Britain's contributions to human rights law

Article

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BRITAIN'S CONTRIBUTIONS TO HUMAN RIGHTS LAW

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ABSTRACT

This article assesses the various contributions made by the United Kingdom to the development of international human rights law (IHRL) in the last century and it focuses specifically on Britain's contribution to the *law* and *institutions* of human rights as opposed to their enjoyment *in practice*. The initial focus of the article is on the political branches of the British State – its government and Parliament – in building the normative and institutional foundations of IHRL and in helping and promoting the work of these institutions. The article then looks at the contributions of the British judiciary and legal practitioners, which have been especially notable since the entry into force of the Human Rights Act 1998 (HRA). Finally, the article looks at the contributions of British academics, who have played an outsized role in the scholarly study of IHRL when compared to those from most other States.

Keywords: international human rights law, Human Rights Act 1998, European Convention on Human Rights.

I. INTRODUCTION

My task in this article is to assess the various contributions made by the United Kingdom to the development of international human rights law (IHRL) in the last century. This is a vast topic, and my account will necessarily be selective. I will focus on Britain's contribution to the *law and institutions* of human rights as opposed to their enjoyment *in practice*. Even if the latter question was narrowed down solely to issues of the UK's compliance with its legal obligations, attempting to answer it would not be particularly useful. As with any other developed democracy, the UK's record of compliance with IHRL within its society is better than that of most other States, but still far from perfect. And as with any other reasonably powerful State, which projects its power outside its borders with some frequency, the UK has both helped advance the enjoyment of human rights abroad and at times severely harmed them. The task of describing in human rights terms the UK's complex role in Afghanistan and Iraq over the past several decades, for example, is not one I wish to undertake here.

Rather, I will discuss, first, the role of the political branches of the British State – its government and Parliament – in building the normative and institutional foundations of IHRL and in helping and promoting the work of these institutions. Any such account would be incomplete without reflecting on how Britain's contributions and commitments to the ideals of human rights have always been tempered (and tainted) by its interests, by shallow political gamesmanship, and by the reality or legacy of Empire.[1] Second, I will move to the contributions of the British judiciary and legal practitioners, which have been especially notable since the entry into force of the Human Rights Act 1998 (HRA). The HRA allowed for the domestic application of the European Convention of Human Rights (ECHR) by British courts. In the absence of a codified constitution this meant that the ECHR became the primary instrument for the judicial protection of human rights in the UK, unlike in countries with strong constitutional guarantees of fundamental rights. The British courts applying the HRA and other

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[1] The standard treatment on this remaining AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2004).

relevant rules of international law have produced a sophisticated and greatly varied jurisprudence, serving as a laboratory of human rights adjudication. Finally, I will turn to the contributions of British academics, who have played an outsized role in the scholarly study of IHRL when compared to those from most other States.

II. Contributions of the Political Branches of the British State

The historiography of human rights law is not uncontested, especially with regard to their origin story, as it were.[2] But British contributions to the building of the foundations of modern IHRL are hard to deny. If one aligned, for example, with those who see the origins of IHRL in the XIX century ban on the slave trade, it was of course the British Empire, as the global hegemon, that played the main role in that effort, even if it was this and other empires that enabled and greatly profited from the slave trade in the first place. And if one instead opted for the more traditional birthdate of human rights – the post-Second World War period that saw the adoption of the Universal Declaration of Human Rights and the first regional and global human rights treaties – then the UK, despite the waning of its power, still played a pivotal part in these developments.

When it comes to the first human rights treaty, the ECHR, British lawyers and politicians from both the (Labour) government and (Conservative) opposition had much influence on its drafting; one of them, the Conservative MP and future Lord Chancellor David Maxwell Fyfe, has been described as the Convention's 'diligent midwife'.[3] The Attlee government, for its part, was much concerned with the impact the Convention could have in the colonies and insisted during the negotiations on more precise and restrictive definitions of specific rights, the insertion of a colonial clause, and on making the right to individual petition, i.e. the jurisdiction of the European Court, optional. The resulting text, heavily shaped by the UK, was for those and other reasons a disappointment to many proponents of a binding human rights treaty. As the Convention was being signed on 4 November 1950 in Rome's opulent Palazzo Barberini, Paul-Henri Spaak, the President of the Council of Europe's Consultative Assembly, remarked that '[i]t is not a very good Convention, but it is a lovely Palace'.[4] Despite its initial opposition to the Convention, the UK became the first State to ratify it, and a British national, Lord McNair, became the first President of the European Court upon its establishment in 1959.[5]

