treaty laws provide a potentially powerful mechanism through which domestic human rights mobilization can occur.

But constitutionalization is only part of the equation. Now that human rights law is an increasingly prevalent part of the legal toolkit available to lawyers and other advocates in domestic courts around the world, how can it best be put to use? And how can scholars measure such success?

Questions regarding the effective use of constitutionalized human rights law are particularly pertinent in states with limited or nascent democracies and only a partially developed tradition of advocacy for non-citizens. Non-citizens in authoritarian states have little chance of protection from human rights violations or access to lawyers who might advocate for them. On the other end of the spectrum, non-citizens in highly developed democracies are likely to benefit from strong democratic institutions and enjoy access to well-established networks of cause lawyers, NGOs, and grass roots social movements. It is non-citizens who flee to countries somewhere between those two extremes who present situations that particularly deserve further scrutiny.

5. “Constitutionalization” in this context refers to the process through which national governments incorporate into their constitutions human rights provisions contained in international human rights treaties or other instruments. In some cases, this involves direct reference to the treaties within the national constitution. See Zachary Elkins, Tom Ginsburg, and Beth Simmons, Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice, 54 Harv. Int’l L.J. 61 at 64-65 (2013) (finding that the transmission of rights from international human rights instruments to national constitutions affects rights performance on the ground: “We find that... international [human rights] instruments have a powerful coordinating effect on the contents of national constitutions... This finding also suggests that international law is most effective when it works with domestic institutions, including constitutional structure.” Incorporation of international human rights law into other forms of domestic law, such as statutes, is also associated with improved treaty effectiveness. See also Stephen Meili, Do Human Rights Treaties Help Asylum-Seekers?: Lessons from the United Kingdom, 48 Vand. J. Transnat’l L. 123 (2015) at 172-73. See also Wayne Sandholtz, Treaties, Constitutions and Courts: The Critical Combination, in THE POLITICS OF THE GLOBALIZATION OF THE LAW 29, 29-46 (Alison Brysk ed., 2013).

6. Elkins, et al., supra note 5 at 63. The constitutionalization of individual duties and responsibilities has also proliferated during this period. See also Fernando Berdson Del Valle and Kathryn Sikkink, “(Re)discovering Human Duties: Individual Responsibility in International Human Rights Law and Global Constitutions,” paper delivered at Workshop on The State of the Field: Challenges & Opportunities in the Study of Human Rights, University of Minnesota Law School, April 8, 2016.

7. Sandholtz, supra note 5 at 31.

This issue lies at the intersection of scholarship on treaty effectiveness and “cause lawyering,” the latter of which examines lawyers whose professional work combines representing individual clients with advocacy for larger causes. While informative, the bodies of literatures addressing these areas overlook some critical questions. For example, while several quantitative studies suggest that constitutionalizing human rights law provides a pathway to greater protection of rights, there is little qualitative empirical research about how those laws may impact rights practices in a specific given case.

And while cause lawyering literature describes the work of cause lawyers in a variety of practice sites around the world, it is more descriptive than analytical—it fails to develop theories of how these lawyers can become more effective. Moreover, most of the scholarship in both fields analyzes states’ treatment of their own citizens: does the state torture them, provide them with due process, or prevent them from being discriminated against? How do cause lawyers go about trying to influence those practices? Few studies in these fields analyze the treatment of, and advocacy for, non-citizens in particular. Given the growing number of refugees and other categories of displaced persons around the world, this presents a knowledge gap that must be addressed.

This article addresses that gap. It qualitatively analyzes how cause lawyers utilized human rights law embedded in Ecuador’s 2008 Constitution to successfully challenge a presidential decree that limited the rights of asylum-seekers in that country, most of whom were fleeing the armed conflict in neighboring Colombia. In its August 2014 decision striking down parts of Presidential Decree No. 1182, the Constitutional Court of Ecuador invoked human rights laws contained in Ecuador’s 2008 Constitution, including universal citizenship and the prohibition of discrimination based on migration status. While not a complete victory for non-citizens and their advocates (it let stand the President’s ability to restrict constitutional rights through executive fiat rather than the normal legislative process) the decision demonstrates how constitutionalized human rights law may, under certain circumstances, alter state practices in countries lacking fully developed democracies. Those circumstances include the presence of domestic and transnational cause lawyers who are able to navigate the local legal and political landscape in order to maximize positive outcomes for their clients, the state’s global reputation for protecting non-citizens, the degree to which a constitutional challenge on behalf of non-citizens threatens key state actors, and whether

10. See Sandholtz, supra note 5; Elkins, et al. supra note 5; Torelly, infra note 24.
11. See Marshall and Hale, infra note 35.
12. Presidential Decree No. 1182 reduced the time limit for applying for asylum in Ecuador from 90 days after arrival in the country to 15 days and reduced the time to appeal a rejected asylum claim from 15 days to three days. It also narrowed the definition of “refugee” under Ecuadoran law to exclude those fleeing generalized violence, such as the armed conflict in Colombia.
the state has other means to accomplish its objectives short of violating the rights of non-citizens.

Ecuador is an ideal site for an analysis of some of the legal and political conditions under which human rights treaty law may be utilized by lawyers representing non-citizens in domestic courts. It has the highest concentration of refugees as a percentage of total population of any country in Latin America. It has a reputation (arguably now tarnished) for respecting the rights of non-citizens. And it has a small but active civil society that includes lawyers and other activists who have advocated on behalf of non-citizens in a variety of ways, including rights-based litigation, lobbying and grass roots mobilization. Moreover, the recent Constitutional Court decision rejecting parts of Decree 1182 demonstrates that, at least in certain situations, the Ecuadoran judiciary is willing to block executive actions that restrict constitutionalized human rights protections for non-citizens.

Analysis of these conditions has implications well beyond Ecuador. If effective advocacy through constitutionalized human rights law is not possible in Ecuador, it may not have much of a potential role in other developing democracies. On the other hand, if such advocacy is successful in Ecuador, the same factors may enable it to be successful elsewhere, particularly in areas currently experiencing large-scale refugee migration such as Europe.

13. See UNHCR, Mid-Year Trends 2016, http://www.unhcr.org/en-us/statistics/unhcrstats/58aa8f247/mid-year-trends-june-2016.html (Last visited on August 8, 2017). According to UNHCR estimates, as of mid-2016, Ecuador had 121,535 refugees, which constitutes a ratio of citizens to refugees of 137 to 1. The only other Latin America country with a remotely close ratio is Venezuela, with 183 citizens to every refugee. Id. Brazil’s ratio is 23,272 citizens to every refugee. The ratio in the U.S. is 1,199 to 1. Id. UNHCR includes in the category of refugees persons recognized as refugees under the 1951 Refugee Convention and those who “face protection risks similar to those of refugees but for whom refugee status has, for practical or other reasons, not been ascertained. Id. at notes 2 and 3. See also Worldometers, “Countries in the World by Population (2017), available at http://www.worldometers.info/world-population/population-by-country/.

14. See Comparative Constitutions Project, Constitution Rankings, http://comparativeconstitutionsproject.org/ccp-rankings/. Ecuador’s 2008 Constitution contains 99 human rights, out of a total of 117 such rights contained in all of the world’s constitutions in the aggregate. The country with the second highest total is Serbia, with 88. The average number of human rights in national constitutions is 50.1. The U.S. Constitution contains 35.

15. See discussion, infra.

Part I of this article reviews the relevant scholarship on treaty effectiveness and cause lawyering. Part II discusses the article’s methodology. Part III examines the underlying political and legal context within which the Constitutional Court litigation on Decree 1182 occurred. Part IV analyzes the litigation itself, including the strategy of the lawyers involved in it. Part V offers a series of observations and conclusions, including a set of factors under which constitutionalized human rights law may lead to improved rights outcomes for non-citizens.

II. THEORETICAL AND CONCEPTUAL FRAMEWORK: CONSTITUTIONALIZATION OF HUMAN RIGHTS TREATY NORMS AND CAUSE LAWYERING

Over the past several decades numerous scholars have considered the factors that impact state compliance with human rights treaties. As the scale of human rights treaty ratification has increased exponentially during that time, scholars have endeavored to determine whether such ratification actually improves respect for human rights by governments, or whether it is mere window dressing that conceals stagnant or, in some cases, worsening human rights records. This literature, which largely consists of quantitative

3, 18-32 (2008). However, asylum is broader than refugee status, and as the Court of Justice of the European Union has noted, “Member States may grant a right of asylum under their national law to a person who is excluded from refugee status.” See María-Teresa Gil-Bazo, Asylum as a General Principle of International Law, 27 Int. J. Ref. Law (2015) 1, 5, (citing Joined Cases C 57/09 and C 101/09 Bundesrepublik Deutschland v B & D [2010] EC I-10979).


studies, has identified several factors that the authors claim are associated with treaty compliance. These factors include strong democratic institutions, an active civil society, the nature of the human right being protected, an independent judiciary, and whether such treaties have become part of the national constitution. Other studies have explored how


19. The empirical methodology of some contributions to the treaty effectiveness literature has been the subject of considerable criticism. One of the most notable critiques is Goodman and Jinks’ response to Oona Hathaway’s Do Human Rights Make a Difference? (supra, note 17) in which Hathaway concluded that treaty ratification is associated with worse human rights practices. While Goodman and Jinks acknowledge that Hathaway’s study was “the most well-conceived empirical study of [treaty effectiveness] in the legal literature” at the time, they fault her for not taking into account the various circumstances under which human rights norms are incorporated into state behavior. Ryan Goodman and Derek Jinks, Measuring the Effects of Human Rights Treaties, 14 European Journal of International Law, 171 (2003). Simmons argues that much of the empirical scholarship on treaty compliance suffers from problems that include selection, endogeneity of treaties, and a state-centric focus that ignores the influence of non-state and sub-state actors in influencing state behavior. See Simmons (2010) supra note 17.

20. See Oona Hathaway, Why Do Countries Commit to Human Rights Treaties?, 51 I. of Con. Res. 4 588, 593 (2007) (“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”).

21. See Eric Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights?, 49 J. of Con. Res. 925, 951 (2005) (“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.” See also Greg Shafer and Thomas Ginsburg, The Empirical Turn in International Legal Scholarship, 106 Am. J. Int’l L. 1-24 (2012) (“International human rights treaties...providing leverage for domestic mobilization to improve outcomes, but do not, on their own, work well in the absence of domestic mobilization.”); See also Sally Engel Merry, Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law, 44 Osgood Hall L.J. 53, 55 (2006) (finding that human rights law is more likely to be effective when non-state actors function as intermediaries to interpret and adapt human rights norms to local contexts). See also Margaret E. Keck And Kathryn Sikkink, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998) (finding a “boomerang effect” through which domestic NGOs whose ability to influence their government is blocked reach out to international allies to bring pressure on their states from outside. Id. at 12-13).

22. See Daniel Hill, Estimating the Effects of Human Rights Treaties on State Behavior, 72 J. of Pol. 4, 1161 (2010) (finding 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 and therefore are more willing to comply with it than with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights, both of which are often asserted by political dissidents).


24. See Elkins, et al., supra note 5 (analyzing data from 680 constitutional systems between 1789 and 2006 and concluding that the adoption of human rights norms into domestic constitutions provides multiple monitors and alternatives through which to challenge government behavior, and finding that one way in which human rights norms works is through incorporation into national constitutions. Id. at 92.). See also Sandholtz, supra note 5. But see also Linda Camp Keith, Constitutional Provisions for Individual Human Rights (1997-1996): Are They More than Mere “Window Dressing?”, Political Research Quarterly 55(1): 111-143 (finding that among numerous constitutional rights in national constitutions, only the right to a fair and public trial is associated with improved rights in practice). In a related vein, international law scholars have noted the role of constitutional-
international law (including international human rights law) affects national behavior through a socialization process in which state actors assume the beliefs and norms of others in their surrounding environment.\textsuperscript{25}

These studies have produced significant data suggesting a causal relationship between the factors listed above and states’ human rights performance.\textsuperscript{26} In particular, the data suggests a correlation between constitutionalization and the level of human rights protection in a given state.\textsuperscript{27} But constitutionalization has not always produced these results, and the large-scale quantitative studies do not explain the circumstances under which such constitutionalization is (and is not) likely to improve such protection. Nor do these studies show how cause lawyers have utilized constitutionalized treaty law in attempting to heighten protection for their clients.