The genesis of the European Convention and the early decades of Britain's engagement with it were directly shaped by the continuation, and then the end, of its Empire. It did not take long for a succession of British governments to regret ever committing to this treaty, regret its extension to most of the colonies, and regret accepting the right of individual petition.[6] And while the UK nonetheless remained a party, and later under New Labour even domesticized the Convention through the HRA, the possibility of denouncing it somehow always remained in the air – from the initial angst about the first inter-state case brought by Greece against the

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2 See, eg, J Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP 2012); S Moyn, *The Last Utopia* (Belknap Press 2010); P Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126 Harvard Law Review 2043.

3 M Torrance, 'Maxwell Fyfe and the Origins of the ECHR' (The Journal of the Law Society of Scotland, 19 September 2011) <https://www.lawscot.org.uk/members/journal/issues/vol-56-issue-09/maxwell-fyfe-and-the-origins-of-the-echr/>.

4 W Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 9.

5 See more E Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010); G Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42 ICLQ 796.

6 See Simpson, *Human Rights and the End of Empire*, 12-13.

UK over Cyprus, through the hostile reaction against the Court's judgment over the killing of IRA terrorists in Gibraltar, up to the present day (which I will turn to imminently).[7]

The UK has of course also been a contributor, most often for the better, to the negotiations of many other human rights treaties within the UN or the Council of Europe. This brings us to Britain's other role, similar to that of other major democratic States, as an active *promoter* of human rights law and institutions globally, through diplomacy, multilateral and bilateral, and through various other means of exerting influence on other actors within the international system.[8] One such means is the UK's participation in the activities of Geneva-based UN institutions, chief among them the Human Rights Council. The UK has led various efforts to agree on normative resolutions of the Council or to sponsor new special procedures or fact-finding missions, most often in concert with other European States.[9] Another, and more controversial means, is the use of sanctions against human rights violators on various grounds, including Magnitsky-style sanctions.[10]

Britain's role as a global promoter of human rights is of course substantially undermined by its many inconsistencies in doing so, driven by its pursuit of other interests. Examples of the UK supporting actors systematically violating human rights, or failing to exert pressure on them, are legion – from apartheid South Africa to Saudi Arabia today. This is of course an easy criticism (if no less valid), which can equally be made against most other democratic States. But this is also an observation so obvious that it hardly needs to made.

More corrosive, however, are the thankfully rare, but nonetheless damaging, deliberate attempts by UK authorities to undermine international human rights institutions which they helped build. These are generally a consequence of domestic political considerations, often petty ones, but are particularly harmful in the context of the global deconsolidation of democracy in the past decade or so. A relatively small-scale example are repeated instances of pushback by British authorities against the findings of UN special mandates pertaining to the UK. For instance, upon the 2013 country visit by Raquel Rolnik, the UN Special Rapporteur on the right to housing, the government predictably dismissed her criticism of its bedroom tax policy. But the manner in which it did so was extraordinary. A minister and Conservative Party chairman, who referred to Rolnik as 'a woman from Brazil', wrote to the UN Secretary-General to demand an investigation into Rolnik's supposed political bias.[11] Her full report was later described by the housing minister as 'a misleading Marxist diatribe'.[12]

Or, consider the 2019 UK visit by the UN Special Rapporteur on extreme poverty, Philip Alston. This attracted far greater public attention than the vast majority of country visits by special mandates, including substantial media coverage and discussion in Parliament – in some ways a good thing. But the Conservative government did not take kindly to Alston's forceful

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7 See ibid 12-13, 924-1057.

8 Consider, for example, the UK and Canada-led Media Freedom Coalition, which today included 49 States – see 'Media Freedom Coalition: an overview' (2 February 2022) <https://www.gov.uk/government/publications/media-freedom-coalition-an-overview/media-freedom-coalition-an-overview>.

9 For example, the UK drafted and sponsored the resolution establishing the special mandate on contemporary forms of slavery in 2007 – see UNA-UK, 'The UK's role on the UN Human Rights Council' (December 2014) 6.

10 See 'Magnitsky sanctions' (House of Lords Library, 18 June 2021) <https://lordslibrary.parliament.uk/magnitsky-sanctions/>.

11 See M Ritchie, 'Bedroom tax row: Grant Shapps v "woman from Brazil"' *Channel 4 News* (11 September 2013) <https://www.channel4.com/news/bedroom-tax-un-grant-shapps-brazil-row>.

12 See A Gentleman and P Butler, 'Ministers savage UN report calling for abolition of UK's bedroom tax' *The Guardian* (3 February 2014) < https://www.theguardian.com/society/2014/feb/03/ministers-savage-un-report-abolition-bedroom-tax>.

criticism of the UK's austerity policies, which it simply rejected categorically.[13] And it went further, with the then Foreign Secretary taking umbrage at Alston's accusation of the government being responsible for the 'systematic immiseration of a significant part of the British population', and publicly committing to lodging 'a formal complaint with the UN' on account of Alston's supposed bias.[14] The promised response came from her successor in a letter to the UN High Commissioner for Human Rights, which complained about:

> The inflammatory and highly politicised language used by the Special Rapporteur on Extreme Poverty in his recent report, and associated media handling, which makes a number of unfounded mischaracterisations of the UK's approach to poverty, and is misleading in its selective data. … When used appropriately the Special Procedure system (in line with the Code of Conduct) can provide vital independent, external challenge. Headline-seeking hyperbole and inaccuracies will not affect the UK's longstanding commitment to the Special Procedures, but I am concerned that they will make less democratically robust States disinclined to cooperate with them.[15]

Note how the UK government is supposedly not complaining to the High Commissioner because it was very greatly annoyed by the criticism coming from independent experts, but because of its concern that 'less democratically robust States' would be disinclined to cooperate with them if they are too strident in their criticism. It is of course precisely this type of governmental overreaction that enables other States to refuse to engage with mandates of the Human Rights Council, if they are given access in the first place. If the oh-so-robust UK can do so, why can't we?

Which brings me to the one large-scale example of delegitimizing a human rights institution – the UK's continuing backlash against the European Court of Human Rights. This is a story with many interwoven threads, but the two most obvious concern the questions of prisoner disenfranchisement and deportation of individuals in the face of risk of ill-treatment. As for the former, the UK prisoner voting saga is a long one and I will not recount it in detail here.[16] Suffice it to say that in 2005 the European Court held that a longstanding rule in UK law that all individuals serving a prison sentence are ineligible to vote for the duration of the sentence, regardless of its term or the nature of the underlying offence, was indiscriminate and disproportionate and therefore incompatible with the Convention.[17] For five years the then-Labour Government dragged its feet and did not implement the judgment. When the Coalition Government took office in 2010, the Prime Minister, David Cameron, playing for the backbenches and segments of the press, declared in Parliament that it made him 'physically ill even to contemplate having to give the vote to anyone who is in prison'.[18] The UK attempted relitigating the prisoner voting issue in Strasbourg, leading to some backtracking from the Court, in effect allowing for minor tinkering with the UK's categorical ban to bring the UK

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13 See 'Visit to the United Kingdom of Great Britain and Northern Ireland, Report of the Special Rapporteur on extreme poverty and human rights' (2019) UN Doc. A/HRC/41/39/Add.1, paras 14-19 (summarizing the government's reaction).

14 See R Booth, 'Amber Rudd to lodge complaint over UN's austerity report' *The Guardian* (22 May 2019) <https://www.theguardian.com/politics/2019/may/22/amber-rudd-to-lodge-complaint-over-un-austerity-report>.

15 Letter dated 26 June 2019, quoted in the author's email correspondence with Philip Alston dated 22 December 2021 (on file). The letter also complained about the public comments of the Special Rapporteur on torture regarding the Assange case.