This critique is borne out by Beth Simmons, who, in her comprehensive review of the treaty compliance literature, concludes that, “[T]he best research moves away from unqualified claims and develops a nuanced picture of how strategic as well as principled agents use treaties as tools—sometimes successfully, sometimes not—to achieve their rights objectives.”\textsuperscript{28} Such a nuanced study would certainly advance knowledge in the subgenre of constitutionalized human rights law, which to date has focused mostly on the linkage between ratification of human rights treaties and the appearance of human rights provisions in national constitutions.\textsuperscript{29} What has been less rigorously studied is how domestic and transnational non-state actors utilize those constitutionalized treaty norms to attempt to alter state behavior. Such studies are particularly important in what Simmons terms “middle states”—i.e., partial or transitioning democracies, like Ecuador,
where domestic actors have reason to press those norms in advancing their cause.\(^{30}\) In stable autocracies, Simmons notes, citizens have no means to mobilize without being crushed, whereas in stable democracies they have less need to mobilize around human rights norms because they are otherwise protected under domestic law.\(^{31}\) These more nuanced studies also provide an opportunity to identify additional independent factors beyond ratification as indicators of participation in human rights regimes.\(^{32}\)

The recent efforts to strike down Decree 1182 in Ecuador provide an opportunity for exactly this kind of research. In Simmons’ parlance, Ecuador is a “middle state,” a partial democracy, featuring a democratically elected but, at the time of events analyzed in this article, autocratic president who frequently rules by executive decree and exerts significant control over both the legislative and judicial branches, as well as civil society organizations.\(^{33}\) Thus, according to Simmons’ prediction, we would expect human rights law to be particularly important there. Moreover, Ecuador has many “principled agents” (i.e., individuals and organizations who advocate for Colombian refugees seeking asylum in Ecuador), based both domestically and internationally, who have used constitutionalized human rights law as tools—with limited but nonetheless notable success—to achieve their rights objectives.

One group of principled agents that has received little attention in the human rights treaty effectiveness literature to date is lawyers. While several studies recognize the important contribution of civil society members (e.g., NGOs) in compelling state actors to comply with their treaty obligations, few if any have specifically analyzed the role of lawyers, particularly in the constitutional litigation context, and how their engagement with constitutionalized human rights law might impact treaty compliance.\(^{34}\)

30. Simmons, supra note 17, at 291.
31. Id.
32. See Shafer and Ginsburg, supra note 21, at 25 (noting that the impact of human rights treaties is most likely to be seen in states “at the margins”—that is, between autocratic and fully democratic states).
34. See generally Martín Abregu and Christian Coutis, LA APLICACIÓN DE LOS TRATADOS DE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES, (1997); See also Stephen Meili, Staying Alive: Public Interest Law in Contemporary Latin America, 9 International Review of Constitutionalism 43 (2009) [hereinafter Meili (2009)]. While both of these studies note the important role that lawyers can play in enforcing human rights laws incorporated into many of the recently modified constitutions in Latin American countries, they do not analyze that role in any specific cases. Moreover, while the cause lawyering literature includes several studies of lawyers who seek to deploy human rights law in a variety of transitioning democracies, none focus primarily on how these lawyers’ use constitutionalized human rights law in their advocacy. See, e.g., Stephen Ellman, Cause Lawyering in the Third World, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat and Stuart Scheingold, eds., 1998) [hereinafter CAUSE LAWYERING (1998)] at 349-430; Stephen Meili, Cause Lawyering and Social Movements: A Comparative Perspective on Democratic Change in Argentina and Brazil, in CAUSE LAWYERING (1998) at 487-522. And although
On the other hand, the literature that analyzes lawyers who advocate on the basis of moral or political commitments is extensive. Early studies focused on the work of lawyers in the United States who pursued a rights-based strategy in defending clients whose claims were based on violations of civil liberties and entitlement to social welfare benefits. Other studies have highlighted the public interest work of lawyers in large U.S. law firms, as well as the gradual acceptance of public interest law by the U.S. legal establishment.

The analytical and geographic scope of scholarship on such lawyers increased dramatically with the publication of five volumes on cause lawyering edited by Austin Sarat and Stuart Scheingold between 1998 and 2008. These volumes include studies of cause lawyers in a variety of practice sites around the world who employ numerous strategies, including litigation, legislative advocacy, grass-roots community organizing and interactions with social movements. Recognizing that cause lawyering can involve advocacy across the political spectrum, and for a multitude of causes, Scheingold and Sarat conclude that “at its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service—be those ideals social, cultural, political, economic, or, indeed, legal.”

Simmons has recognized the growth in human rights litigation in recent years, she asserts that whether such litigation is an effective means of achieving real improvement in rights practices remains an open question. Beth A. Simmons, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 129-35 (2009).

35. For a summary of this literature, see Anna-Maria Marshall and Daniel Crocker Hale, Cause Lawyering, Annu. Rev. Law Soc. Sci. 10:301–20 (2014); see also Christos Boukalas Politics as Legal Action/ Lawyers as Political Actors: Towards a Reconceptualisation of Cause Lawyering, 22(3) Social & Legal Studies 395 (2013); see also Jayanth K. Krishnan, Lawyering for a Cause and Experiences from Abroad, 94 CAL. L. REV. 575-615, 579 (2005). Scholars have used a variety of terms to describe such lawyers, including radical, progressive, rebellious, transformative, critical, socially conscious, alternative, political, visionary and activist. See Carrie Menkel Meadow, The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers, in CAUSE LAWYERING (1998), supra note 34, at 33.


38. See CAUSE LAWYERING (1998), supra note 34; CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter CAUSE LAWYERING (2001)]; THE WORLD CAUSE LAWYERS MAKE (Austin Sarat & Stuart Scheingold eds., 2005); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart Scheingold eds., 2006); THE CULTURAL LIVES OF CAUSE LAWYERS (Austin Sarat & Stuart Scheingold eds., 2008). In a review of the fourth of these five volumes, Debra Schleef observed that Sarat and Scheingold had “virtually cornered the market” on cause lawyering. See Debra Schleef, Book Note, Cause Lawyers and Social Movements by Austin Sarat and Stuart A. Scheingold, 41 LAW & SOCIETY REV. 503 (June 2007).

39. See CAUSE LAWYERING (1998), supra note 34; CAUSE LAWYERING (2001), supra note 38; THE WORLD CAUSE LAWYERS MAKE, supra note 38; CAUSE LAWYERS AND SOCIAL MOVEMENTS, supra note 38; THE CULTURAL LIVES OF CAUSE LAWYERS, supra note 38.

40. Scheingold & Sarat, supra note 9, at 3. Scholars have struggled mightily to come up with a way to define cause lawyers that distinguishes them from other types of lawyers. Thomas Hillbink identifies three different types of cause lawyers: proceduralists, whose “cause” is the rule of law rather than any particular moral or political conviction; vanguard/elite lawyers, who view law as a superior form of politics and believe that changes in substantive law can change society in ways...
Cause lawyering scholarship has been criticized for focusing almost exclusively on cause *lawyers* as opposed to cause *lawyering.*[^41] In their recent critique of the cause lawyering literature, Anne-Marie Marshall and Daniel Crocker Hale note that while individual studies of cause lawyers have created a rich set of descriptive narratives about individual cause lawyers, they leave the field of cause lawyering under-theorized.[^42] In laying the groundwork for such a theory, Marshall and Hale suggest a framework of three distinct yet overlapping contexts within which examples of cause lawyering should be analyzed: the degree to which the cause is organized, the settings in which cause lawyering is practiced, and the surrounding legal and political environment.[^43] The authors assert that interactions between these contexts will address questions regarding the relationship between law and movements for social change.[^44]

[^41]: Marshall & Hale, *supra* note 35. A similar criticism has been directed at studies of other categories of lawyers. *See, e.g.* Sida Liu, *Client Influence and the Contingency of Professionalism: The Work of Elite Corporate Lawyers in China*, 40 LAW & SOC’Y REV. 751, 753 (2006) (“After Smigel’s classic study of Wall Street lawyers, research on the structure of the bar flourished [citations omitted], but there have been fewer studies of lawyers’ professional work.”). Sarat and Scheingold themselves seemed to have noticed this deficiency in the cause lawyering literature, as they have urged scholars to “attend to the complex political and professional terrain on which [cause lawyering] occurs.” *Scheingold & Sarat, supra* note 9, at 3.

[^42]: Marshall & Hale, *supra* note 35, at 302. Christos Boukalas has also asserted that the cause lawyering field is under-theorized, noting that its binary distinctions between liberal and non-liberal cause lawyers, law and politics, and law and the state have precluded a thoroughgoing analysis of the shifting dynamics between these elements and their influence on cause lawyering. *Boukalas, supra* note 35. While Boukalas acknowledges that many individual studies address such shifting dynamics in an ad hoc fashion, he proposes a more conscious effort to explore these shifting dynamics in order to better understand the sociopolitical context of cause lawyering. *Id.* at 414-15. In another criticism of the cause lawyering literature, Jayanth Krishnan argues that not enough of it analyzes why cause lawyers invoke the rhetoric of constitutional litigation, i.e., why they frame their legal arguments to conform to constitutional language. *Krishnan, supra* note 35. The conventional wisdom is that this strategy comes from the lawyers themselves, but Krishnan’s study suggests that in certain situations the constitutional framing pressure can come from grass roots organizations. In the study resulting in this article, there is no dispute that the impetus for the constitution-based arguments on behalf of Colombian refugees came from lawyers (both within and outside Ecuador) rather than from grass roots organizations. *Id.*

[^43]: Marshall & Hale, *supra* note 35, at 303. An additional factor which Marshall and Hale do not explicitly identify is how cause lawyers adapt their tactics to the particular political and legal context within which they operate. My thanks to Herbert Kritzer for this insight.

[^44]: *Id.* at 302.
This article fits within the framework recommended by Marshall and Hale. It analyzes the ways in which cause lawyers navigated the legal and political environment in Ecuador to advance the cause of access to justice for asylum-seekers in that country. By focusing on the efforts of national and transnational cause lawyers representing non-citizens in litigation based on constitutionalized human rights norms before the Ecuadoran Constitutional Court, this article will consider several questions relevant to both the treaty effectiveness and cause lawyering bodies of literature:

- What factors in the constitutional litigation setting in a “middle state” may affect the likelihood that cause lawyers challenging state policy toward non-citizens will improve rights outcomes for their clients?
- What are the trade-offs for lawyers representing non-citizens in constitutional litigation where the compelling and overriding purpose of their work is to provide access to the state in order to secure international protection from persecution? That is, do cause lawyers sacrifice longer term, social movement gains in order to establish (or re-establish) constitutionalized human rights protections that have been diminished or eliminated by state policy?
- How does the underlying political and legal context shape the strategic choices cause lawyers make when representing non-citizens?

Answering these questions will advance knowledge on human rights treaty effectiveness and cause lawyering. Rather than making unqualified claims of treaty effectiveness based on quantitative studies, this article highlights the circumstances under which cause lawyers have actually used international human rights treaty law as tools, with partial success, to achieve their rights objectives. And rather than merely describing the work of cause lawyers who challenged Decree 1182 before the Ecuadoran Constitutional Court, this article analyzes how those lawyers attempted to achieve a positive rights-based outcome for their clients within a national political and legal context that included an autocratic executive, a historically non-independent judiciary, and a human rights-laden constitution.

III. METHODOLOGY

This article is a case study of some of the circumstances under which the constitutionalization of international human rights law may increase the likelihood of positive rights outcomes for non-citizens. The article focuses on Ecuador because it is a “middle state”; i.e., a fledgling democracy, featuring some of the characteristics which the relevant literature asserts are associated with improved human rights performance following human rights treaty
ratification: democratic institutions, an active civil society, and constitutionalized treaty law. For this reason, this article qualifies as a “crucial case study” because it can confirm or challenge the theory that the constitutionalization of human rights law leads to better human rights outcomes. If constitutionalized human rights law can improve rights outcomes for non-citizens in Ecuador, it is likely to do so in other “middle states.”

Moreover, the article focuses on a particular series of events in Ecuador—the litigation over Decree 1182—in order to identify factors relevant to the effective utilization of constitutionalized human rights norms by cause lawyers challenging limitations on the rights of non-citizens. In this way, it answers the call for nuanced studies of principled actors (here, cause lawyers) seeking positive human rights outcomes in states at the margins between fully autocratic and fully democratic states. It also arrests the trend toward merely descriptive accounts of cause lawyers in various settings.