16 See more A Horne and I White, 'Prisoners' voting rights (2005 to May 2015)' (House of Commons Library, Standard Note, 11 February 2015) <https://researchbriefings.files.parliament.uk/documents/SN01764/SN01764.pdf>; N Johnston, 'Prisoners' voting rights: developments since May 2015' (House of Commons Library, Briefing Paper, 19 November 2020) <https://researchbriefings.files.parliament.uk/documents/CBP-7461/CBP-7461.pdf>.

17 *Hirst v United Kingdom (No. 2)* [GC] App no 74025/01 (ECtHR, 6 October 2005).

18 HC Deb 3 November 2010, vol 517, col 903.

into compliance.[19] This the UK (sort of) did in 2017, by allowing prisoners on temporary license (of which there are about a hundred at any given time) to vote, which did not necessitate any change to primary legislation.[20] The compliance was largely a sham – there clearly is no reason of legal or moral principle why a temporarily released prisoner should be reprieved from a 'civic death' while all individuals currently in prison should not get such a reprieve, regardless of the nature of the wrong they have committed; the ability to vote (or not) remains entirely divorced from the individual's moral desert.[21]

The question of deportation has similarly poisoned relations between the UK and Strasbourg, caused mainly by the Court's categorical *non refoulement* approach – that no individual, no matter how heinous the crimes for which he has been convicted or accused of, can be sent to another state where there is a real risk that he would be subject to torture or other ill-treatment.[22] Here UK authorities generally did not resort to outright non-compliance, if only because (unlike with prisoner voting) domestic courts enforced compliance with the Convention pursuant to the HRA, although it controversially resorted to diplomatic assurances to facilitate deportations. But successive UK governments (or their ministers) have assisted in the creation of a public perception that the ECHR is dangerous to public safety while raising the prospect of denunciation, with the supposed inability to deport 'hardened' criminals being one of the main stated reasons for doing so.[23] Before Brexit, for example, the then-Home Secretary (and later Prime Minister), Theresa May, wanted the UK to remain in the EU but leave the ECHR.[24] And it was precisely the issue of deportation that brought together the British and Danish governments in spearheading efforts to signal their displeasure with the Court, including through the diplomatic processes that culminated in the Brighton and Copenhagen declarations.[25] Today, after Brexit, the current Conservative Government is of the view that leaving the ECHR would politically be more trouble than it is worth, but is committed to neutering the HRA, which ensures effective domestic compliance with the Convention. As of the time of writing, the Justice Secretary, who has long opposed the ECHR, has announced a consultation on extensive proposals to amend the HRA on the same day on which he released

19 *Scoppola v Italy (No. 3)* [GC] App no 126/05 (ECtHR, 22 May 2012).

20 See Johnston, 'Prisoners' voting rights', 25-26.

21 The Committee of Ministers did (very questionably) find this to be adequate in terms of compliance – see Committee of Ministers, 'Action report (02/09/2018)' (7 September 2018) <https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2018)843E%22]}>. See more A von Staden, 'Minimalist Compliance in the UK Prisoner Voting Rights Cases' *ECHR Blog* (16 November 2018) <https://www.echrblog.com/2018/11/guest-blog-minimalist-compliance-in-uk.html>.

22 See, eg, *Chahal v United Kingdom* App no 22414/93 (ECtHR, 15 November 1996); *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008).

23 A *Daily Mail* article puts it as follows: 'The right to family life under Article 8 of the European Convention on Human Rights is regularly deployed by foreign criminals, including murderers and rapists, to avoid deportation from Britain after committing crimes here'. See J Groves and D Barrett, 'Dominic Raab turns up the heat up on Human Rights Act: Reforms branded "spicy" will make it easier to kick out migrants who abuse law' *Mail Online* (26 November 2021) <https://www.dailymail.co.uk/news/article-10244193/Human-Rights-Act-reforms-branded-spicy-make-easier-kick-migrants-abuse-law.html?ico=topics_pagination_desktop>.

24 See A Asthana and R Mason, 'UK must leave European convention on human rights, says Theresa May' *The Guardian* (25 April 2016) <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>.