The empirical data for this article consists of 15 semi-structured interviews, both in person and via Skype, with lawyers who worked for the four organizations that litigated the Constitutional Court challenge to Decree
1182, as well as other lawyers familiar with the litigation.\textsuperscript{53} Key informants in Ecuador helped identify lawyers that fit this criteria.\textsuperscript{54}

These interviews were included in the study in order to analyze how lawyers in the litigation over Decree 1182 encouraged state actors (i.e., the Ecuadoran Constitutional Court) to comply with constitutionalized human rights treaty law. The lawyers’ views about how to bring about a positive rights outcome in that litigation contextualizes this study’s other findings regarding the Ecuadoran legal and political context surrounding the Decree 1182 litigation. Because the lawyers in this study all have the same professional specialization and detailed knowledge of the Decree 1182 litigation, the number of interviews planned for this study is sufficient to reach thematic saturation: the point at which no new themes are likely to emerge.\textsuperscript{55}

IV. BACKGROUND CONTEXT

The political context within which cause lawyers engaged with constitutionalized human rights law in the litigation over Decree 1182 consists of several factors: a strong executive, a historically weak judiciary, an active yet intimidated NGO community reluctant to challenge the executive, a burgeoning refugee crisis, and a recently revised, rights-laden constitution. Each of these factors is described in more detail below.

A. A Strong Executive and a Non-Independent Judiciary

President Rafael Correa, first elected in 2007 as part of his self-described “Citizens’ Revolution,” blended populism and autocracy in a way that many observers have likened to former President Hugo Chávez of Venezuela.\textsuperscript{56}

\textsuperscript{53} The organizations that filed the case in chief were Asylum Access Ecuador, the Quito-based branch of an international NGO headquartered in San Francisco, California, and the Law Clinic of the Universidad de San Francisco, based in Quito [hereinafter “USF Quito Clinic”]. Both of these organizations are staffed with Ecuadoran attorneys. An amicus brief was jointly filed by Human Rights Watch and the Human Rights and Atrocity Prevention Clinic at the Benjamin N. Cardozo School of Law in New York [hereinafter “Cardozo Clinic”]. In addition to the nine lawyers who worked on the litigation, I interviewed five lawyers employed by refugee-rights NGOs and governmental agencies in Ecuador who are familiar with the Decree 1182 litigation. I also met with the Ministry of Human Mobility and several members of her staff. All interviews were conducted in English or with a Spanish-speaking translator, in Quito or via Skype, between July 2015 and February 2016.

\textsuperscript{54} See Geoffrey Payne & Judy Payne, Key Concepts in Social Research 135 (2004) (“A key informant is simply someone who, by virtue of his [sic] particular position in the society, knows a great deal about the subject of the research. It may be that his expertise is to know who knows, so that he refers the research worker to others more knowledgeable than himself.”).

\textsuperscript{55} See Greg Guest, Arwen Bunce & Laura Johnson, How Many Interviews Are Enough?: An Experiment with Data Saturation and Variability, 18 Field Methods 59, 64–65 (2006) (defining “[t]heoretical saturation” as the point at which “all of the main variations of the phenomenon have been identified and incorporated into the emerging theory”). Guest et al. conclude that for studies with a high level of homogeneity among the studied population, a sample of as few as six interviews may suffice to enable development of meaningful themes and useful interpretations. Id. at 78.

Benefitting from the wealth created by Ecuador’s oil reserves, he instituted many social programs that made him very popular with certain segments of the population.57 At the same time, Correa consolidated power in the executive branch and retaliated against those in the media and general public who criticized him.58 He intimidated many of his opponents into silence. Ecuador’s previous constitution did not allow presidents to serve for successive terms, but the 2008 Constitution, the formation of which Correa exerted significant control over, eliminated that restriction.59

Correa continued, and many say exacerbated, Ecuador’s tradition of executive control over the judiciary. During the debate over judicial reforms soon after he was elected, he famously stated that “we will stick our noses into the justice system.”60 In 2011 he established an ad hoc commission, the Transnational Judicial Council, which was authorized to hire, fire, and reappoint judges at all levels across Ecuador. By 2014, the Council, headed by Correa’s former Justice Minister, had removed 254 judges from their positions.61

Even before Correa took office, Ecuador had one of the least independent and most unstable judiciaries in Latin America, a region known historically...
for weak judiciaries overall.\textsuperscript{62} Between 1985 and 2008 it experienced more attacks from the other branches of government than any other country in the region, by far.\textsuperscript{63} According to the World Justice Rule of Law Project, Ecuador ranks 77\textsuperscript{th} out of 102 countries (and 13\textsuperscript{th} out of 16 in Latin America) in adherence to the rule of law, and scored below average on most measures of judicial independence, including corruption within the judiciary and effective judicial limits on government power.\textsuperscript{64} Numerous academics and lawyers interviewed for a comprehensive study of judicial independence around the world considered the lack of judicial independence and the corruption within the Ecuadoran judiciary are “very serious” problems in Ecuador.\textsuperscript{65}

The imbalance of power between the executive and judicial branches of government in Ecuador is reflected in the relative authority they wield under the 2008 Constitution. The Comparative Constitutions Project (CCP) ranks the world’s constitutions according to a number of indicia, including Executive Power and Judicial Independence. For Ecuador, the CCP assigned a score of seven (out of seven) for Executive Power and a two (out of six) for Judicial Independence.\textsuperscript{66} The 2008 Constitution thus further institutionalizes the historic dominance of the executive over the judiciary in Ecuador.\textsuperscript{67}

The Constitutional Court, whose decision on Decree 1182 is the focus of this article, reflects this lack of independence. Originally created in 1996, the Constitutional Court (called the Constitutional Tribunal at the time) was

\begin{footnotesize}
\textsuperscript{62} Santiago Basabe-Serrano, Determinants of the Quality of Justice in Latin America: Comparative Analysis of the Ecuadorian Case from a Sub-national Perspective, \textit{35} JUST. SYS. J. 104, 108 (2014). For studies of judiciaries in Latin America generally, see Rachel Sieder, Line Schjolden & Alan Angell, eds., \textit{THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA} (2009). Even after judicial reforms in numerous Latin American countries, including Ecuador, over the past two decades, a lack of judicial independence persists. \textit{See} Pisama, \textsuperscript{supra} note 55.

\textsuperscript{63} Gretchen Helmke & Jeffrey K. Staton, \textit{The Puzzling Judicial Politics of Latin America: A Theory of Litigation, Judicial Decisions, and Interbranch Conflict, in CTS. IN LATIN AM.} 306, 309-10 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011). These attacks included attempts, successful or otherwise, by executives and/or legislatures to impeach, dissolve, or strip the jurisdiction of a country’s high court or courts. \textit{Id.}


\textsuperscript{65} \textit{Id.}

\textsuperscript{66} Constitution Rankings, \textit{supra} note 14. (Last visited August 8, 2017). By way of comparison, the United States received a score of 1 for Executive Power and 3 for Judicial Independence. The CCP’s Executive Power index reflects the constitutional presence or absence of seven aspects of executive lawmaking: (1) the power to initiate legislation; (2) the power to issue decrees; (3) the power to initiate constitutional amendments; (4) the power to declare states of emergency; (5) veto power; (6) the power to challenge the constitutionality of legislation; and (7) the power to dissolve the legislature. The judicial independence index reflects the constitutional presence or absence of six features thought to enhance judicial independence: (1) whether the constitution contains an explicit statement of judicial independence; (2) whether the constitution provides that judges have lifetime appointments; (3) whether appointments to the highest court involve either a judicial council or two (or more) actors; (4) whether removal is prohibited or limited so that it requires the proposal of a supermajority vote in the legislature, or if only the public or judicial council can propose removal and another political actor is required to approve such a proposal; (5) whether removal explicitly limited to crimes and other issues of misconduct, treason, or violations of the constitution; and (6) whether judicial salaries are protected from reduction. \textit{Id.}

\textsuperscript{67} The Ecuadorian legislature also scores comparatively low on the Legislative Power indicia in the CCP database. \textit{Id.}
\end{footnotesize}
limited to deciding whether a particular law was constitutional.\footnote{Santiago Basabe-Serrano, Judges without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador’s Constitutional Court, 1999–2007, 44 J. LATIN AM. STUD. 127, 136-37 (Feb. 2012) [hereinafter “Basabe-Serrano (2012)”]. This limited jurisdiction of the Constitutional Court is not unusual, as most countries’ constitutional courts have jurisdiction to hear only constitutional questions. See Kim Lane Scheppel. Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe, 154 U. PENN. L. REV. 1757, 1761–62 (2006). In contrast, of the 80 to 100 reasoned opinions that the United States Supreme Court generally issues each year, usually fewer than half of them have to do with constitutional questions. See David Fontana, Docket Control and the Success of Constitutional Courts, in COMP. CONST. L. 624, 624 (Tom Ginsburg & Rosalind Dixon eds., 2011).} Between 1999 and 2007 none of the Constitutional Court’s judges finished the four-year term to which they were elected.\footnote{Id. at 138-142. See also Shimon Shetreet, Creating A Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure, The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges 24 (Shimon Shetreet & Christopher Forsyth ed., 2011).} During this time, there were four episodes of wholesale removal of judges and court restructuring.\footnote{Basabe-Serrano (2012), supra note 68, at 136-37. Ecuadorian Constitution, Article 124.} The Constitutional Tribunal was eliminated by the 2008 Constitution and replaced with the Constitutional Court. Its powers were broadened to include interpretation of the law and creation of jurisprudence.\footnote{Pásara, supra note 60. This view was echoed by several of the lawyers interviewed for this article. One of them noted that all of the Constitutional court judges had some link to President Correa. Indeed, constitutional courts are often politicized, as they are frequently charged with reviewing the constitutionality of the conduct of the other branches of government. See Danielle E. Finck, Judicial Review: The United States Supreme Court Versus the German Constitutional Court, 20 B.C. INT’L & COMP. L. REV. 123 (1997). For this reason, constitutional courts are typically cautious about the number of cases they take on, especially following a period of political upheaval, lest they create too many enemies. See Fontana, supra note 68.} It is now the supreme authority on constitutional questions within Ecuador.\footnote{Ecuadoran Constitution, Article 124.} However, while the 2008 Constitution includes an elaborate process for the selection of judges in order to insure their independence, observers note that the executive has nevertheless been able to continue its dominance of the Court.\footnote{Pasara, supra note 60. This view was echoed by several of the lawyers interviewed for this article. One of them noted that all of the Constitutional court judges had some link to President Correa. Indeed, constitutional courts are often politicized, as they are frequently charged with reviewing the constitutionality of the conduct of the other branches of government. See Danielle E. Finck, Judicial Review: The United States Supreme Court Versus the German Constitutional Court, 20 B.C. INT’L & COMP. L. REV. 123 (1997). For this reason, constitutional courts are typically cautious about the number of cases they take on, especially following a period of political upheaval, lest they create too many enemies. See Fontana, supra note 68.} One of the lawyers who represented the refugees in the Decree 1182 litigation before the Constitutional Court sounded the same theme: “the Constitutional Court in Ecuador decides its cases . . . mostly on political criteria.”\footnote{The Ecuadoran Constitutional Court’s lack of independence is not unique among constitutional courts. Given that such courts frequently adjudicate political issues, they are reticent to take on cases likely to offend powerful governmental interests, especially in their early years or after significant political change. See Fontana, supra note 68; Maria Angela Jardim de Santa Cruz Oliveira, Reforming the Brazilian Supreme Federal Court: A Comparative Approach, 5 WASH. U. GLOBAL STUD. L. REV. 99 (Jan. 2006).}

B. An Intimidated Civil Society

Ecuador has historically boasted an active and influential civil society. Its NGOs have had an impact on government policy on a range of issues,
including rural technical assistance, disability services, family planning, education, and social movements such as women’s rights, environmental rights, and indigenous rights.  

While civil society organizations devoted to refugee issues are relatively new, given the paucity of refugees in the country prior to 2000, their numbers have increased over the past 15 years. The 2008 Constitution explicitly recognizes and promotes the role of civil society organizations in influencing public policy and monitoring all levels of government.

On the other hand, President Correa significantly curtailed the independence and influence of civil society, as he assumed the power to shut down NGOs that ran afoul of his administration. In 2013, Correa issued Decree 16 (since renamed Decree 739), which created an agency called the National Secretary of Politics Management, which is “responsible for regulating the fulfillment of the objectives and activities of social and civil organizations.” Under Decree 739, the executive branch may dissolve any social organization that “deviates from the goals and objectives for which it was created.” Moreover, it may shut down any organization that engages in activities that “compromise public peace” or “interfere with public policies that undermine national[... ] security of the state.”

Decree 739 was not an empty threat: in December 2013 the government dissolved the environmental advocacy foundation, Pachamama, which had been in existence for 16 years, on the grounds that it was not “fulfilling its objectives” and that it was “acting like a political party that affects the internal security of the state as well as public peace.”

---

76. There are numerous organizations within Ecuador who provide direct services, such as food, clothing, shelter and medicine to refugees. The only organization that provides legal services to refugees is Asylum Access Ecuador (AAE). AAE also provides direct services to refugees.
77. Article 96 of the 2008 Ecuadoran Constitution states, “All forms of organizing society are recognized as an expression of the people’s sovereignty to develop processes of self-determination and to influence public decisions and policymaking and for social monitoring of all levels of government, as well as public and private institutions that provide public services. Organizations can be articulated at different levels to build up citizen power and its forms of expression; they must guarantee internal democracy, the rotation of power of their leaders, and accountability.”
78. Decree 16, Art. 10 (Ecuador). Decree 16 has been retitled Decree 739, following minor modifications. See Reglamento Sistema Unificado Informacion de Organizaciones Sociales, Decreto Ejecutivo 739, Registro Oficial 570 (Aug. 21, 2015) (Ecuador). Article 739 does not apply to educational institutions, which are governed by a different law. See Ley Organica Educacion Superior, Ley 0, Registro Oficial Suplemento 298 (Oct. 12, 2010) (Ecuador). The education law sets academic standards but does not regulate the political activity of educational institutions, such as law school clinics.
79. Decree 739, Art. 22(2) (Ecuador).
80. Decree 739, Art. 22(6). A subsequent decree (No. 355, issued in July 2014) ordered that any organization that failed to provide information to the government regarding its activities would be declared “inactive.” One lawyer who works for a consortium of NGOs that advocate for refugees told me that one must be very careful about what he or she says in Ecuador, lest the government characterize that person as a terrorist. Interview 6.
intimidation created by Decree 739 has caused many NGOs to refrain from any activity that might be perceived as challenging the government. 82 One lawyer who works with a coalition of refugee NGOs in Ecuador described the results of this intimidation:

In past years, our group [made] legal reports [critical of the government], and now these organizations have a lot of fear. They say we have to be very polite, don’t look for conflict. [We need to do] silent work. With the press we have to be very careful with our words in an interview. 83

As this statement indicates, Ecuadoran civil society became less robust in the Correa era due to its advocacy efforts being curtailed by threats of government retaliation. 84

C. The 2008 Constitution

As noted earlier in this article, Ecuador’s 2008 Constitution contains more human rights provisions than any other country in the world. 85 In addition, it

in a public demonstration outside a hotel in Quito where government officials were reviewing license applications filed by several foreign companies seeking to explore for oil in the Ecuadorian Amazon. Environmental NGO Shut Down by Presidential Decree in Ecuador, HUMAN RIGHTS WATCH (12 Dec. 2013), https://www.ifex.org/ecuador/2013/12/12/ecuador_rights_group/. The Correa government claimed that the demonstration had turned violent when protestors assaulted the Chilean ambassador to Ecuador and a Belarusian corporate executive. Id.

82. Several of the lawyers interviewed for this article indicated that their litigation strategy over Decree 1182 was altered as a direct result of this intimidation. For example, Asylum Access Ecuador, the only Ecuador-based NGO involved in the litigation, chose to focus only on what it termed the administrative part of the Decree (i.e., the shortening of the time to file an asylum claim intentionally and the narrowing of the refugee definition). The USF Quito Clinic, which is not subject to Decree 739, challenged the authenticity of the Decree itself on the grounds that it exceeded the president’s powers under the Constitution. All of the lawyers involved in the litigation viewed the latter position as far more challenging to Correa’s authority.

83. Interview 6.

84. Correa’s intimidation of his critics extended beyond Decree 739. He frequently used the media, including a weekly Saturday television show, to criticize and verbally abuse NGOs and other civil society actors who oppose his policies, characterizing them as political pawns that were being used against him and his government. Ecuador: Clampdown on Civil Society, HUMAN RIGHTS WATCH (Aug. 12, 2013), https://www.hrw.org/news/2013/08/12/ecuador-clampdown-civil-society. Correa, who is limited to two terms in office by the Ecuadorian Constitution, will be leaving office once the results of the 2017 presidential elections are finalized.

85. Constitutional Rankings, supra note 14. Ecuador’s 2008 Constitution is one of the more obvious manifestations of the “Citizens’ Revolution,” which brought Rafael Correa to power in early 2007. In addition to a plethora of rights for individuals and even for Nature, the Constitution grants broad powers to the Executive to implement his or her agenda. See Joshua Partlow and Stephan Kuflner, Voters in Ecuador Approve Constitution, WASHINGTON POST (Sept. 29, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/28/AR2008092802644.html. This abundance of rights combined with expanded Presidential power has led one critic to observe that the 2008 Constitution adheres to the “rule of rights” rather than the “rule of law.” See DANIELA SALAZAR, MY POWER IN THE CONSTITUTION: THE PERVERSION OF RULE OF LAW IN ECUADOR 12, https://www.law.yale.edu/system/files/documents/pdf/SELA15_Salazar_CV_Eng.pdf. According to Salazar, when this approach is combined with all the powers the Constitution gives to the executive (through decrees and the like), it results in excessive executive power to determine who is permitted to exercise those rights. In her view, this rights-heavy approach has allowed the President to become the “exclusive
incorporates all international human rights instruments (not merely those which Ecuador has ratified or otherwise acceded to) into its domestic law. Moreover, it declares that international treaties ratified by Ecuador (and thus incorporated into its Constitution) have preeminence over any conflicting laws and Constitutional provisions.

With respect to the rights of non-citizens and universal citizenship in particular, Article 11(2) states that all persons are equal, and protects all persons (i.e., not only Ecuadoran citizens) from discrimination on the basis of numerous categories, including “ethnic belonging, place of birth . . . cultural identity . . . [or] migratory status.”

Such declarations of universal citizenship, equality and prohibitions against discrimination have roots in various international human rights instruments. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the American Convention on Human Rights (ACHR), each of which was ratified
or acceded to by Ecuador, recognize the equality of all persons. The ICCPR, the ICESCR, and the ACHR all prohibit discrimination on the basis of several specific categories, including race, national origin, birth, or “other status.”

In addition to its protection of the fundamental human rights of equality and non-discrimination, the Ecuadoran Constitution includes several provisions relevant to the right of asylum. For example, article 41 recognizes the right to asylum “in accordance with... international human rights instruments.” The inclusiveness of this provision means that it incorporates instruments such as the Cartagena Declaration, which broadens the scope of asylum to include persons fleeing generalized violence. Moreover, Article

90. Ecuador ratified the ICCPR in 1969 and the ACHR in 1977. It was also among the members of the UN General Assembly who voted to adopt the UDHR in 1948. Article 1 of the UDHR states, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Article 2 of the ICCPR states, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

91. Article 2, Section 2 of the ICCPR states, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 2, Section 2 of the ICESCR states, “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 1, Section 1 of the ACHR states, “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” And while the UDHR does not specify categories of prohibited discrimination, its Article 7 does prohibit discrimination more broadly: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

92. Article 41 of the Ecuadoran Constitution states, “Their rights to asylum and sanctuary are recognized, in accordance with the law and international human rights instruments.” It is noteworthy that this provision guarantees the right to asylum and not merely the right to seek asylum, which is contained in human rights instruments such as the UDHR and the ACHR.

93. Under Article II(A)(2) of the 1951 U.N. Convention relating to the Status of Refugees, to obtain asylum, a person must demonstrate a “well-founded fear” of being persecuted in her home country “for reasons of race, religion, nationality, political opinion, or membership in a particular social group.” Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6233, 660 U.N.T.S. 267 [hereinafter 1967 Protocol]. The Cartagena Declaration on Refugees, a non-binding regional human rights instrument incorporated into the domestic law of 15 Latin American nations (Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay) broadened this definition to included persons feeling generalized violence. Article III(3) of the Cartagena Declaration states, in relevant part, “Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”
41 also recognizes the concept of *non-refoulement*: “The State shall respect and guarantee the principle of non-return, in addition to humanitarian and legal emergency assistance.”94 And finally, the Constitution prohibits penalizing asylum-seekers for having entered or remained in Ecuador without official status.95

As with the Constitution’s anti-discrimination provisions, its guarantee of the right to asylum is based on international human rights law. For example, both the UDHR and the ACHR protect the right to asylum.96 And the 1951 Refugee Convention limits a signatory State’s ability to penalize individuals who seek asylum.97

D. Ecuador’s Refugee Crisis

Prior to the early 2000s, Ecuador was an infrequent destination for asylum-seekers. Between 1979 and 1999 the average number of refugees arriving in Ecuador annually was just over 500.98 Many who sought protection in Ecuador during this period were exiles from authoritarian regimes in Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay.99 As a result, Ecuador has traditionally enjoyed a reputation as a society that welcomed...
those fleeing persecution elsewhere. Indeed, Ecuadoran officials have often proudly touted the nation’s openness toward refugees on the international stage.

Migration into Ecuador began to increase significantly in the early 21st century, as growing numbers of Colombians began crossing the border into Ecuador to flee the intensified violence in the decades-long armed conflict between FARC guerrillas, the government, and paramilitary forces. The exact number of Colombian refugees in Ecuador is unknown, but according to UNHCR the total number of refugees arriving annually in Ecuador, the vast majority of whom are Colombian, grew from 1,600 in 2000 to 123,000 in 2013.

A significant number of Colombians refugees have applied for asylum in Ecuador, putting a tremendous strain on the country’s refugee determination system. The number of asylum-seekers grew from 500 in 2000 to over


101. In August of 2014, Ecuador’s Foreign Minister stated, “our country is a country of hosting refugees, we have by historical tradition and people’s mandate enshrined in our Constitution, to fulfill that purpose. We have provided, in this sense, shelter and assistance to thousands of people from around the world. Let’s remember when our continent suffered the nightmare of repressive military dictatorships in the Southern Cone, many citizens from Chile, Argentina, Uruguay, Bolivia and Paraguay escaped to Ecuador where they obtained shelter and settled with their families. Also hundreds of people from Colombia and other countries have done so. That is why Ecuador now is the country with the highest number of refugees recognized in the Latin American region.” See Statement of the Government of the Republic of Ecuador on the asylum request of Julian Assange, Ministerio de Relaciones Exteriores y Movilidad Human, http://www.cancilleria.gob.ec/statement-of-the-government-of-the-republic-of-ecuador-on-the-asylum-request-of-julian-assange/.

102. Between 1999 and 2006, approximately two million people—facing recurrent massacres, forced recruitment by the irregular armed forces, and aerial fumigation by the Colombian military as part of a U.S.-financed effort to eradicate the cocaine trade—were displaced within Colombia. Additionally, an unknown number of civilians fled to neighboring countries, most notably Ecuador and Venezuela. Korovkin, supra note 93, at 324. See also Laura Parker and Nicoletta Riccabianca, Invisibility for the Refugees: Risk and Opportunities of Ecuador’s New Immigration Policy (2015). The surge in refugees from Colombia was also fueled by the breakdown in peace talks between the Colombian military, paramilitary groups and the FARC in 2002. Brad D. Jokisch, Ecuador: From Mass Emigration to Return Migration? Migration Policy Institute (2014), http://www.migrationpolicy.org/article/ecuador-mass-emigration-return-migration. The 2016 peace accord between those parties is unlikely to immediately stem the flow of refugees from Colombia, as the violence that forces people from their homes is likely to continue along the border between the two countries. See also Laura Gamba, El Nuevo Herald, Diálogos de paz no Frenan Éxodo de Colombianos a Ecuador (July 4, 2016), http://www.elnuevoherald.com/noticias/mundo/america-latina/columbia-es/article87580582.html (according to the UNHCR spokesperson in Ecuador, “about 500 Colombians continue to arrive in Ecuador per month, even with the prospect of peace on the horizon”).

103. Refugee Population by Country of Asylum, 1960–2013 (End-Year Figures), United Nations High Commissioner for Refugees (listing the total refugee population of Ecuador), http://www.unhcr.org/pages/4a0113e6b06.html. In 2008, the last year for which data is available, Ecuador’s Ministry of Foreign Affairs estimated that there were approximately 500,000 Colombian refugees in Ecuador. Ecuador’s Refugee Policy, Ministry of Foreign Affairs, General Office for Refugees (2008).
170,000 by 2013. As of September 2013, Ecuador had 55,000 registered refugees, by far the highest number of any Latin American country.