25 See generally M Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 Law and Contemporary Problems 141; L Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?' (2020) 20 HRLR 121; J Hartmann, 'A Former Danish Minister for Immigration is Sentenced: A new Chapter in the Danish "Migrants Saga"' *EJIL: Talk!* (29 December 2021) <https://www.ejiltalk.org/a-former-danish-minister-for-immigration-is-sentenced-a-new-chapter-in-the-danish-migrants-saga/, and the sources cited therein>.

the findings of a (government-commissioned) independent review of the HRA, which concluded that such proposals were largely unnecessary.[26]

Successive UK governments have thus undermined the legitimacy of the European Court, including by refusing to comply with its judgments. They have done so in the face of widespread democratic decline globally and in Europe, precisely a time when such institutions should be most protected. In doing so they have facilitated non-compliance by other States, such as Russia, Poland or Turkey.[27] And they have done so largely out of ideological and political opportunism, on issues that on any objective measurement did not call for such a response. To be clear, I should not be taken as saying here that decisions of international or domestic courts or human rights bodies *can never be questioned*; (quasi-)constitutional adjudication in particular invariably raises the so-called counter-majoritarian difficulty, with an unelected body preventing an elected one from having its will. Sometimes an unelected court arguably *should be* pushed back against.[28] But the issues the UK chose to push back on hardly dealt with fundamental questions of morality, grand policy or the general welfare of the country. Nobody really cared about prisoner voting, for example, until opportunistic politicians and the press decided to make it into an issue. And it is simply nonsense to say that the UK has become a substantially less safe country because a very few dangerous people could not be deported elsewhere (even if we took the morality of exporting danger elsewhere out of the equation). These were all tempests in teacups.

In short, without going into the correctness (or the practical wisdom) of the Court's various judgments, the reactions they provoked were entirely disproportionate, especially in light of the fact that the UK government loses only a tiny proportion of cases brought against it in Strasbourg. The advantage that the UK got from its backlash against the Convention, however measured, was far outweighed by the harm it inflicted upon the system. I do not want to get here into the complex question of to what extent the backlash succeeded in influencing the jurisprudence of the Court; it certainly succeeded in undermining its authority.[29] Nor can I examine the various structural factors that led to the UK's backlash, ranging from a constitutional tradition of Parliamentary supremacy, through quotidian, cynical political gamesmanship, up to rising anti-European sentiment and a sense of British exceptionalism[30] ('we don't want Romanian judges telling us what to do').[31] Ultimately these were political choices made by people, rightly or wrongly, in a position to make them. My point is simply that, just like we cannot divorce the UK's contributions to the building of human rights law from the legacy of Empire, so we cannot divorce its indisputable ongoing contributions, as a

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[26] See 'The Independent Human Rights Act Review Final Report' (December 2021) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf> ('IHRAR Report'); Ministry of Justice, 'Human Rights Act Reform: A Modern Bill Of Rights' (December 2021) <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/supporting_documents/humanrightsreformconsultation.pdf>.

[27] See also E Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 HRLR 503.

[28] Consider the famous example US President Roosevelt threatening the 'constitutional hardball' tactic of packing the Supreme Court as a response to its obstruction of the New Deal.

[29] See more L Helfer and E Voeten, 'Walking Back Human Rights in Europe?' (2020) 31 EJIL 797; A Stone Sweet and others, 'Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten' (2021) 32 EJIL 897.

[30] A red thread from the inception of the ECHR to the present day – as Brian Simpson explains, British elites (or segments thereof) have generally embraced the export theory of human rights: 'human rights were for foreigners, who did not enjoy them, not for the British, who enjoyed them anyway'. Simpson, *Human Rights and the End of Empire*, 347.

[31] See also H Hardman, 'Prisoner voting rights: the conflict between the government and the courts was really about executive power' *LSE Blogs* (20 June 2019) <https://blogs.lse.ac.uk/politicsandpolicy/prisoner-voting-rights/>.

major democracy, to the operation and promotion of that law and its institutions from simultaneous efforts to undermine them.