The Ecuadoran government’s response to the Colombian refugee crisis has changed over time as a result of developments in relations between the two countries as well as domestic political pressures. In 2004, two-thirds of Colombian asylum applications were rejected, compared to a one-fifth rejection rate in 2000 when the number of applicants was far fewer. These figures reflect the increasing hostility toward Colombians prevalent among the Ecuadoran population.

However, in 2008 two things happened which fostered a more welcoming attitude—at least within the Ecuadoran government—toward the ever-increasing number of refugees crossing the border. The first was the approval of the 2008 Constitution, which explicitly included the principle of universal citizenship. The second was a military raid into Ecuador launched by the Colombian government in March 2008 that resulted in the death of 19 FARC

107. Korovkin, supra note 93 at 325. At that time, Ecuador interpreted the Cartagena Declaration narrowly, applying it only to those asylum seekers who were fleeing large-scale, well-documented massacres. Id. at 325. In addition, the government required that they produce a police record documenting their persecution in Colombia, which many refugees did not possess. Id.
108. Although, as noted above, Ecuador has a history of welcoming immigrants from the United States and Europe, as well as exiles from certain Latin American countries, it has been far less accommodating toward immigrants from nearby countries, such as Chile, Colombia, and Peru. See Ramirez, supra note 94. Immigrants from Colombia in particular are seen as a security threat, a drain on social welfare programs, and a threat to take jobs away from Ecuadorans. Diana M. Orcés, Democratic Values and Public Opinion Toward Immigrants: The Case of Ecuador, 51 LATIN AM. POL. & SOC’y 131, 137–38 (2009). In a 2011 poll, approximately 64% of Ecuadorans said that their opinion of Colombians living in Ecuador was “bad” or “very bad,” Beatriz Zepeda and Luis Verdesoto, Ecuador, las Americas y el mundo 2010: Opinion pública y política exterior (2011), http://dominio1.cide.edu/documents/320058/00af85fd-678b-4040-a980-0038a3fa870. Colombians were by far the worst perceived of any immigrant group in the survey, which included Peruvians, Cubans, Chinese, Americans, and Europeans. Id. Negative perceptions of Colombian refugees are exacerbated by the media, which often portrays Colombians in a negative light.
109. Article 416(1) of the Ecuador Constitution states, “Ecuador’s relations with the international community shall respond to the interests of the Ecuadorian people, to which those persons in charge of these relations and their executors shall be held accountable, and as a result, it advocates the principle of universal citizenship, the free movement of all inhabitants of the planet, and the progressive extinction of the status of alien or foreigner as an element to transform the unequal relations between countries, especially those between North and South.” Universal citizenship “includes the notion that citizenship’s subjects are entitled to certain fundamental rights incident to the status, and that these rights are to be equally available to all; the ideal does not tolerate ‘second-class citizenship.’” Linda Bosniak, Universal Citizenship and the Problem of Alienage, 94 NW. U. L. REV. 963, 968 (2000).
guerillas and one Colombian soldier.\textsuperscript{110} This incident led to a break in diplomatic relations between the two countries and otherwise poisoned relations between President Correa and his Colombian counterpart, Álvaro Uribe.\textsuperscript{111} Afterwards, the Ecuadoran government began working closely with the United Nations High Commissioner for Refugees and various NGOs to register and process asylum applications for tens of thousands of Colombians crossing the border into Ecuador.\textsuperscript{112} As a result of this effort, known as the Enhanced Registration Program, the time for reviewing asylum applications was reduced from several months to one day, and thousands of Colombians received international protection.\textsuperscript{113}

The domestic and international political context of Ecuador’s refugee crisis shifted once again in 2010, when Juan Manuel Santos replaced Uribe as Colombia’s President. His election improved relations between the two countries, including Correa supporting Santos’ efforts to negotiate a peace agreement with the FARC guerillas.\textsuperscript{114} In order to legitimize that peace process, Colombia needed to minimize its ongoing humanitarian crisis, which had resulted in large numbers of internally displaced persons and the mass exodus of Colombians to Ecuador. Ecuador could assist these efforts by making it more difficult for Colombians to relocate within Ecuador.\textsuperscript{115} Accordingly, in 2011 Ecuador added a second stage to its Refugee Status Determination process in order to reduce what it perceived as fraudulent

\textsuperscript{110} See Luz Estella Nale, Colombia’s Incursion into Ecuadorian Territory: Justified Hot Pursuit or Pugnacious Error?, \textit{17 JOURNAL OF TRANSNATIONAL LAW AND POLICY} 359-85 (2008). According to research on relations between the two countries, periods of time in which Ecuador was most critical of Colombia’s militarized response to FARC rebels have corresponded with Ecuador’s more peaceful response to the paramilitary group, including welcoming Colombian migrants and displaced people. \textit{See} Marcela Ceballos Medina, \textit{La Política Migratoria de Ecuador Hacia Colombia: Entre la Integración y la Contención, 1 REGIONS AND COHESIONS} 45, 68 (2011).


\textsuperscript{112} UNHCR, “Mobile Registration Project for Colombian Refugees in Ecuador” (2009), \url{www.unhcr.org/49d478206.html}. The more aggressive processing of Colombian refugees at the Ecuadoran border was, in part, a retaliation of the deterioration in bilateral relations between the two countries. \textit{See} Marcela Ceballos Medina, \textit{La Política Migratoria de Ecuador Hacia Colombia: Entre la Integración y la Contención, 1 REGIONS AND COHESIONS} 45, 50-51 (2011). \textit{See also} Colombian Refugees in Ecuador: The collateral damage of a drug war and an insurgency, \textit{COUNCIL ON HEMISPHERIC AFFAIRS} (Aug. 24, 2009), \url{http://www.coh.org/columbian-refugees-in-ecuador-the-collateral-damage-of-a-drug-war-and-an-insurgency/}.

\textsuperscript{113} Ana Guglielmelli White, \textit{In the Shoes of Refugees: Providing Protection and Solutions for Displaced Colombians in Ecuador}, \textit{UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES} (2011). The Enhanced Registration Program was able to expedite the asylum application process because it devoted significant resources to processing those applications in field sites at the border between Colombia and Ecuador, rather than waiting for applicants to present themselves at application sites in major cities, which many fear being detained due to their lack of immigration status. \textit{Id.} The process resulted in refugee visas which had to be renewed after one year, rather than full asylum status, which entitles the asylee to apply for citizenship after one year.

\textsuperscript{114} Interview 1 (Aug. 2015); \textit{See also} Rafael Correa Praises Colombia’s FARC Deal, \textit{TELESUR} (April 16, 2016), \url{http://www.telesurtv.net/english/news/Rafael-Correa-and-Juan-Manuel-Santos-Meet-to-Strengthen-Ties-20151215-0008.html}.

\textsuperscript{115} Interview 1.
applications. More dramatically, in May 2012 President Correa issued Decree 1182, which imposed drastic restrictions on access to asylum in Ecuador. Among the most draconian of these restrictions was a reduction in the asylum application deadline from three months to fifteen days of entry into the country, and a reduction in the deadline for appealing an adverse decision from fifteen days to three days. Moreover, Decree 1182 declared that Ecuador would no longer grant asylum to refugees fleeing generalized violence, thus revoking Ecuador’s accession to the Cartagena Declaration, which had broadened the Refugee Convention’s refugee definition. Asylum applicants would now have to prove that they were individually targeted for persecution, rather than fleeing an armed conflict that victimized indiscriminately. Most refugees from Colombia would thus no longer receive protection under this narrower refugee definition. Decree 1182 had its desired effect: both the number of asylum applications and the asylum grant rate dropped precipitously. In 2009, slightly over 34,300 asylum applications were filed, and the grant rate was 71.8 percent. Between January and September 2013 (the year after Decree 1182 was issued) only 8,300 applications were filed, and the grant rate fell to 6.2 percent.

V. THE CONSTITUTIONAL COURT LITIGATION OVER DECREE 1182

A. Cause Lawyering Strategy

The legal challenge to Decree 1182 demonstrates not only the opportunity for improved rights outcomes provided by constitutionalized human rights...
law but also the increasingly sophisticated efforts of the lawyers who attempt to seize those opportunities. Informal lobbying by UNHCR and NGOs to persuade the government to rescind or modify the Decree had proven unsuccessful. And because the policies imposed by Decree 1182 were promulgated by a decree rather than a law, lobbying the National Assembly was not a viable strategy. At that point, Asylum Access Ecuador (the only NGO in Ecuador that provides legal services to refugees) and the USF Quito Clinic filed separate petitions to the Constitutional Court challenging the Decree. Asylum Access focused on what its lawyers called “administrative” claims: challenging the shortened deadlines and more limited definition of “refugee”. The USF Quito Clinic challenged President Correa’s author-

120. The standing requirement for legal challenges under Ecuador’s Constitution is very broad. The law on such standing states, in relevant part, that such challenges may be brought “by any person, community, village, nationality or collective” who has been affected “in one or more of their constitutional rights”. See Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional [Law of Jurisdictional Guarantees and Constitutional Control], Art. 9(1) Registro Oficial 52 (Ecuador), https://www.corteconstitucional.gob.ec/images/contenidos/normativa/Ley_orgánica_de_garantías_jur.pdf. Moreover, the Constitution’s section on jurisdiction states that “Any person, group of persons, community, people or nation will be able to propose actions envisaged in the Constitution.” Constitution, Art. 86(1) (Ecuador).

121. Interviews 8, 10-11. Lawyers with Asylum Access had attempted to negotiate with the Ecuadoran government, particularly the Office of the Ombudsman (which is akin to the U.S. Attorney General) over numerous refugee policies, including Decree 1182. According to one of its attorneys, “That process didn’t get us to any solution.” Interview 10. In addition, one of the lawyers for the USF Quito Clinic noted that the local UNHCR office had attempted to persuade the Foreign Ministry to change Decree 1182, without success. Interview 11.

122. As one of the lawyers for the USF Quito Clinic noted, because the decree was issued by the President rather than the legislature, “we thought [a court challenge] was the only way.” Interview 11. And under Ecuadoran law, any legislative enactment can be rejected by the President, which would delay the enactment process for one year. See also Maria Dolores Miño, The Basic Structure of the Ecuadorian Legal System and Legal Research, NYU LAW SCHOOL: GLOBALEX (2015), http://www.nyulawglobal.org/globalex/Ecuador1.html#creationoflawsandratification. Thus, even if the Legislature had attempted to pass legislation annulling Decree 1182, President Correa could have struck it down.

123. One of the lawyers at AAE described the decision to pursue a litigation strategy, as opposed to continuing to work on a grassroots advocacy model, as follows: “Some things we want [the refugees] to do themselves, that is actually being able to exercise their rights. [But] this challenge under the Constitution is our part of the work; that’s what we are being trained for.” Interview 10.

124. Brief of Asylum Access Ecuador (Oct. 26, 2012). AAE argued that Decree 1182’s shortened deadlines for applying for asylum and appealing negative determinations violated the right to due process under article 76 of the Constitution, as well as the right to travel under Article 66(14). Id. at 35-36. The government’s response was that the shortened deadlines were necessary to prevent asylum-seekers from filing fraudulent or flawed applications and “manipulating the process for their personal gain, third parties or groups.” See Government Brief (July 11, 2013). With respect to the narrowing of the refugee definition, AAE argued that the Cartagena Declaration, which broadened the refugee definition to include those fleeing armed conflict, is an international instrument and thus enforceable under Article 11 of the Constitution. Id at 21. As such, any act that diminishes such a constitutional right (in this case, Decree 1182) should be unconstitutional. Id. at 28 (citing 2008 Constitution, Article 11(8)). AAE also argued that the Cartagena Declaration has become customary international law within Latin America. Id. at 28. In response, the government asserted that Decree 1182’s definition of “refugee” was consistent with international law and complimentary to the Cartagena Declaration. “[The Cartagena Declaration] confers a universal concept, comprehensive, general, and with no restrictive aspect, that neither opposes nor is exclusive to opposing, but rather is complementary.” See Government Brief, supra note 111.
ity to attempt to change the law via executive decree. The reason for this split illustrates the level of intimidation felt by many NGOs in Ecuador: Asylum Access took on the less controversial argument, not wanting to defy President Correa’s decree power. As an NGO operating with the permission of the Ecuadoran government, Asylum Access could be shut down under the vague parameters of Decree 16 if its activities were deemed to threaten national security. The USF Quito Clinic, which is not subject to Decree 16 because it is not a “social organization”, was more willing to confront Correa in this way.