III. Contributions of the British Judiciary and Practicing Lawyers

This brings us to a set of British contributions to human rights law with fewer negatives – those of the UK's judges and the legal profession. One aspect of that contribution is that, due to their unique institutional and legal context, British courts frequently serve as laboratories for litigating novel and complex human rights questions, including those that pertain to the relationship of IHRL (and the ECHR in particular) with other parts of international law, such as the law of state responsibility, international humanitarian law, or the law of immunities. This is primarily because the UK lacks a codified constitution, coupled with its courts using the ECHR, through the vehicle of the HRA, as the primary legal instrument for protecting fundamental rights *within* the State. This of course complements a long tradition (if hardly a perfect one) of the protection of individual liberties through the common law,[32] which has recently had something of a revival, partly perhaps due to fears by judges that the HRA might be repealed.[33] But the basic point of the HRA – that all public authorities (save for Parliament) must act in compliance with Convention rights *as they exist in international law*, and that they are subject to judicial review in that regard – has, in the absence of any domestic constitutional text, produced a jurisprudence grounded in the ECHR and international law even more than in 'monist' legal systems. It also (together with the UK's erstwhile membership in the EU) gradually pushed British constitutionalism from a more political into a more legalised and judicialized one.

All this has led to a serious, sustained and sophisticated engagement of the British courts and practicing lawyers with the ECHR and international law, in numerous and varied scenarios. These range from routine daily issues, say in the policing and criminal law context, to formidable questions such as the regulation of wartime detention in Iraq and Afghanistan[34] or of mass electronic surveillance for the purpose of countering terrorism.[35] And while the analytical posture of British judges in these cases is grounded in the so-called 'mirror principle' – that the 'duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'[36] – the reality is that they have frequently confronted questions of first impression,[37] or others on which guidance from Strasbourg is limited or conflicting. This is especially the case when it comes to issues at the intersection of the Convention and other parts of international law. To give a personal example, I still remember attending a hearing before the Appellate Committee of the House of Lords in the *Al-Jedda* case, at which I could observe how their Lordships (including Lord Bingham and Baroness Hale) discussed the many complex questions in that case, from attribution to interaction between the ECHR and the supremacy clause in article 103 of the UN Charter, with learned counsel including Keir Starmer, Christopher Greenwood and James Crawford.[38] The rigour of

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32 See Simpson, *Human Rights and the End of Empire*, 14-41

33 See, eg, *Kennedy v Charity Commission* [2014] UKSC 20; *R (UNISON) v Lord Chancellor* [2017] UKSC 51. See more M Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 Current Legal Problems 85.

34 See, eg, *Mohammed and Ors v Ministry of Defence* [2017] UKSC 1; [2017] UKSC 2.

35 See, eg, *Human Rights Watch Inc & Ors v The Secretary of State for the Foreign & Commonwealth Office & Ors* UKIPTrib 15_165-CH.

36 *R (Ullah) v Special Adjudicator* [2004] UKHL 26 [20].

37 See in particular *Rabone v Pennine Care NHS Foundation* [2012] UKSC 2.

38 *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58. The subsequent Strasbourg case is *Al-Jedda v United Kingdom* [GC] App no 27021/08 (ECtHR, 7 July 2011). See more M Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 EJIL 121.

argument and intellectual firepower on all sides was simply breath-taking. And I remember being similarly awestruck in reading Mr Justice Leggatt's judgment in *Serdar Mohammed*, dealing with the legality of the security detention of fights in a non-international armed conflict and the interaction between international humanitarian law and article 5 ECHR, marvelling at how comprehensively and clearly the judge understood the issues when almost his entire previous experience was in commercial law.[39]

There are many such examples.[40] It is therefore little wonder that the European Court itself is citing the judgments of British courts even in cases that have nothing to do with the UK.[41] As three current Strasbourg judges (including the Court's President) told the recent HRA review:

> Apart from the Judges [of the European Court], the Court's Registry and Registry lawyers were also familiar with those decisions. Many may have done their postgraduate education in the UK. Some were UK-trained lawyers. Additionally, UK judgments, which were followed closely, were circulated by many European Court Judges amongst themselves, not least because of the analytical and persuasive way in which the UK judiciary discussed and dealt with questions of rights.[42]

To be clear, I am not saying here that the national courts of other States are not making innovative contributions to IHRL jurisprudence – far from it.[43] My point is rather that British judges are exercising an outsized influence, driven not only by the detailed and serious judgments of the British courts, but also by the unique domestic legal context of the HRA coupled with the lack of other constitutional methods of protecting individual rights. This simply generates a different mindset from, say, the French, German or American constitutional traditions of individual rights protection, which are grounded in their domestic instruments even when they exhibit a cosmopolitan rather than a parochial outlook. A good example here would be the recent judgment of the German Constitutional Court holding that German security services engaging in extraterritorial surveillance must respect the right to privacy of all individuals outside Germany, which clearly nudged to the European Court to make a similar ruling under the ECHR, but was nonetheless expressly grounded in the German Basic Law and not the Convention.[44]

There are, of course, shades of Empire in some of the masses of human rights jurisprudence pumped out by the British judiciary, especially in cases relating to armed conflict and the ECHR's extraterritorial application.[45] But even so, a particularly remarkable feature of the

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39 See *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB).

40 For some interesting recent cases, see, eg, *DPP v Ziegler and others* [2021] UKSC 23 (on how freedom of assembly applies to protests involving obstructing highways); *R (Hotta and others) v Secretary of State for Health and Social Care and another* [2021] EWHC 3359 (Admin) (mandatory Covid quarantines in hotels a necessary and proportionate restriction on personal liberty); *R (Elan-Cane) v Home Secretary* [2021] UKSC 56 (article 8 ECHR does not require the issuance of passports with a non-gendered marker); *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49 (owners of a bakery could not be required to make a cake with a message promoting same-sex marriage, contrary to their religious beliefs).

41 For an excellent example, see *S.,V. and A. v Denmark* [GC] App nos 35553/12 etc (ECtHR, 22 October 2018) [46], [102] and [122], relying on *R (Hicks) v The Commissioner of Police for the Metropolis* [2017] UKSC 9.

42 IHRAR Report, 151.

43 Perhaps the most consequential recent example would the 2019 *Urgenda* climate change judgment of the Dutch Supreme Court – see more A Nollkaemper and L Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' *EJIL: Talk!* (6 January 2020) <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/>. See also E Bjorge, 'National supreme courts and the development of ECHR rights' (2011) 9 ICON 5.

44 1 BvR 2835/17, 19 May 2020.

45 See, eg, *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; *R (Smith) v Secretary of State for Defence* [2010] UKSC 29; *Smith & Ors v Ministry of Defence* [2013] UKSC 41 (the two *Smith* cases were

British legal system is the sheer number (and quality) of practising solicitors and barristers who are fearlessly litigating cases against the British State, at times confronting substantial backlash in doing so. Many international human rights NGOs, staffed to a significant extent by British (and British-educated) lawyers, are also headquartered or have a substantial presence in the UK, including Amnesty International, the AIRE Centre, Liberty, Minority Rights Group International and Redress. And many British (and British-educated) lawyers – probably more than from any other country – are also engaged in human rights litigation internationally, against or in the courts of other States. For every high-profile practitioner – every Amal Clooney, Helena Kennedy or Karim Khan – there are dozens more fighting for human rights worldwide. This is enabled by an environment in which a generation of British lawyers have grown increasingly acculturated in international law generally and human rights law specifically. An internationalist outlook today permeates the British legal profession, and not just in those areas where the big money is. And this is at least partly due to the increasing internationalism of British universities, in which many of these lawyers were educated, whose contribution to IHRL I turn to next.