The two claims were eventually joined by the Constitutional Court, and they proceeded as one lawsuit. Soon thereafter, Human Rights Watch and the Human Rights and Atrocity Prevention Clinic at the Benjamin N. Cardozo School of Law in New York filed an amicus curiae brief. In challenging the reduced time limits for asylum applications and appeals, the amicus brief cited numerous provisions of international human rights law that are incorporated into the Ecuadoran Constitution, including the right to due process. In addition, the amicus brief criticized Decree 1182 as a “retrogression” in Ecuador’s refugee rights law through its effective rejection of the Cartagena Declaration’s more expansive definition of a refugee. In making this argument, the amicus brief noted that the Constitution accepts as binding all “international human rights instruments,” including the Cartagena Declara-

---

125. Brief of USF Quito Clinic (Nov. 26, 2012). The Clinic argued that under Article 133 of the Constitution, so-called “organic laws” (i.e., laws that, among other things, govern the exercise of constitutional rights) cannot be issued absent approval by the National Assembly, which is Ecuador’s main legislative body. So-called “regular laws” do not require such legislative approval. Because Decree 1182 affected the constitutional rights of refugees (including the right to seek asylum, which is enshrined in the Constitution), and thus was an organic law, it should only have been enacted through the National Assembly, rather than via executive decree. Id. at 10-12. In its response, the government argued that Decree 1182 was necessary to fulfill the Ecuadoran government’s obligation under Article 423(5) of the Constitution to implement “policies that guarantee human rights of the people living along borders and refugees.” Government Brief (July 12, 2013).

126. On the one hand, Asylum Access was aware that it might be shut down by the government in retaliation for its advocacy against Decree 1182. Interview 10. Indeed, it had been investigated by the government for anti-government activities prior to the release of Decree 1182. Id. However, once Decree 1182 was issued, Asylum Access’ attitude changed and it became more defiant. According to one of its lawyers, the organization felt that “if this [being shut down by the government] is going to happen, let’s do something to make that happen.” Id. Nevertheless, this same lawyer thought it was unwise to challenge Correa’s ability to dictate policy via executive decree: “I really believe [that argument] was a mistake . . . I don’t believe anyone in the country would tell the President that his word is not the law.” Id.

127. The lawyers for these two organizations met the Ecuadoran lawyers from AAE and the USF Clinic through an assortment of academic and advocacy-oriented connections that illustrate the importance of transnational advocacy networks as well as the globalization of cause lawyering over the past two decades. See Keck and Sikkink, supra note 21); Scheingold and Sarat (2004), supra note 9. Interviews 7-10. And according to one of the lawyers at the Cardozo Clinic who had experience with litigation on the right to education before the Colombian Constitutional Court, “people were feeling hopeful . . . seeing that [successful litigation before the Constitutional Court] could happen in another context, maybe we could try it here.” Interview 8.

128. The brief cited to the ICCPR and the ACHR, both of which guarantee due process protections.

129. Amicus Brief. Introduction.
The amicus brief reminded the Court that Ecuador had previously been recognized by the UNHCR for its generous policies and practices toward the treatment of refugees.\textsuperscript{130} Lawyers involved in the Decree 1182 litigation, including those who worked on the amicus brief, noted that the strategy of allowing the transnational legal organizations (i.e., Human Rights Watch and the Cardozo Clinic) to focus on international human rights law was a conscious, collaborative decision.\textsuperscript{132} They felt that involving such lawyers to weigh in on Decree 1182 was a way to let the Constitutional Court know that, as one of the Ecuadoran lawyers put it, “the world was watching.”\textsuperscript{133} According to that lawyer:

> It helps the case when the Court feels like people outside are watching them, and that this could be an issue that internationally could raise some interest, and people in other countries might read the decision. In a way (this is going to sound awful), but it’s a way to put pressure on the Court, as it’s not only a couple of human rights advocates in Ecuador who are concerned about this issue; it goes beyond Ecuador, and other people are watching and other people are interested. And that forces the Court to give a better reasoning in its decision.\textsuperscript{134}

One of the transnational lawyers whose organization co-authored the amicus brief sounded a similar theme, noting that such lawyers have both a symbolic and political impact:

> The fact that someone from abroad is paying attention to this case was important . . . Even if we were saying the same things [the domestic lawyers] were saying, the mere fact that someone from the outside was paying attention was an important message for [the Constitutional Court . . .] The Court and the government knew that it was not just [domestic lawyers and NGOs] questioning the Constitutionality of the law, but rather that there were international experts looking at this decree and expecting a resolution from the Court.[ . . .] The added value of the amicus[ . . .] was to leave no doubt as to what Ecuador’s international obligations were.\textsuperscript{135}

Another deliberate strategy employed by both the Ecuadoran and transnational lawyers was to invoke Ecuador’s reputation for respecting refugee rights as a shaming tactic. Thus for example, as part of the publicity campaign pursued by the petitioners when the case was filed, the lawyers

\textsuperscript{130} Amicus Brief, Introduction.
\textsuperscript{131} Amicus Brief, § IV.
\textsuperscript{132} Interviews 7-11.
\textsuperscript{133} Interview 11.
\textsuperscript{134} Interview 11.
\textsuperscript{135} Interview 7.
took advantage of the publicity surrounding the 30\textsuperscript{th} anniversary of the Cartagena Declaration:

There was a lot of positive press around Cartagena. We mobilized around that, in thinking that if you say to Ecuador, “You’ve been so generous in the past, you’ve been adhering to Cartagena, why are you deviating now?” [We were] thinking of it more as living up to its previous commitments.\footnote{Interview 8. As noted above, Ecuador was the first Latin American country to incorporate the Cartagena Declaration’s broadened refugee definition into domestic law.}

In a similar vein, the USF Quito Clinic brief admonished the government for reneging on its obligations to refugees under the Cartagena Declaration:

This is a step backwards for refugee rights, and violates the principle of non-regression, covered by international regulations governing the matter. The Ecuadoran state cannot, under the principle “pacta sunt servanda” [agreements must be kept] and good faith in the execution of its international commitments, back out in its obligations and not adopt in its internal regulation, the provisions of the Cartagena Declaration on the Right of Refugees.\footnote{USF Quito Brief at para. 19.}

This shaming strategy was consciously aimed at convincing the Constitutional Court to prevent backsliding on Ecuador’s previously positive record in the area of refugee rights. Nevertheless, the lawyers were careful to modulate it in light of political realities. For example, one of the lawyers who worked on the amicus brief noted that they had considered and rejected an additional shaming strategy that would have focused on Ecuador being out of step with the regional trend in Latin America of greater openness toward immigrants generally and asylum-seekers in particular:

We did a whole analysis on regional trends and a [ . . . ] shaming tactic of, “Hey Ecuador, look at what you’re doing, you are restricting when everyone else is getting a little more open to the idea of asylum.” That section was cut because we decided[ . . . ] to focus on the process and . . . procedural due process concerns that are contravening [Ecuador’s] hard law obligations.\footnote{Interview 8. The liberal trend on asylum law within Latin America has been analyzed by several scholars. See, e.g., Pablo Ceriani Cerandas and Luisa Feline Freier, Migration Policies and Policymaking in Latin America and the Caribbean: Lights and Shadows in a Region in Transition, IMMIGRATION AND ASYLUM LAW AND POLICY IN LATIN AMERICA, at 11-32 (David James Cantor, Luisa Feline Freier, and Jean-Pierre Gauci, eds.) (2015).}

These litigation strategies employed in challenging Decree No. 1182 demonstrate that constitutionalized human rights treaty law can be used by
principled agents (here, cause lawyers) to seek rights objectives (here, the right to apply for asylum within a reasonable period of time and under an expanded definition of “refugee”), even where other indicia of treaty effectiveness (such as an independent judiciary and an unencumbered civil society) are not present because of the underlying domestic and international political context. The constitutional provisions utilized in this case included the right of non-citizens to be free from discrimination and the incorporation of human rights instruments, including the Cartagena Declaration, which broadened the definition of refugee to include those fleeing generalized violence. These provisions afforded cause lawyers an opening to challenge Decree 1182 through litigation after non-legal attempts to alter state policy had failed. Indeed, as one lawyer familiar with the Decree 1182 litigation noted, the Constitution was “the only weapon [the lawyers litigating the case] had.” It enabled them to challenge the government’s failure to abide by its human rights obligations incorporated into the Constitution. We now turn to analysis of how this litigation strategy fared before the Ecuadoran Constitutional Court.

B. Decision of the Constitutional Court

In August 2014, the Constitutional Court issued a mixed decision on Decree 1182. It ruled that the shortened time periods for filing asylum claims and appeals violated the Constitution’s principle of equality enshrined in Article 11. In reaching this conclusion, the Court first noted that the time limits were too short to allow access to the refugee process. It then reasoned that the time limits created “an unjustified difference” between deadlines relevant to asylum applications and those applicable to other administrative procedures under Ecuadorian law. The Court also held that the procedures governing such administrative processes “guarantee the protection of persons faced with the possible affectation of their subjective rights.” The Court thus equated refugees with citizens in terms of the need for fairness in vindicating such rights. It ultimately reinstated the relevant deadlines that existed prior to Decree 1182: 90 days to file an asylum

---

139. Interview 1.
140. Sentencia N. 002-14-Sin-CC, Case No. 0056-12-IN y 0003-12-IA, August 14, 2014, at 49 [hereinafter “Const. Court decision”].
141. The Court did not specifically reference any international human rights instruments, such as the 1951 Refugee Convention, or even its own Constitutional provision guaranteeing the right to asylum, in this part of its decision. However, the amicus brief filed by Human Rights Watch and the Cardozo Clinic had pointed out that the ICCPR guarantees equal protection and prohibits discrimination, and that the ADHR guarantees due process through reasonable time limits for the determination of rights. See Amicus Brief, supra note 131, at § III(A)(6).
142. Const. Court decision, at 49 (“[T]he time limits imposed by Decree 1182] violate the right of equality, in that an unjustified difference exists between these time periods and those [established] for the common administrative procedures, considering that both provide the protection of subjective rights in the substantiation of processes.”
143. Id.
application and 15 days to appeal an adverse decision.\textsuperscript{144}

In addition to rejecting Decree 1182’s shortened deadlines, the Court further ordered the reinstatement of the Cartagena Declaration into Ecuadoran asylum law.\textsuperscript{145} This allows refugees to once again seek protection from generalized violence such as Colombia’s armed conflict. In reaching this conclusion, the Court noted that Article 11 (3) of the Ecuadoran Constitution incorporates international human rights instruments into Ecuadoran domestic law, and that the Cartagena Declaration is such an international human rights instrument.\textsuperscript{146} Accordingly, the Court ruled, the Cartagena Declaration’s broadened definition of refugees should apply to those seeking asylum in Ecuador. The Court’s conclusion here was also based on the international law principle of \textit{non-refoulement}, which is explicitly recognized in Article 41 of the Constitution.\textsuperscript{147}

On the other hand, the Constitutional Court let stand the manner in which the substance of Decree 1182 was promulgated; i.e., through executive fiat rather than the legislative process.\textsuperscript{148} As noted above, the USF Quito Clinic had argued that this process violated Article 133 of the Constitution, which guarantees that any government action which arguably restricts a constitutional right must be arrived at through legislation rather than executive decree.\textsuperscript{149} The Constitutional Court rejected this argument, holding that Article 147 of the Constitution, which provides for executive decrees, allows the President to issue regulations necessary for the smooth running of public administration.\textsuperscript{150}

The decision on Decree 1182 was therefore mixed from a human rights advocacy perspective. It partially rejected the rollback of refugee rights by the executive. This is a noteworthy result in and of itself, given the Ecuadoran judiciary’s history of weakness vis-a-vis the executive. It also based its decision in this regard on international human rights law and instruments that had been made part of the 2008 Constitution. Thus, the Constitution, and the human rights law it incorporates, were a mechanism for

\textsuperscript{144} Several of the lawyers interviewed for this article expressed disappointment that the Court did not abolish \textit{any} deadline for applying for asylum, as they had pleaded in their submissions to the Court. Interviews 8, 10, and 11. Nevertheless, one of those lawyers acknowledged, “the 90 day deadline [for applying for asylum] has made life easier for everyone”. Interview 10.

\textsuperscript{145} Const. Court decision, at 51-52 (Ecuador).

\textsuperscript{146} Id.

\textsuperscript{147} Id. Article 41 of the Constitution states, in part, “The State shall respect and guarantee the principle of non-return, in addition to humanitarian and legal emergency assistance.” The amicus brief had pointed out that the principle of \textit{non-refoulement} was set forth in Article 33 of the 1951 Refugee Convention. Amicus Brief, \textit{supra} note 131, at § III(A)(ii).

\textsuperscript{148} Const. Court decision, at 43 (Ecuador).

\textsuperscript{149} This was the argument that Asylum Access Ecuador chose not to make because it would be deemed as too confrontational to the Correa administration.

\textsuperscript{150} Article 147 (5) of the Constitution states that one of the duties of the President of the Republic is “to direct public administration with a decentralized approach and to issue the decrees needed for its integration, organization, regulation and monitoring.”
the mobilization of civil society to achieve positive rights outcomes. And that mobilization was not a one-off phenomenon. It has had an enduring effect: several of the lawyers who worked on the case say that the litigation has strengthened the credibility of Asylum Access Ecuador in the eyes of the government. This enhanced credibility will likely assist AAE as it participates in the debate over the implementation of Ecuador’s recently enacted human Mobility Law.

On the other hand, many of the lawyers who worked on the case felt the decision was a severe setback because the Court upheld President Correa’s ability to limit constitutional rights through executive decree rather than the legislative process. In their view, this part of the decision keeps the door open for further decrees that violate the Constitution and the human rights law it incorporates. As one of the lawyers for AAE put it: That part was very painful, as it put a shadow on the [decision]. Now any rights can be ruled by decree because of this [decision]. And one of the lawyers for the USF Quito Clinic decried this aspect of the ruling in declaring, overall, that the decision was “one step forward and ten steps back.”

Moreover, although the decision on Decree 1182 should have made the asylum application process more accessible and should have increased the likelihood of receiving asylum, it is unclear whether either has occurred. The government has not released statistics on the number of asylum applications or the asylum grant rate in Ecuador since 2013, well before the Constitutional Court’s decision on Decree 1182. Moreover, in March 2014, not long before the decision, Ecuador introduced the Mercosur Visa. It provides temporary immigration status (renewable after two years), and with it the right to work and receive benefits such as health care and housing. It is generally issued within seven days of application, which makes it far more attractive to many refugees than asylum, which is not guaranteed to the

151. See Elkins, et al., supra note 5.
152. According to one of the lawyers at AAE, “after receiving the [decision] from the Constitutional Court our relationship with the [government] improved. Suddenly we became a legitimate actor regarding refugee law. I lost the fear of presenting a constitutional challenge.” Interview 10. One of the transnational lawyers who helped draft the amicus brief confirmed this assessment: “All in all it gave legitimacy to the work [AAE was] doing . . . so they could go back to the local [government agency that rules on asylum applications] and say, ‘we just got this great win and this is actually what you must do according to the law.’” Interview 8.
153. See note 119, supra, for a description of the Human Mobility Law.
154. Interview 10.
155. Interview 11.
applicant and can take many months, if not longer, to receive. Thus, even though it does not offer international protection from refoulement, most refugees in Ecuador have opted for it over applying for asylum. As many of the advocates interviewed for this article stated, the Mercosur Visa has made refugees in Ecuador “invisible,” converting them into migrants with limited, short-term legal status but without international protection.

Despite some harms, the decision on Decree 1182 thus benefited each of the parties with interests in the outcome of the litigation. President Correa retained the President’s ability to rule via executive decree on issues with constitutional implications. Transnational and domestic cause lawyers, and the non-citizens for whom they advocated, saw a return to the status quo on asylum procedure and standards. One particular cause lawyering group, Asylum Access Ecuador, successfully challenged the executive without being shut down in retaliation; its reputation as a key player in the debate over the rights of refugees may have been enhanced. And the traditionally weak Ecuadoran Constitutional Court enhanced its credibility by declaring an executive policy unconstitutional. So it was something of a win-win-win result. Indeed, one lawyer for the USF Quito Clinic thinks (but cannot prove) that the decision was the result of an actual negotiation between the Court and the government.

VI. DISCUSSION AND ANALYSIS

The Constitutional Court litigation over Decree 1182 suggests five key points about the opportunities and limitations of constitutionalized human rights law and how cause lawyers effectively use constitutionalized human rights law on behalf of non-citizens.

First, constitutionalization provides what may be the most meaningful legal mechanism through which principled agents (e.g., cause lawyers) can

---

157. On the other hand, the government may not renew a Mercosur Visa after the initial two-year period if the refugee does not have a job or other evidence of financial support. And by that time, the deadline for applying for asylum will have long expired.

158. Interviews 5, 10.

159. The refugee advocacy community in Ecuador has a conflicted attitude toward the Mercosur Visa. Most appreciate the way it offers immediate status, and accompanying rights, to most refugees. But these same advocates are concerned that it offers no international protection to refugees. Asylum Access, which provides direct services to refugees in addition to pursing what it calls strategic litigation on their behalf, bases its advice to individual refugees on the strength of their asylum claim. If it is a particularly strong asylum claim, Asylum Access encourages them to apply for asylum. If not, they advise them to apply for a Mercosur Visa.

160. In this way, the Constitutional Court’s decision is reminiscent of the compromise between branches of government that the U.S. Supreme Court struck in Marbury v. Madison, 5 U.S. 137 (1803) (establishing the principle of judicial review of acts of Congress while limiting its jurisdiction over presidential authority in this particular case).

161. “When I saw the decision I realized that there had been some conversations between the government and the Court where the government had realized that there were some things they were willing to let go, that . . . maybe they had made a mistake. So the Court’s decision in a way I think was a compromise with the government in some aspects.” Interview 11.
advocate for the rights of non-citizens in “middle,” or not fully democratic, states. Given that such states generally offer few human rights protections to non-citizens in their domestic law, constitutionalization of treaty law will frequently offer the “only weapon” available to cause lawyers. It elevates human rights law to the highest status within a state’s domestic legal framework, superior to conflicting statutes or other forms of domestic law. Indeed, to the extent that a human rights instrument itself becomes incorporated into a national constitution (as in Ecuador), that instrument may hold sway over any conflicting constitutional provisions. And because disputes involving constitutional provisions are adjudicated by specialized constitutional courts with relatively modest dockets and liberal standing requirements, there are fewer of the procedural hurdles that may impede advocacy in other court settings. At least in theory, then, constitutionalized human rights law is perhaps the most powerful in the legal toolkit of cause lawyers representing non-citizens in middle states.

In this case, constitutionalized human rights laws provided the only means of effectively challenging Decree 1182. Other methods of advocacy, such as negotiating directly with government officials, had proven unsuccessful. Through Constitutional Court litigation, domestic and transnational cause lawyers were able to achieve a limited, but nonetheless positive, rights outcome by invoking specific constitutionalized human rights norms, such as due process and nondiscrimination, and by referencing specific human rights instruments, such as the ICCPR, the ACHR and the Cartagena Declaration, which are incorporated into the Ecuadoran Constitution. Without the constitutional provisions that allowed for these human rights-based arguments, Decree 1182 would most likely still be in effect.

Second, while constitutionalized human rights law is a potentially powerful weapon, its on-the-ground significance is often limited by political and legal realities, particularly in “middle” states. These realities include the weakness of the judiciary’s authority over the political branches of government, as well as the government’s ability to silence civil society organizations that challenge state policy. In Ecuador, the latter of these factors deterred Asylum Access Ecuador from challenging President Correa’s ability to limit the constitutional rights of asylum-seekers through executive decree. One can also reasonably surmise that the relative weakness of the Ecuadorian judiciary’s authority over the executive rendered the Constitutional Court unwilling to declare Decree 1182 unconstitutional. Thus, while constitutionalized human rights law provided an avenue for the historically politicized and non-independent Constitutional Court to partially return Ecuador’s refugee status determination process to the status quo ante, the underlying

162. Indeed, in this regard the Ecuadoran Constitution afforded greater protection to non-citizens than international law, given that the 1951 Refugee Convention only protects refugees who face persecution for specifically enumerated reasons.
political and legal context prevented it from more fully confronting executive power.\textsuperscript{163}

The underlying political and legal context may also limit the long-term impact of the Constitutional Court’s decision. In the context of Latin American constitutional courts in particular, such impact typically can be influenced by (1) whether the court’s decision includes oversight mechanisms to ensure compliance and (2) the level of civil society engagement with such mechanisms.\textsuperscript{164} In its decision on Decree 1182, the Ecuadorian Constitutional Court included no mechanisms to ensure the government complied with its ruling. Such a mechanism might have been particularly helpful with respect to the reinstatement of the broadened definition of “refugee” in the Cartagena Declaration, which undergoes considerable subjective interpretation by government bureaucrats when they initially decide asylum claims. Moreover, the intensity of civil society monitoring of the Decree 1182 decision (even absent a formal mechanism for doing so) is likely to be limited due to fear of government reprisal against civil society organizations deemed to pose a threat to national security.

Third, transnational cause lawyers operating in “middle states” who hope to overcome these often daunting political realities are likely to be more successful if they become increasingly sophisticated tacticians, better able to adapt to what Scheingold and Sarat term the “local scene” in developing effective strategies that take into account the legal and political context on the ground.\textsuperscript{165} Earlier cause lawyering studies revealed a somewhat ham-handed, one-size-fits-all approach (usually rights- and litigation-based) by transnational (mostly U.S.-based) cause lawyers who were tone-deaf to the political, legal, and cultural context of the country into which they had

\textsuperscript{163} Such reluctance by courts to confront other branches of government in any serious way is not unique to Ecuador. See, e.g., Neha Jain, The Democratizing Force of International Law: Human Rights Adjudication by the Indian Supreme Court in COMPARATIVE INTERNATIONAL LAW 20 (Anthea Roberts et al. eds., Oxford University Press 2016) ("scholars have posited that the lack of any attempt at principled decision-making is a deliberate strategy by the [Indian Supreme Court] to avoid serious conflict with the other organs of the State . . . . Thus, its decisions ‘seek to provide a workable modus vivendi rather than to articulate high values’ . . . . It has carefully avoided upsetting any major political players and concentrated on political issues that are unlikely to directly threaten their interests.") (citations omitted). The Ecuadoran Supreme Court’s cautious approach confirms Richard Abel’s observation that cause lawyering is more about acting as a shield to protect rights (in this case, the right to seek asylum) rather than a sword to create them. Abel supra note 34, at 69-117. See also Jennifer Gordon, Concluding Essay: The Lawyer is not the Protagonist: Community Campaigns, Law, and Social Change, 95 CALIF. L. REV. 2133 (2007) (observing that the efforts of cause lawyers are more frequently devoted to shaping legal processes (which she describes as soft law) rather than creating enforceable rights (hard law)).

\textsuperscript{164} See Rodriguez Garavito, supra note 34. See also Sandra Botero Cabrera, Courts that Matter: Judges, Litigants and the Politics of Rights Enforcement in Latin America (2015) (unpublished graduate dissertation, Graduate School of the University of Notre Dame).

\textsuperscript{165} SCHEINGOLD & SARAT (2004), supra note 9, at 138 (citing case studies where cause lawyers from the U.S. were ineffective or uninterested in mobilizing local opposition to state policies or U.S. corporate practices in several developing countries).
parachuted. While the globalization of the legal profession provided opportunities for transnational legal advocacy, the top-down nature of that advocacy often eroded public support for the kinds of social changes that those lawyers, and the social movements with which they were affiliated, sought to achieve.

The Ecuadoran case suggests that the era of culturally tone-deaf transnational cause lawyering may be ending. It demonstrates that cause lawyering across borders is more likely to thrive, or at least reach modest success, when it features a collaboration between domestic and transnational cause lawyers that acknowledges the limitations and takes advantage of the strengths that both sets of lawyers bring to the table. Thus, while Asylum Access decided to participate in the litigation over Decree 1182, it chose not to aggressively challenge the government’s policy, lest that very government decertify it. The USF Quito Clinic, less concerned about confronting executive power, challenged (albeit unsuccessfully) Correa’s ability to restrict the rights of asylum seekers through executive fiat. The transnational lawyers, aware of the advantage accompanying their status as outside parties, also relied on international human rights law arguments that would show the Constitutional Court that “the world was watching” and would remind the Court of Ecuador’s reputation for protecting refugees. This coordinated strategy reflects a sophisticated awareness of how to shape lawyering tactics to fit political realities. It also demonstrated the power of collaborations between principled agents on the domestic and transnational level.

The transnational collaborations in the litigation over Decree 1182 suggest a modification to the “boomerang” pattern of influence over state behavior described by Keck and Sikkink. In the typical boomerang pattern, a domestic non-state actor (typically an NGO), frustrated by its inability to influence its own government, reaches out to transnational NGOs, who induce their own government (or third party organizations) to pressure the recalcitrant state.