IV. Contributions of British Academics

British academics, and the institutions they work in, have of course consistently made substantial contributions to the scholarly study of IHRL and its development. From Hersch Lauterpacht, who wrote the Urtext of human rights,[46] through Kevin Boyle at Essex, David Harris at Nottingham and John Merrills at Sheffield, who were among those who mainstreamed the academic study and instruction of IHRL in the UK, including by establishing dedicated research centres, to literally hundreds of scholars working today on various human rights questions, employing many different methodologies. British academics have also advised governments and non-governmental organisations and have actively participated in the work of UN and regional human rights bodies; here one needs only mention scholars such as Christine Chinkin, Malcolm Evans, Françoise Hampson, Rosalyn Higgins or Nigel Rodley. All in all I cannot escape the impression that, even if judged purely academically, the output of British scholars on human rights questions has (again) had an outsized influence when compared to those of other major democracies, and certainly so if we take into account the amount of resources actually funnelled into British law schools.

There are many reasons why this is the case. One is the dominance of English as a scholarly *lingua franca*. The other is the dominance of British publishers, especially the Oxford and Cambridge university presses, in international law generally and human rights specifically, not simply as the publishers of academic books with the greatest prestige and market penetration, but also as the publishers of influential textbooks used all over the world,[47] and publishers of the most eminent journals. Another important factor is the remarkable openness of the UK's academic labour market, in law and elsewhere, which has long been friendly to immigrants from all over the world. An early example would, of course, be Hersch Lauterpacht

particularly novel (and imperial) in that they dealt with the extraterritorial applicability of the ECHR to *British soldiers* against their own country, rather than with the protection of the local population); or the long-running Chagos islanders litigation, including *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010 and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61.

46 H Lauterpacht, *An International Bill of the Rights of Man* (1945, republished by OUP 2013).

47 See, eg, D Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2018); D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (4th edn, OUP 2022).

himself, who came to Britain as a migrant from Austria-Hungary barely speaking English,[48] yet ultimately became the Whewell Professor at Cambridge and the UK's judge on the International Court of Justice.[49] Today, many British international (human rights) lawyers are not just British – and this openness of British universities to immigrants is by no means limited to international or 'foreign' legal sub-disciplines. Similarly, human rights are not some kind of niche subject, but are mainstreamed across the curriculum and the research interests of scholars in different fields.

Thus, for example, in the two UK law schools in which I have worked myself (Reading and Nottingham) about a half of all academic staff obtained their first law degree outside the UK, and about a half of all academic staff have had some kind of scholarly interest in human rights (the two halves do not overlap exactly). While these law schools might be at the higher end of the spectrum, they are by no means unique in the UK. And then there is also the very international student body, especially for postgraduate studies, many of whom go on to pursue human rights careers worldwide. If we, for example, compared the average UK law school to the (much better resourced, and also teaching in English) average US law school, we would observe a far greater openness of the UK academic market to foreign-educated staff when compared to the US one, and a far greater level of the mainstreaming of human rights law and international law.[50] While there are other open legal academic markets, as in the Netherlands or Scandinavia, most of them lack the size and critical mass of human rights lawyers, and international lawyers, of the UK one. There is, in other words, probably no place as open, as cosmopolitan and as influential for the study of human rights as Britain is today. This has happened largely by fortunate accident, rather than due to some kind of concerted effort to build an (academic) human rights Empire. But it has happened nonetheless, providing a strong foundation for the contributions of British lawyers to human rights in the century to come.

48 See E Lauterpacht, 'Sir Hersch Lauterpacht: 1897-1960' (1998) 2 EJIL 313.

49 Although it must be said that Lauterpacht was not appointed as the first British delegate on the European Commission of Human Rights at least partly due to the opposition of the then-Foreign Office Legal Adviser, who considered that Lauterpacht's appointment would be 'disastrous…Professor Lauterpacht, though a distinguished and industrious international lawyer, is, when all is said and done, a Jew recently come from Vienna. [The British representative] on human rights must be a very English Englishman imbued throughout his life and hereditary [*sic*] to the real meaning of human rights as we understand this in this country'. Simpson, *Human Rights and the End of Empire*, 350. At the time Lauterpacht had already been in Britain for more than twenty years, and a British citizen for more than ten; Simpson reads this more as an expression of common British exceptionalism and the 'export theory' of human rights than one of anti-Semitism. It is perhaps also worth noting that the current British judge on the European Court, Tim Eicke, was born and first studied law in Germany.

50 See more A Roberts, *Is International Law International?* (OUP 2017).