In a corollary to the boomerang effect known as “re-entry”, domestic actors submit disputes with their government to international bodies that issue rulings that create legal change at the domestic level. In this case, the impetus for the


167. SCHEINGOLD & SARAT (2004), supra note 9, at 137.

168. See KECK & SIKKINK, supra note 21.

169. See id.

170. See id. at 12-13. In a corollary to the boomerang effect known as “re-entry”, domestic actors submit disputes with their government to international bodies that issue rulings that create legal change at the domestic level. See Torelly, supra note 24, at 11 (citing MARCELO NEVES, TRANSCONSTITUTIONALISM (2013) at 32-33, 41-42, 75).
involvement of the transnational lawyers did not come from the domestic cause lawyers; the transnational lawyers were already aware of the decree and proceeded to engage in conversations with domestic cause lawyers about how best to challenge it. Moreover, the transnational lawyers did not demand that other states or intergovernmental organizations pressure the Ecuadoran government to abolish the decree. Rather, they applied that pressure themselves, in the form of an amicus brief to the Constitutional Court that highlighted Ecuador’s obligations under international human rights law. Thus, rather than a boomerang thrust into the air by a single individual that gains strength as it circles back towards its target, the transnational advocacy network featured in the Decree 1182 litigation more closely resembled a two-person catapult, where the combined efforts of two individuals are necessary to launch a projectile over a wall that would otherwise be impenetrable to either combatant acting alone.

Domestic and transnational cause lawyers who follow this two-person catapult model are able to exploit what Yves Dezalay and Bryant Garth have termed the “global industry” of the rule of law. Such lawyers directly pressure states through their judiciaries, rather than waiting—perhaps endlessly—for other states, intergovernmental or international organizations, to intervene. The growing constitutionalization of human rights law over the past few decades facilitates—one might even say invites—this direct pressure: human rights law is the lingua franca of transnational cause lawyers, and when states accord it premium status in their domestic law by incorporating it into their national constitution, they provide direct access for such lawyers to challenge state behavior. In this way, constitutionalized human rights law realizes political claimants’ language of fundamental rights, and in the process develops an ever-expanding body of domestic law. It also creates opportunities for cause lawyers and other activists to generate broader domestic political involvement, e.g. through lobbying of government officials.

Fourth, contrary to some of the earlier writing on cause lawyers, effective cause lawyering at the transnational level need not be exclusively “community-oriented and community place-oriented.” Cause lawyering studies suggest that in order to be successful in addressing local disputes, transnational cause

171. See Yves Dezalay & Bryant Garth, The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States (2002) Dezalay and Garth note the growing “global industry promoting the import and export of the ‘rule of law.’” Id. at 3. Similarly, they assert that “in Africa, Asia, Eastern Europe, and Latin America, a burgeoning group of consultants, think tanks, philanthropic foundations, and national and transnational agencies has come to the conclusion that, whatever the problem, an essential part of the solution is an independent and relatively powerful judicial branch.” Id.

172. See Elkins, et al., supra note 5.

173. See Torelly, supra note 24 at 11-12.

174. Id. at 12.

175. Samir & Shiv, supra note 38, at 287-304; Coutin, supra note 38, at 117-40; see also Scheingold & Sarat, supra note 9, at 139.
lawyers need to take their cues from the local community, rather than pursue a litigation strategy that ignores underlying problems affecting that community. 176 Indeed, a pure rights-based approach to social change lawyering has been criticized in many quarters for a variety of reasons, including diverting public attention and scarce resources from grassroots, community-based advocacy methods, privileging the role of lawyers in social movements, and focusing on short-term court victories rather than longer-term social movement goals. 177 Due at least in part to these critiques, cause lawyers have, over the past two decades, been encouraged to integrate their legalistic strategies with community empowerment and grassroots activism in order to achieve meaningful social change. 178

However, as the Decree 1182 litigation illustrates, litigation without corresponding grassroots/community-based advocacy can be an effective strategy in the context of representing non-citizens in “middle states” where the cause at issue is access to international protection through asylum. In such a context, the options for community-based, grassroots advocacy are limited. Asylum-seekers, particularly in the developing world, are recent arrivals in their country of refuge, with little opportunity to engage with any active social movements. Their main goal is obtaining access to state protection rather than a particular benefit of citizenship that might be the source of popular mobilization. They are, in Hannah Arendt’s words, seeking the “right to have rights.” 179 A litigation-oriented approach will thus typically provide the most efficient means of achieving this goal, especially when the national Constitution contains human rights provisions applicable to the rights of non-citizens. In this way, lawyers who reference constitutionalized international human rights law in domestic court on behalf of non-citizens are providing greater protection to that group of claimants than was previously available to them. This suggests that the cause lawyering literature, at least when it is focused on “middle” countries, needs to take into account how cause lawyers have utilized the rapidly expanding number and scope of constitutionalized human rights treaty norms.

Finally, this article has identified several factors that may influence the degree to which principled agents are able to use constitutionalized human rights law to accomplish their rights objectives on behalf of non-citizens in “middle states.” These factors include:

176. See Torelly, supra note 24 at 11-12.
• The presence of domestic cause lawyers who challenge state practices on the grounds that they violate constitutionalized human rights norms;¹⁸⁰
• The presence of transnational cause lawyers who challenge state practices by referencing international human rights law that has been incorporated into the domestic constitution, either through reference to international instruments or to provisions derived from such instruments;
• The country’s global reputation for protecting human rights, which allows principled agents to engage in shaming tactics;
• The extent to which the rights-based challenge advanced by the cause lawyers threatens key state actors; and
• Whether the government has other means at its disposal to achieve its policy objectives and thus limit the rights of the affected group.

Each of these factors played a role in the litigation over Decree 1182. Some of these factors facilitated the Constitutional Court’s decision to return Ecuador’s asylum determination process and legal standards to the status quo ante: the presence of sophisticated domestic and transnational cause lawyers, a national reputation for openness toward refugees, and the easy availability of the Mercosur Visa, which rendered waiting for an asylum status determination less desirable for most refugees, even under re-instated application deadlines and legal standards. Others factors influenced the court to refrain from issuing a more robust decision that would have significantly broadened the human rights protections for non-citizens—the aspect of the lawsuit that most challenged executive power was the claim that Correa could not limit the rights of asylum-seekers through executive decree.

VII. CONCLUSION

The litigation over Decree 1182 demonstrates that the constitutionalization of human rights law is not an automatic ticket to improved human rights behavior by individual states.¹⁸¹ Politics often gets in the way. Principled politics often gets in the way. Principled

¹⁸⁰. One example of such a constitutionalized human rights norm in the Ecuadoran case is the broader definition of refugee, based on the Cartagena Declaration. That definition has been incorporated into the Constitution through Article 41, which recognizes the right to asylum “in accordance with the law and international human rights instruments.” See Constitution of the Republic of Ecuador 2008, art. 41. Given that the Cartagena Declaration is a non-binding legal instrument, its incorporation into the Constitution is an example of how soft law obligations can constitute an important part of human rights commitments. See Wuerth, supra note 27, at 67 (“One way of maximizing benefits and minimizing costs would be to acknowledge that international human rights are—in some sense—soft international legal obligations although they are often included in binding domestic law.”).

¹⁸¹. For example, while the constitutions of thirteen E.U. member states (Bulgaria, Czech Republic, France, Germany, Hungary, Italy, Poland, Portugal, Romania, Serbia, Slovenia, Slovakia, and Spain) contain the right to asylum, “constitutionalized asylum” has been underutilized for a number of reasons, most notably the availability of refugee protection through the 1951 Refugee
agents (in Simmons’ parlance) must adapt to those political realities in forging strategies that include legal challenges based on constitutionalized human rights law. The success of their efforts depends, in part, on the factors identified in the previous section of this article.

In addition, this article has demonstrated that the diffusion of human rights law through incorporation into national constitutions creates significant opportunities for cause lawyering in developing countries. That diffusion has substantially expanded the tool kit with which cause lawyers operating both domestically and transnationally can raise domestic court challenges to state policies that adversely affect their clients. Constitutionalization can transform lofty statements of aspiration embedded in human rights treaties into concrete and enforceable causes of action. It can convert otherwise unfamiliar and vaguely threatening international law into domestic law which domestic court judges are more comfortable interpreting and applying. But it is far from a panacea. Rather, the effective use of constitutionalized international human rights law, particularly in emerging democracies, will often depend on a lawyer’s sophisticated awareness of a host of factors relevant to the local political and legal landscape. It will also often depend on collaboration between domestic and transnational cause lawyers, where each focuses on the legal strategies and arguments most the judges will find most compelling coming from each particular actor.

Indeed, the litigation over Decree 1182 in Ecuador suggests that the constitutionalization of international human rights law has rendered effective cause lawyering in developing countries neither exclusively top-down nor bottom-up. It is not only a matter of “alternative lawyering” that takes its cues from grass roots mobilization. Nor is it exclusively dictated by elite lawyers, NGOs, and law schools from the “Global North.” Rather, it is the result of an institutionally self-aware combination of strategies and resources sufficiently agile to respond to (and influence) political realities on the ground. And to the extent that one of those realities is a judiciary that aspires to some level of power and independence, constitutionalized treaty law can be part of that equation.

Convention. See Hélène Lambert, Francesco Messineo & Paul Tiedemann, Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?, 27 REFUGEE SURV. Q., No. 3, at 16, 18-32 (2008). However, asylum is broader than refugee status, and as the Court of Justice of the European Union (CJEU) has noted, “Member States may grant a right of asylum under their national law to a person who is excluded from refugee status.” See Bundesrepublik Deutschland v B & D, Joined Cases C 57/09 & C 101/09, [2010] E.C.R I-10979 (In that case, the German Federal Administrative Court had asked the CJEU to clarify whether someone denied refugee status because of criminal activity under Article 1F of the Refugee Convention might nevertheless be eligible for asylum under the German Constitution). Id. at 26 (citing Case No. 1407765, Metautres v. Republique Francaise, Decision 16 Sep. 2014, 3-4).

182. As Alison Brysk has observed, human rights mobilization and enforcement proceeds along a dynamic horizontal rather than vertical plane, involving myriad interconnected individuals and organizations that defy the static categories of “top down” or “bottom up.” See Alison Brysk, Human Rights Movement, POLITY (forthcoming).
In drawing conclusions from this experience, it is useful to return to the question posed in the literature on crucial case studies: does this article’s analysis of the Decree 1182 litigation confirm or deny the theory that the constitutionalization of human rights law leads to better human rights outcomes? The answer has two parts. The first is that, at least in the short term, it confirms the theory that but for the inclusion in the Ecuadoran Constitution of provisions guaranteeing equality and non-discrimination on the basis of migratory status, as well as the incorporation of human rights instruments such as the Cartagena Declaration of 1984, Decree 1182 and its limitations on the rights of asylum seekers would very likely still be in effect. As the plaintiff’s attorneys noted, the Constitution was the only effective means of challenging that decree. Accordingly, that constitutional challenge undeniably improved human rights outcomes for non-citizens seeking asylum in Ecuador. While that improvement may not have been as robust or as durable as some advocates had hoped, it was an improvement nonetheless.

The second part of the answer concerns the long-term impact of the decision, and it is more complicated. Whether the decision ultimately creates lasting, positive human rights outcomes for non-citizens in Ecuador depends on a variety of circumstances that will unfold over the next several years. These include: how decision-makers at various levels of the Ecuadoran refugee status determination process will interpret the broader definition of “refugee” under the Cartagena Declaration, whether President Correa’s successor will issue additional decrees limiting the rights of asylum-seekers and whether cause lawyers and other principled agents are successful in challenging such limits, whether the nascent peace process underway in Colombia will stem the flow of large numbers of refugees into Ecuador, whether the Mercosur Visa will remain a more favorable option than asylum for the majority of refugees crossing into Ecuador, and whether the new Human Mobility Law will establish sufficiently specific procedures and standards relevant to the refugee determination process.\textsuperscript{183}

What is undeniable, however, is the importance of constitutionalized human rights treaty law in offering protection to the most vulnerable of groups—non-citizens—at a time when civil strife, terrorism, and climate change have increased their numbers to unprecedented levels. This protection is particularly important in developing states, where domestic law may otherwise be unhelpful to non-citizens. Whether such constitutionalized treaty law will actually assist non-citizens in a given political and legal context depends on the factors identified in this article.

\textsuperscript{183. See supra note 119 for a discussion of the recently enacted Human Mobility Law.}